UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant YOGENDRA RAMBHAROSE
United States Air Force

ACM 38769

15 December 2016

Sentence adjudged 21 October 2014 by GCM convened at Joint Base Charleston, South Carolina. Military Judges: Tiffany M. Wagner (arraignment); Lynn Watkins.

Approved Sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

Appellate Counsel for Appellant: Captain Annie W. Morgan.

Appellate Counsel for the United States: Major Jeremy D. Gehman; Major Mary Ellen Payne; Captain Matthew L. Tusing; and Gerald R. Bruce, Esquire.

Before

J. BROWN, DUBRISKE, and KIEFER
Appellate Military Judges

OPINION OF THE COURT

KIEFER, Judge:

A military judge sitting alone convicted Appellant, pursuant to his pleas, of two specifications of assault consummated by a battery and, contrary to his pleas, of two specifications of abusive sexual contact in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928. The military judge sentenced Appellant to a bad-conduct discharge, confinement for 18 months, and reduction to the grade of E-1. The convening authority approved the bad-conduct discharge, 15 months of confinement, and reduction to the grade of E-1.

Appellant alleges four assignments of error (AOE): (1) whether the finding as to Specification 1 is legally and factually sufficient; (2) whether the finding as to Specification

3 is legally and factually sufficient; (3) whether it was plain error to allow alleged human lie detector testimony by a Special Agent from the Air Force Office of Special Investigations (AFOSI); and (4) whether the military judge erred by allowing alleged improper sentencing evidence. In addition, we specified two issues: (1) whether the military judge prejudicially erred by considering statements from Appellant's guilty plea inquiry in deciding whether to allow trial counsel to argue false exculpatory statements in findings argument; and (2) whether the military judge prejudicially erred by considering charged conduct as possible propensity evidence under Military Rule of Evidence (Mil. R. Evid.) 413 in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). We find merit in Appellant's second AOE and accordingly grant relief in our decretal paragraph.

Background

Appellant was alleged to have inappropriately touched, with the intent to gratify his sexual desires, three different women on the breasts and one woman on her breast and thigh, all through their clothing, on six separate occasions, and was charged with five specifications of abusive sexual contact in violation of Article 120, UCMJ. Appellant pleaded guilty to the lesser-included offense (LIO) of assault consummated by a battery under Article 128, UCMJ for Specifications 1, 2, and 4, and pleaded not guilty to Specifications 3 and 5.[1] The military judge found Appellant guilty of the greater Article 120 offense for Specifications 1 and 3, guilty of the Article 128 LIO for Specifications 2 and 4, and not guilty of Specification 5.

In support of Specification 1, which resulted in a conviction on the charged Article 120 offense on divers occasions contrary to Appellant's plea, Ms. JF testified that she worked with Appellant in an office consisting of multiple desks in a large open room with some movable divider walls. Not all desks were protected by dividers. While in the office, Ms. JF asked Appellant for help with a work issue. Appellant came over to her desk to look at something on her computer. According to Ms. JF, after talking for a moment, Appellant reached down and cupped and squeezed her breast. She told him to stop and leave.

Appellant testified to similar facts and also provided a sworn statement to investigators where he admitted to intentionally touching Ms. JF's breast. Appellant claimed that when he first came over to the desk and reached for the mouse to review something on Ms. JF's computer screen, she said, "I thought you were going to grope me," and Appellant responded "how, like this" and touched her breast. Appellant maintained that the touching was a joke and not intended to gratify his sexual desire.

Ms. JF also testified that a few months later Appellant was again at her desk helping with a work issue. Appellant again grabbed her breast, and this time Ms. JF pulled

[1] Specification 1 was charged on divers occasions, but Appellant pleaded to only a single unwanted touching incident against Ms. JF under the lesser included offense (LIO). The military judge convicted Appellant as charged of the greater offense on divers occasions.

Appellant's hand away and bent his fingers backward. Appellant denied this second incident ever occurred.

In support of Specification 2, which resulted in a conviction on the Article 128 LIO pursuant to Appellant's plea, Senior Airman (SrA) BN testified that one afternoon she and Appellant attended a unit social function. Sometime after SrA BN left the event, Appellant called her and asked her to come back and give him a ride home because he had been drinking. While SrA BN drove Appellant home, he commented that he could not understand how people could be gay "when they have all of this," motioning his hand up and down toward SrA BN's body. Appellant then reached over and touched SrA BN's breast and moved his hand down her body to her thigh. SrA BN testified the touching was not consensual and made her uncomfortable.

Appellant provided a sworn statement to investigators agreeing with most of the essential facts, admitting that he touched SrA BN's breast and "knee," and stating that he "felt terrible afterward." Appellant, however, maintained there was nothing sexual about the touching.

In support of Specification 3, which resulted in a conviction on the charged Article 120 offense contrary to Appellant's plea, SrA HK testified that on one occasion Appellant was at her desk. While she was working the mouse of her computer, Appellant pulled her hand away from the mouse and placed it on his penis. According the SrA HK, Appellant then reached over and grabbed her breast. SrA HK also testified that in addition to working together, she and Appellant were friends and had a social relationship outside of the office. They communicated regularly by texting, and sometimes their conversations and texts were sexual in nature. For example, SrA HK testified that Appellant asked her questions about her breast size and what sexual positions she preferred. She indicated that she felt uncomfortable with these conversations, but she participated and answered these types of questions. SrA HK further testified that on at least one occasion, Appellant asked her if she wanted to have sex with him.

In his interview with AFOSI, Appellant initially stated that SrA HK grabbed his hand and placed it on her breast. Later in the interview and in his written statement, he indicated he touched SrA HK first and grabbed her breast. He maintained the touching was a joke, and after the incident, SrA HK sent him a text saying she liked being touched. SrA HK agreed that she sent a text with words to that effect.

Specifications 4 and 5 allege separate incidents against SrA TW. With respect to Specification 4, Appellant pleaded guilty to the Article 128 LIO and was convicted of this offense pursuant to his plea. Concerning Specification 5, Appellant pleaded not guilty to the charged Article 120 offense and was found not guilty. In support of Specification 4, SrA TW testified that she and Appellant worked in the same office. Once, when she asked Appellant for help with a work issue, he came to her desk and, while there, touched her breast. In support of Specification 5, SrA TW testified to a separate incident a few weeks

later. On this occasion, she was upset about being reduced in rank. Appellant initially came to her desk to discuss the matter and comfort her. The two then went into a hallway to talk, and while there, Appellant gave her a hug. SrA TW testified that during the hug, Appellant reached his hand farther around her back and touched her breast. She indicated that based on the circumstances and their positions the touching was not a mistake.

In his interview and sworn statement to AFOSI, Appellant admitted to intentionally touching SrA TW's breast on the first occasion when they were at her desk, but he said it was a joke, and they both laughed about it. Appellant also admitted to consoling SrA TW and hugging her, but he denied touching her breast on the second occasion.

Appellant's sworn, written statement admitted touching all four women and closed with, "I recognize that what I have done is wrong, disrespectful, inappropriate, and belitting (sic)."

Legal and Factual Sufficiency

Appellant argues that the findings of guilt as to the greater offense of abusive sexual contact in Specifications 1 and 3 were neither legally nor factually sufficient.

We review issues of factual and legal sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *see also United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). The term "reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325; *see also United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

Specification 1: Abusive Sexual Contact against JF

At trial, there was no disagreement as to whether Appellant touched Ms. JF's breast on the first occasion. In fact, his plea to the lesser-included Article 128 offense established all elements of the greater Article 120 offense, except the intent to gratify his sexual desire. In analyzing this element, we first note that the part of the body Appellant intentionally touched was the breast, which supports an inference that Appellant had a sexual intent when he committed the act. Moreover, Appellant had no previous romantic connection to JF, nor had he previously engaged in sexual banter with her that may have given him the mistaken impression that she was interested in engaging in this type of physical activity with Appellant.

Additionally, Appellant told investigators that when he was at Ms. JF's desk and reached for her computer mouse, she said, "I thought you were going to grope me." Appellant did not use the words "bump me" or "touch me" to describe the interaction. The plain meaning of "grope" in this context carries a sexual connotation. *See* Merriam-Webster online dictionary, Merriam-Webster.com, http://www.merriam-webster.com (last visited 10 November 2016) (defining "grope," in part, as "to touch (someone) in an unwanted and unexpected sexual way").

While we recognize Appellant attributes the word "grope" to Ms. JF, he admitted to intentionally touching her breast in response to this word. Appellant's reaction, touching Ms. JF's breast as opposed to her arm for example, evidences his sexual intent. Additionally, Ms. JF never testified to using the word "grope." Thus, if the military judge believed Appellant chose this word to describe the interaction, it further indicates Appellant's sexual state of mind. Considering the evidence in the light most favorable to the Government, there was more than ample information from which a reasonable fact finder could have found all elements beyond a reasonable doubt, including that Appellant had the intent to gratify his sexual desire when he intentionally touched Ms. JF's breast.

With respect to factual sufficiency, upon review of all of the evidence in the case, particularly Ms. JF's testimony and Appellant's AFOSI interview and written statement addressing his interaction with Ms. JF, we are convinced of Appellant's guilt beyond reasonable doubt.

Concerning the second touching incident involving Ms. JF, to which the accused pleaded not guilty, her testimony satisfies all of the elements of the offense. She described an encounter in a one-on-one situation in which Appellant grabbed her breast, a very personal and intimate part of her body. There is no evidence that the touching was unintentional or that Appellant was somehow mistaken about the nature of the interaction, especially given Ms. JF's negative reaction to the previous incident. Considering all of the evidence in the light most favorable to the government, the conviction on this offense is legally sufficient.

Further, evaluating factual sufficiency for the second touching incident against Ms. JF, conducting a fresh review of all of the evidence presented, we are convinced of Appellant's guilt beyond a reasonable doubt.

Accordingly, we find Specification 1 is legally and factually sufficient.

Specification 3: Abusive Sexual Contact against SrA HK

With respect to Specification 3, we find that the evidence is factually insufficient. We have weighed the evidence in the record of trial and made allowances for not having personally observed the witnesses, and we are not convinced of Appellant's guilt beyond a reasonable doubt. Article 66(c), UCMJ; *Turner*, 25 M.J. at 325; *see also United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Specifically, we are not convinced that the Government proved beyond a reasonable doubt lack of consent or that Appellant did not have a reasonable mistake of fact as to consent concerning the incident with SrA HK. The charged acts were preceded by multiple interactions between Appellant and SrA HK that were of a sexual nature, including discussions of breast size, desired sexual positions, and having sex. While SrA HK indicated she was at times uncomfortable with these discussions, she admitted that she never conveyed this discomfort to Appellant, and she agreed that she participated in these conversations. She also testified to several inconsistencies regarding the events in question. Finally, SrA HK admitted that she wrote a text to Appellant after the touching incident stating, "Thanks, I needed that, it has been 6 months," or words to that effect. This response to Appellant touching her breast provides further evidence of the nature of their relationship. Consequently, based on the totality of the evidence, we are not convinced beyond a reasonable doubt that the Government proved lack of consent or that Appellant was not under a reasonable mistake of fact that SrA HK consented.

In addition to determining that the conviction on Specification 3 is factually insufficient, we also note that the finding as announced by the military judge creates confusion and may be legally defective.

Specification 3 alleged that Appellant:

> did . . . commit sexual contact upon [SrA HK], to wit: touch through the clothing the breasts of [SrA HK] with his hand and cause [SrA HK] to touch through the clothing the genitalia of [Appellant] with her hand with an intent to arouse or gratify his sexual desire, by causing bodily harm to her, to wit: touching through the clothing the breasts of [SrA HK] with [Appellant's] hand and causing [SrA HK] to touch through the

> clothing [Appellant's] genitalia with her hand *without her consent*.[2]

The military judge announced the finding to Specification 3 by exceptions as follows:

> Guilty, except the words "and cause [SrA HK] to touch through the clothing the genitalia of [Appellant] with her hand" and "causing [SrA HK] to touch through the clothing [Appellant's] genitalia with her hand *without her consent*."[3] Of the excepted words: Not Guilty.

The finding of not guilty to the words "without her consent," raises multiple issues. First, by excepting this language, the military judge may have determined that the Government failed to prove lack of consent. If so, then the finding by exceptions is missing an essential element and could constitute a fatal variance. It may be that the military judge made a mistake in removing "without her consent" from the specification, or she may have viewed that language as duplicative of "causing bodily harm," which also includes an element of consent. Whether intended or not, the military judge did not merely dismiss the words "without her consent," she entered a finding of not guilty to that language. Because the military judge effectively acquitted Appellant of touching SrA HK's breast without her consent, she could not also convict him for causing bodily harm, which was predicated on a lack of consent. *See United States v. Johnson*, 54 M.J. 67 (C.A.A.F. 2000) (consent can convert what would otherwise be an offensive touching into a non-offensive touching). This circumstance creates an ambiguous finding with respect to what the military judge actually concluded concerning consent. Finally, entering a finding of not guilty to the words "without her consent," while also convicting on the specification, creates a potential double jeopardy issue. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (a person may not be convicted of the same offense for which she has been acquitted).

Given our finding that the evidence for Specification 3 is factually insufficient, however, we need not resolve whether the finding by exceptions constitutes a fatal variance, an ambiguous finding, or a double jeopardy issue. We nonetheless caution military judges to carefully craft their findings to avoid such problems.

Accordingly, we find Specification 3 factually insufficient.

Human Lie Detector Evidence

Appellant alleges that the military judge erred by allowing the Government's witness, Special Agent (SA) DKR, to provide what amounted to human lie detector

[2] Emphasis added.
[3] Emphasis added.

testimony. Human lie detector evidence is elicited when a witness provides "an opinion as to whether [a] person was truthful in making a specific statement regarding a fact at issue in the case." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citation and internal quotation marks omitted). "There is no litmus test for determining whether a witness has offered 'human lie detector' evidence." *United States v. Jones*, 60 M.J. 964, 969 (A.F. Ct. Crim. App. 2005). If a witness does not expressly state that he believes a person's statements are truthful, we examine the testimony to determine if it is the "functional equivalent" of human lie detector testimony. *See United States v. Brooks*, 64 M.J. 325, 329 (C.A.A.F. 2007). Testimony is the functional equivalent of human lie detector testimony when it invades the unique province of the court members to determine the credibility of witnesses, and the substance of the testimony leads the members to infer that the witness believes the victim is truthful or deceitful with respect to an issue at trial. *See United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010).

Because Appellant failed to object to this evidence at trial, we review for plain error. To establish plain error, Appellant must prove: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007).

Appellant cites the following question from trial counsel and answer from the special agent as improper human lie detector testimony:

> Q. Agent [DKR], the military judge will have a chance to watch the interview but just based on some of the defense's questions I wanted to ask you in the initial part of that interview was [Appellant] cooperative? I guess, let me clarify a little bit. After rights advisement and after he waived his right to counsel when Agent [R] started asking questions about the allegations at hand was he very cooperative initially?
>
> A. The answers he was providing was not -- they were very minimal and not as truthful. We had to actually dig and really pry to get answers.

Given the context of this line of questioning, we do not find it to be plain error. The question was posed during redirect examination in response to an area of inquiry raised by defense counsel in cross-examination concerning Appellant's cooperativeness in his AFOSI interview. The trial counsel's question was phrased in the same manner asked by defense counsel regarding cooperativeness—not truthfulness. Further, the question served to rebut testimony elicited by defense counsel and was relevant to the issue of consciousness of guilt. When a suspect chooses to speak, but is not forthcoming with information during a voluntary interview, one reasonable inference is that the suspect harbors some consciousness of guilt.

In responding to the question, the AFOSI agent mentioned the word "truthful," but not every utterance of "truthful" during a trial constitutes error, let alone plain error. The agent did not testify that Appellant lied generally or concerning any specific fact or issue. His answer, taken in its full context, indicates that Appellant may not have been as cooperative or forthcoming in his early responses as he was later during the AFOSI questioning. Review of the totality of the evidence, particularly the videotaped interview, supports that Appellant's level of cooperation varied with him providing more details as more information came to light.

We thus find that Appellant has failed to demonstrate that this isolated rebuttal testimony plainly or obviously constituted an opinion as to whether Appellant "was truthful in making a specific statement regarding a fact at issue in the case," *Knapp*, 73 M.J. at 36, or invaded the province of the fact-finder to determine Appellant's credibility. *See Mullins*, 69 M.J. at 116.

Further, even if we were to find plain or obvious error, Appellant has failed to demonstrate prejudice. The agent's response was a relatively small part of his overall testimony and only a small portion of the Government's entire case. During argument, neither counsel made any mention of the agent's reference to "truthful." While trial counsel did comment on Appellant's cooperation with AFOSI—a door trial defense counsel opened—those statements were reasonable and proper inferences from the admitted portions of Appellant's interview, and they were not linked specifically to the agent's testimony. Trial counsel thus did not attempt to exploit the testimony for any impermissible purpose.

Finally, we note that this was a judge-alone proceeding. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." *Erickson*, 65 M.J. at 225. This includes the general prohibition on the admission and use of human lie detector testimony. A key remedy to human lie detector testimony is a "prompt cautionary instruction[] to ensure that the members do not make improper use of such testimony." *Knapp*, 73 M.J. at 36 (citation omitted). We are confident the military judge was aware of the limitations of such testimony and did not improperly consider this evidence.

Improper Sentencing Evidence

Appellant next alleges the military judge erred by allowing testimony that, with respect to the court-martial and charges, Appellant told a fellow non-commissioned officer, "I think that it's all bullshit," or words to that effect, and acted as if the charges and case against him were unimportant and did not matter.

A military judge's decision to admit or exclude evidence at sentencing is reviewed for an abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009); *see also United States v. Clemente*, 50 M.J. 36, 37 (1999). The admission of sentencing

evidence is subject to the Mil. R. Evid. 403 balancing test and the procedures set forth in Rule for Courts-Martial (R.C.M.) 1001. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citing *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)). When the military judge fails to provide the Rule 403 analysis on the record, her decision to admit the evidence is given less deference. *Rust*, 41 M.J. at 478.

R.C.M. 1001(b)(4) allows a trial counsel to "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." "An accused's attitude toward the offense of which he has been convicted is directly related to that offense and relevant to fashioning a sentence appropriate to both the offense and offender. An accused's awareness of the magnitude and seriousness of a crime is admissible in sentencing, as is a remorseless attitude toward the offense committed." *United States v. Alis*, 47 M.J. 817, 825 (A.F. Ct. Crim. App. 1998) (citation omitted). Such evidence is thus admissible if its probative value is not substantially outweighed by its prejudicial effect. Mil. R. Evid. 403.

Here, the evidence has some probative value in demonstrating Appellant's attitude toward the offenses of which he was convicted. We also find little prejudicial effect, especially in this judge-alone proceeding. We thus find no abuse of discretion in the military judge admitting this evidence.

Use of Guilty Plea Inquiry during Findings

During our review of the case, the court specified the following issue surrounding the military judge's consideration of statements from Appellant's guilty plea inquiry during trial on the remaining specifications:

> Whether the military judge prejudicially erred by considering statements made by Appellant during the guilty plea inquiry when deciding whether there was sufficient evidence for trial counsel to use the false exculpatory instruction during closing argument.

After initially failing to raise the issue, Appellant now argues that it was error for the military judge to consider his guilty plea inquiry as a basis for establishing potential false exculpatory statements.

"[F]alse statements by an accused in explaining an alleged offense may themselves tend to show guilt." *United States v. Colcol*, 16 M.J. 479, 484 (C.M.A. 1983) (citing *Wilson v. United States*, 162 U.S. 613 (1896)). A military judge may consider "false exculpatory statements if the Government introduces evidence of an accused's false statement or a false explanation concerning an alleged offense and the Government contends that an inference of consciousness of guilt should be drawn from the evidence." *United States v. Boore*, ACM 38058 (recon), unpub. op. at 15 (A.F. Ct. Crim. App. 21 August 2014). The

statement must be more than a general denial of guilt. *Boore*, unpub. op. at 15–16; *see also Colcol* 16 M.J. at 484. For example, in *Boore*, the accused provided specific details about the offenses that were contradicted by other evidence in the case. *Id.* at 15. In *United States v. Burgh*, ACM 38207, unpub. op. at 12 (A.F. Ct. Crim. App. 2014), this court addressed an issue of false exculpatory statements in the context of a sexual assault case. In that instance, the accused initially denied recollection of any of the alleged incidents but later stated that he recalled a consensual sexual encounter and provided details of his purported recollection. This court held that it was appropriate for the military judge to give the false exculpatory statement instruction because "[t]he appellant did not merely deny guilt in a general fashion. Instead, he described scenarios that, if believed, would exonerate him of any wrongdoing." *Id.*

Ordinarily, the military judge in a judge-alone trial "may not use admissions made during the plea inquiry to prove elements contained in the greater offense to which an accused has pleaded not guilty." *United States v. Axelson*, 65 M.J. 501, 518 (A.C.C.A. 2007). If a military judge errs by considering an accused's statements that were outside the waiver of the right against self-incrimination that follows from a provident plea of guilty, the error would be of constitutional dimension. *United States v. Grijalva*, 55 M.J. 223, 228 (C.A.A.F. 2001).

When an appellant fails to object at trial, we will grant relief only if he can demonstrate: (1) that there was an error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. But when, as here, the alleged error is of constitutional dimension, the prejudice prong is fulfilled unless the Government can show that the error was harmless beyond a reasonable doubt. *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011). We review de novo whether constitutional error was harmless beyond a reasonable doubt. *Id.* (citing *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991)).

At trial, defense counsel did not object to the use of the guilty plea inquiry on the issue of false exculpatory statements, instead arguing that there simply were no false exculpatory statements:

> What we have here is him being consistent throughout the course of his [AF]OSI interrogation all the way into what would have been the *Care* inquiry yesterday where he said it was a joke to him and that it was not something that potentially was inappropriate.

The military judge disagreed and cited three areas where there appeared to be inconsistencies in Appellant's statements: (1) he did not do anything wrong or inappropriate; (2) he never touched anyone inappropriately; and (3) anything that happened was joking. In granting trial counsel's request to argue that Appellant made false exculpatory statements, the military judge generally cited evidence from Appellant's

AFOSI interview and written statement, witness testimony, and statements during the *Care* inquiry.

As noted above, ordinarily it is error to use an appellant's statements made during a guilty plea inquiry as evidence of offenses or elements to which he has pleaded not guilty. *United States v. Flores*, 69 M.J. 366, 368 (C.A.A.F. 2011). Here, however, trial defense counsel not only failed to object to such use but affirmatively placed the *Care* inquiry before the fact-finder as evidence during the contested portion of the trial. In opening statements, to support the Defense theory that there was no intent to gratify sexual lust or desire, trial defense counsel referred to what the military judge "heard earlier in the *Care* inquiry." Further, during the Defense case-in-chief, trial defense counsel moved to admit the *Care* inquiry into evidence:

> Your Honor, I also would like for your consideration for the defense case-in-chief that you incorporate the *Care* inquiry and the elements that you received during the *Care* inquiry from Staff Sergeant Rambharose.

In *United States v. Resch*, 65 M.J. 233, 236 (C.A.A.F. 2007), the Defense similarly asked the military judge to consider guilty plea statements on a greater offense. The accused was charged with desertion but pleaded guilty to absence without leave. The Government sought to prove up the greater offense, and the only issue in findings was whether the accused had the intent to remain away permanently from his unit. Prior to closing argument, trial defense counsel asked the military judge to consider statements made during the *Care* inquiry. Our superior court held that the military judge erred in not readvising the accused of his right against self-incrimination and obtaining an affirmative waiver of such right prior to considering guilty plea statements on the greater offense. *Id.* at 236.

Here, the military judge initially advised Appellant, "by your plea of guilty you give up three important rights, and this is *only as to the lesser included offenses* as mentioned."[4] One of these rights was the privilege against self-incrimination. During the guilty plea inquiry, the military judge also advised Appellant that his statements could be used against him in sentencing and for charges of perjury or making false statements. Appellant, however, was not advised that his statements could be used in findings on elements to which he pleaded not guilty. Later in the case, when the Defense specifically requested the court consider *Care* inquiry statements in findings, the military judge did not advise Appellant regarding his right against self-incrimination. As in *Resch*, this failure to readvise and obtain an affirmative waiver constitutes error.

The court in *Resch*, however, did not end the inquiry upon finding error, but instead analyzed whether the error was harmless beyond a reasonable doubt. *Id.* at 237–238. The

[4] Emphasis added.

court focused on the strength of the Government's case and whether there was sufficient evidence aside from the guilty plea inquiry to support conviction on the greater offense. *Id.* In this case, as discussed above, we find the Government's evidence was sufficient to prove the intent element of the greater Article 120 offense for Specification 1,[5] completely independent of any statements Appellant made during the *Care* inquiry. Appellant's AFOSI interview, his sworn statement, and the testimony of witnesses provide sufficient evidence to find an intent to gratify his sexual desire beyond a reasonable doubt.

Additionally, there was ample evidence, aside from the guilty plea inquiry, to support trial counsel's request to argue false exculpatory statements. Appellant provided specific denials and offered several inconsistent statements regarding his interactions with the various women during his AFOSI interview and within his written statement. Appellant initially said the first physical contact with SrA HK at her desk consisted of her placing his hand on her breast. Later in his interview, Appellant admitted that he touched SrA HK first and placed his hand on her breast. Appellant initially denied touching SrA TW in any manner. Later in the interview, he agreed that he touched SrA TW's breast at her desk. Appellant also initially maintained that he never touched anyone inappropriately; however, in his written statement to AFOSI, he used words such as "offense," "wrong," and "inappropriate" to describe his actions. Consequently, without regard to the guilty plea inquiry, there was ample evidence within Appellant's AFOSI interview and sworn statement to support the Government's request to argue false exculpatory statements. *See United States v. Kekoa*, 54 M.J. 921, 923 (A.F. Ct. Crim. App. 2001) ("the military judge did not rely solely upon the stipulation [in the guilty plea inquiry] in deciding the contested specification").

Further, it was trial defense counsel, not the Government, who repeatedly used the guilty plea inquiry for Appellant's benefit. Defense counsel mentioned the *Care* inquiry during opening statement, offered guilty plea statements as affirmative evidence without any limitation, and referenced the *Care* inquiry at least five times in findings argument, for example noting:

> When you review the *Care* inquiry and the evidence what you also know is that Sergeant Rambharose sometimes acts before he fully thinks about what he's about to do. He's pled guilty to a number of the people, three women, for assault consummated by a battery because what you heard in his *Care* inquiry was that what he did at the time was intended to be a joke and nothing more. It's that context that we ask that you review his case.

[5] We reference only Specification 1 in this section, as we have already found Specification 3 factually insufficient, and the military judge did not find Appellant guilty of the greater Article 120 offenses in Specifications 2, 4, or 5.

Given the strength of the Government's case regarding Appellant's intent to gratify his sexual desire, the numerous false exculpatory statements aside from anything in the *Care* inquiry, and the Defense's extensive use of the guilty plea inquiry during trial, we find the error in failing to readvise Appellant concerning use of his guilty plea inquiry in findings was harmless beyond a reasonable doubt.

Use of Other Charged Offenses for Propensity Purposes

The court also specified the following additional issue:

> Whether the military judge erred to the prejudice of Appellant in considering evidence of other charged offenses for purposes of propensity under Military Rule of Evidence 413 in light of *United States v. Hills*, No. 15-0767/AR (C.A.A.F. 27 June 2016).

Prior to argument, trial counsel requested that the military judge consider evidence related to the various offenses for propensity purposes pursuant to Mil. R. Evid. 413. Appellant failed to object at trial. Accordingly, we review for plain error.

In *United States v. Hills*, the Court of Appeals for the Armed Forces recently held that it was error to admit evidence of other charged offenses for the purpose of proving propensity under Mil. R. Evid. 413:

> We hold that because the evidence of the charged sexual misconduct was already admissible in order to prove the offenses at issue, the application of [Mil. R. Evid.] 413—a rule of admissibility for evidence that would otherwise not be admissible—was error. Neither the text of [Mil. R. Evid.] 413 nor the legislative history of its federal counterpart suggests that the rule was intended to permit the government to show propensity by relying on the very acts the government needs to prove beyond a reasonable doubt in the same case.

75 M.J. 350, 352 (C.A.A.F. 2016).

The facts in *Hills* were distinct from the instant case as *Hills* addressed a single victim with multiple charged offenses all occurring at essentially the same time and place. In this case, Appellant was charged with offenses against four different women in separate incidents that spanned a period of more than three years. The court in *Hills*, however, did not limit its holding to the facts of that case. Consequently, pursuant to *Hills*, because the military judge in the instant case announced that she would consider evidence of other charged offenses for purposes of propensity under Mil. R. Evid. 413, she committed error.

Assuming this error was plain or obvious, we still must evaluate for prejudice. In *Hills*, when the court considered prejudice, it applied a harmless beyond a reasonable doubt standard. There, the court was assessing instructional error to members and found that a confusing instruction to lay people impinged on the presumption of innocence, and thus was of constitutional dimension. *Id.* at 357–58. Here, in contrast, in this judge-alone proceeding, there was no instruction, and we have no indication that the military judge misunderstood or misapplied the presumption of innocence. *See United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (military judges are presumed to know the law and to follow it, absent clear evidence to the contrary). To the contrary, the military judge specifically acknowledged the issue of spillover and noted the need to keep offenses separate. Thus, as an evidentiary matter, the military judge erroneously considered propensity evidence, but there is no indication it impacted Appellant's presumption of innocence in this case. We thus assess not constitutional, instructional error, but instead assess non-constitutional, evidentiary error. *United States v. Solomon*, 72 M.J. 176, 182 (C.A.A.F 2013).

Under these circumstances, the test for prejudice is whether the error materially prejudiced a substantial right of Appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). In evaluating this question, we use a four-part test, weighing: (1) the strength of the Government's case, (2) the strength of the Defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. *United States v. Berry*, 61 M.J. 91, 98 (C.A.A.F. 2005).

Applying these standards, we find no prejudice. We only consider Specification 1 here given our finding of factual insufficiency for Specification 3, the other abusive contact offense.[6] For Specification 1, Ms. JF testified consistently and credibly, addressing all of the elements of two incidents where Appellant grabbed her breast in an unwanted and uninvited manner. With respect to the first incident, Appellant admitted intentionally touching Ms. JF's breast, a very intimate part of her body, but asserted it was not with the intent to gratify his sexual desire. Appellant also provided conflicting information regarding his contact with Ms. JF, which weakened his claims regarding the absence of sexual gratification. Consequently, the Government's case on Specification 1 was relatively strong, while the Defense case, brought out through cross-examination of witnesses and consideration of Appellant's AFOSI interview and sworn statement, was relatively weak.

The propensity evidence was also of limited materiality and quality. Again, the strength of the evidence was in Ms. JF's direct testimony, not in the propensity evidence. Reviewing the military judge's mixed findings, it is apparent that she gave the propensity evidence little weight, instead assessing each specification independently and acknowledging on the record a clear understanding of spillover and its relation to this case.

[6] Additionally, as noted previously, Appellant pleaded guilty and was found guilty of LIOs for Specifications 2 and 4, and the military judge found Appellant not guilty of Specification 5. Thus, none of those specifications are directly at issue in this analysis of Mil. R. Evid. 413 evidence.

For example, she did not simply convict on all of the specifications or on the greater offenses where Appellant had entered pleas of guilty to LIOs. This was not the type of close case where there was a real danger that propensity evidence substantially influenced the military judge's verdict.

In fact, even if we were to apply a constitutional standard in this case, based on the analysis above and our review of the entire record, we would find the error harmless beyond a reasonable doubt.

Post-Trial Processing

In a supplemental assignment of error, Appellant asserts that he received untimely appellate review and his convictions should be set aside.

Under *United States v. Moreno*, courts apply a presumption of unreasonable delay when the time from docketing at this court to issuance of the decision exceeds 18 months. 63 M.J. 129, 142 (C.A.A.F. 2006). This presumption triggers analysis applying the four factors set out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) Appellant's assertion of the right to timely review and appeal, and (4) prejudice. *Id*.

Even when appellate delay does not rise to the level of a due process violation, this court may exercise its broad authority under Article 66(c), UCMJ, to grant sentence relief in the absence of a showing of material prejudice. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). In *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006), our superior court held that a service court may grant relief even when the delay was not "most extraordinary." It held, "The essential inquiry remains appropriateness in light of all circumstances, and no single predicate criteria of 'most extraordinary' should be erected to foreclose application of Article 66(c), UCMJ, consideration or relief." *Id*.

This court set out a non-exhaustive list of factors we consider when evaluating the appropriateness of *Tardif* relief in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). Those factors include how long the delay exceeded appellate review standards, the reasons noted by the government for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional neglect, harm to the appellant or the institution, the goals of justice and good order and discipline, and, finally, whether the court can provide any meaningful relief given the passage of time. *Id*. No single factor is dispositive, and we may consider other factors as appropriate. *Id*.

As this case was docketed with the court on 4 March 2015, the 18-month period expired on 4 September 2016. Despite this facially unreasonable delay, we find no due process violation. The length of delay is not excessive. First, we consider the multiple enlargements of time that Appellant requested and was granted, resulting in Appellant

filing his initial brief after 279 days had elapsed—in other words, after more than half of the 18-month period had passed. Second, this case involves unique circumstances which required this court to specify two issues beyond the four raised by Appellant. The second of these issues was in response to *United States v. Hills*, 75 M.J. at 352, which was decided after the initial assignments of error and the first specified issue had been fully briefed and required additional time for briefing. The *Hills* issues also required a fresh review of the record of trial to ascertain the impact of the matters raised by the court. This was necessary to provide both Appellant and the Government with a full and fair review of the case. We also consider that Appellant did not raise post-trial delay until 1 September 2016 and did not expressly demand speedy post-trial processing until 7 November 2016. Finally, we find no prejudice to Appellant beyond that ordinarily experienced by all appellants, particularly given that Appellant's 15-month period of confinement expired in January 2016.

Considering the totality of circumstances, we find that the delay in this case was not egregious or excessive. We are mindful of the need for timely post-trial processing; however, we must balance this with the need to fully evaluate all issues before the court, including those that may arise during post-trial processing. *See Moreno*, 62 M.J. at 137–38 (providing a more flexible review of the time period of a court of criminal appeal's decision because it involves the exercise of judicial decision-making authority). We further find that *Tardif* relief is not appropriate in this case.

Sentence Reassessment

Having found that Appellant's conviction for abusive sexual contact under Specification 3 is not factually sufficient, we must consider whether we can reassess the sentence or whether this case should be returned for a sentence rehearing. This court has "broad discretion" when reassessing sentences. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). Judges of the Courts of Criminal Appeals can modify sentences "'more expeditiously, more intelligently, and more fairly' than a new court-martial." *Id.* at 15 (quoting *Jackson v. Taylor*, 353 U.S. 569, 580 (1957)). In determining whether to reassess a sentence or order a rehearing, we consider the totality of the circumstances and the following factors: (1) dramatic changes in the penalty landscape and exposure, (2) the forum, (3) whether the remaining offenses capture the gravamen of the criminal conduct, (4) whether significant or aggravating circumstances remain admissible and relevant, and (5) whether the remaining offenses are the type with which we as appellate judges have the experience and familiarity to reliably determine what sentence would have been imposed at trial. *Id.* at 15–16.

In the present case, dismissing one of the abusive sexual contact convictions reduces the maximum length of confinement for the charged offenses from 35 years to 28 years. This is not a substantial reduction in penalty exposure. Moreover, the remaining offenses,

which we affirm, adequately capture the gravamen of Appellant's criminal conduct, still involve one instance of abusive sexual contact, and consist of Appellant intentionally and inappropriately touching multiple women without their consent. We are confident that we have the experience and familiarity with the remaining offenses to properly determine an appropriate sentence.

Considering the totality of the evidence, we are able to "determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Accordingly, we reassess Appellant's sentence to a bad-conduct discharge, confinement for 13 months, and reduction to the grade of E-1. We also conclude that the reassessed sentence is appropriate based on our individualized consideration of this Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007).

Conclusion

The finding of guilty to Specification 3 of the Charge is **SET ASIDE** and **DISMISSED WITH PREJUDICE**. The remaining findings are affirmed. We have reassessed the sentence to a bad-conduct discharge, confinement for 13 months, and reduction to the grade of E-1. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings, as modified, and sentence, as reassessed, are **AFFIRMED.**

FOR THE COURT

KURT J. BRUBAKER
Clerk of Court