

The Brigadier General Wayne E. Alley
Military Law Moot Court Competition

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Fort Belvoir, VA

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23–26 October 2024

Problem

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting *En Banc*

UNITED STATES, Appellee
v.
SERGEANT JACOB M. GREENE
United States Army, Appellant

ARMY 20240000

ORDER

WHEREAS:

On 29 July 2024, this court issued a memorandum opinion for the above captioned case. On 5 August 2024, appellant requested this court reconsider the case *en banc*. That request is granted.

NOW THEREFORE, IT IS ORDERED:

The parties will file briefs on the following issues:

I.

WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION IN ADMITTING EVIDENCE FROM
APPELLANT'S PHONE.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION IN ADMITTING EVIDENCE AS A PRIOR
CONSISTENT STATEMENT.

The parties shall file their briefs no later than 23 September 2024.

DATE: 12 August 2024

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JAMES, UTLEY, and WILLIAM
Appellate Military Judges

UNITED STATES, Appellee
v.
SERGEANT JACOB M. GREENE,
United States Army, Appellant

ARMY 20240000

4th Infantry Division, Fort Carson, CO
Colonel Mike Robison, Military Judge
Lieutenant Colonel John Laurance, Staff Judge Advocate

29 July 2024

MEMORANDUM OPINION

JAMES, Judge:

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of violating a lawful general order and one specification of assault consummated by battery in violation of, respectively, Articles 92 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928 [UCMJ]. The panel sentenced appellant to be confined for 18 months and a bad-conduct discharge. The convening authority took no action on the findings or sentence.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises two assignments of error, both of which merit discussion but no relief.¹

¹ We have also given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

BACKGROUND

At the time of both offenses, appellant was serving as a 35F, Intelligence Analyst assigned to the 4th Infantry Division at Fort Carson, Colorado. His duties included working with commercial vendors and military future concept offices to develop new weaponry for the armed forces. He held a Top Secret security clearance, and worked in a Sensitive Compartmented Information Facility [SCIF]. During the entirety of appellant's assignment at Fort Carson, a general order was in effect prohibiting anyone from bringing personal electronic devices into SCIFs.

Appellant lived in the barracks with his roommate, Specialist Alex Jandreau, who was in the same unit as appellant. Appellant and Specialist Jandreau occasionally video chatted together with friends from their respective homes. And when Specialist Jandreau's camera was broken on his phone, he would borrow appellant's to video chat with people. Appellant was always in the room when this was occurring.

Appellant also had a girlfriend, Specialist Desiree Knoll. Appellant and Specialist Knoll met shortly after she arrived to the unit in January of 2023 and began dating shortly after that.

Appellant's court-martial convictions are based on two separate, but related, incidents. The first is that appellant brought his phone into a SCIF and took photos of documents labeled "Top Secret." The evidence supporting this specification comes primarily from a search of appellant's phone. The second is that appellant unlawfully struck his fellow soldier with a closed fist. Evidence of a prior consistent statement offered by the victim in large part supported this second specification.

I. Evidence Related to the Search of Appellant's Phone

On the evening of Friday, 9 June 2023, into the early morning hours of Saturday, 10 June 2023, appellant was out with some of his friends, and his roommate, to celebrate his 21st birthday. Although appellant was tired from being at work the whole night before, he was looking forward to the celebration, but disappointed that Specialist Knoll was out of town. The group visited various bars and restaurants on Tejon Street in Colorado Springs (taking numerous photos throughout the night). Appellant handed his phone, unlocked, to Specialist Jandreau and Private First Class Benjamin Holt and allowed each to take photos of the group, selfies, and photos of a flaming shot they all drank. Appellant even scrolled through some of the pictures with Specialist Jandreau and Private First Class Holt to select the best ones to post to social media. As the night progressed, appellant became increasingly intoxicated and tired.

Throughout the night, appellant talked about his dream of becoming an Armor Officer in the United States Army and leading a platoon of tanks. After dozing off at the bar, appellant abruptly awoke and stated that he had seen “super secret” blueprints for the Army’s newest tank. He then took out his phone and showed Specialist Jandreau and Private First Class Holt the photos he had taken of the blueprints and screamed about how one day he would command the new tank. Several other patrons at the bar looked over towards the commotion. Thinking quickly, Specialist Jandreau snatched the phone away and told Private First Class Holt that he would take appellant back to their barracks and get him to bed. Private First Class Holt left immediately and began walking home.

Shortly after leaving the bar, Private First Class Holt called their company commander, Captain Andrew Marsh. Private First Class Holt reported to Captain Marsh that appellant had been discussing sensitive military technology. Private First Class Holt also indicated that he believed appellant had pictures of those designs on his phone based on how appellant acted (although neither Private First Class Holt nor Specialist Jandreau could see any photos clearly). Captain Marsh departed his off-post residence immediately after receiving the call from Private First Class Holt and traveled to appellant’s barracks room.

Meanwhile, still at the bar, Specialist Jandreau—whose phone had died—attempted to explain to appellant that he needed to use appellant’s phone to call for a ride back to their room. Specialist Jandreau asked appellant for the passcode, and instead of providing the numbers, appellant—sleepy again—muttered that it was the year of Thunder Run. Not knowing the background for the famous tank battle and exhausted and ready to be home, Specialist Jandreau held the phone up to appellant’s face to see what would happen. It unlocked, and Specialist Jandreau called them a ride. Appellant also told Specialist Jandreau to go into Appellant’s phone and send \$50 he owed to Specialist Jandreau. Specialist Jandreau then said, “I should delete those photos too; what were you thinking?” to which appellant responded “don’t even think about it,” shot his hand out and relocked the phone, preventing Specialist Jandreau from deleting the photos. Specialist Jandreau kept the phone, which was locked, to track the ride. Once the ride showed up, Specialist Jandreau helped appellant into the car; Appellant once again passed out.

During the drive, while appellant was asleep, Specialist Jandreau, still not knowing the passcode, again used the facial recognition feature to unlock the phone and began watching videos. The noise woke up appellant, who shifted and said to Specialist Jandreau: “turn my phone down,” and then fell asleep again. Upon returning to the barracks, Specialist Jandreau dumped appellant into bed and lied on the couch to finish watching the movie.

Moments later, Specialist Jandreau heard a knock on the door. He opened it and found Captain Marsh outside. Captain Marsh went back to appellant’s room but

was unable to wake him up. Then, Captain Marsh asked Specialist Jandreau if he knew where appellant's phone was. Specialist Jandreau grabbed the phone from the coffee table where it had locked itself and handed it to Captain Marsh. Captain Marsh sighed and asked, "Do you know the passcode?" Specialist Jandreau responded that he did not know the numbers, but knew it was the year of Thunder Run. Captain Marsh searched for the battle on his own phone, and then he typed 2-0-0-3 into appellant's phone. It unlocked, and Captain Marsh set the phone to airplane mode and disabled the auto-lock feature. At no point did Specialist Jandreau, also exhausted, think to mention the ability to unlock the phone with facial recognition.

Captain Marsh then went to the Fort Carson Detachment of the Army Criminal Investigation Division [CID] and turned the phone over to CID while providing them some background on what happened. Special Agent Connie Cavanaugh took possession of the phone, ensured it was on airplane mode and the auto-lock was off, and placed it on a charger and in a container that prevented electronic signals from coming in or going out. Special Agent Cavanaugh asked Captain Marsh to have Specialist Jandreau report to CID for questioning. After arriving, Specialist Jandreau signed a consent form, authorizing CID to have full access to the appellant's phone. At no point were Captain Marsh or Specialist Jandreau asked what the passcode was. Additionally, Specialist Jandreau never mentioned, nor was he asked about, using facial recognition or knowing of facial-recognition access on appellant's phone.²

The next day the phone was taken to Special Agent Katie Whitting, the Digital Forensic Examiner [DFE] working in Fort Carson's CID field office. She ran the unlocked phone through the relevant software and extracted all of the phone's contents. Special Agent Whitting sorted the extraction into chronological order and found pictures that were dated approximately two weeks earlier. The pictures appeared to portray documents with specifications of the tank's schematics, capabilities, and reports of the tank's performance. At the bottom and top of the documents, many had "Top Secret" markings. At no time did CID get a magistrate authorization to search appellant's phone—nor did they get appellant's consent to search the phone. When CID later questioned appellant, he invoked his right to remain silent and immediately obtained counsel. Appellant's attorney requested a return of the phone; she claimed that her client did not consent to the search and seizure of his phone, and Specialist Jandreau had no common authority to have

² Immediately after talking to CID, both Captain Marsh and Specialist Jandreau departed on a previously scheduled Worldwide Individual Augmentation System [WIAS] tasker. They were unreachable in their classified location. Their particular WIAS mission was scheduled to last from nine to eighteen months. However, during the deployment Captain Marsh was killed in action, and Specialist Jandreau was injured and placed in a medically-induced coma.

consented. Since the phone contained contraband and was being held as evidence, CID refused to return it.

At trial, appellant's counsel made a timely motion to suppress the results of the search. At the Article 39(a), UCMJ motions hearing, both the CID agent who received the seized phone (Special Agent Cavanaugh) and the DFE (Special Agent Whitting) testified. Special Agent Cavanaugh testified that he knew the phone was appellant's and not Specialist Jandreau's. He admitted that he did not consider whether Specialist Jandreau actually had authority to grant access to the phone. However, since the commander presented him the phone unlocked, Special Agent Cavanaugh believed there was sufficient consent. He testified that, had consent been revoked prior to the phone being searched, he likely would have sought a search authorization.

The DFE testified that without the phone being unlocked, it may have been difficult to enter it and conduct her search. This is because the phone was of the newest model with an updated encryption. At the time, the software to quickly access a locked phone of this model had not been developed. Normally the requisite software comes around 3–6 months after a new phone goes on the market. Special Agent Whitting noted that if one does not disable the password (which takes typing in the password after it has been unlocked in the settings feature), the phone may go dormant after a few seconds and require it to be unlocked again. Without the password, the agent indicated that she would have had to send it to her higher headquarters to see if they could attempt to unlock it. If sending it to higher headquarters would not have worked, then she would have sought permission from her leadership to send the phone to be entered through brute force by a private company. This would have required contracting, which is a lengthy and possibly expensive process. The time it takes to enter the phone through brute force is caused by the fact that for every iteration of password entered, the time between incorrect attempts exponentially grows. So, although the phone inevitably would be unlocked—it could take a long time. However, the DFE believed it had been done in a few cases she knew of, although she was not the agent on those cases and did not remember the results. Special Agent Whitting also indicated that if she had known of the facial recognition, then CID would have ordered appellant to unlock the phone that way or would have placed the phone in front of appellant's face. She admitted that unlocking a phone using face recognition was not a standard operating procedure, and she did not know if it was permitted or not. But she had heard of other agents doing it.

II. Evidence Related to the Scuffle

In January of 2023, prior to the investigation, appellant attended a party at a friend's house off-post. Also at that party was another member of appellant's unit, Specialist Dominic Hofmann. With Specialist Hofmann came Specialist Knoll, who

had just arrived to a separate unit on Fort Carson. Specialist Hofmann and Specialist Knoll had been talking and hanging out for a few days before the party. Specialist Knoll was looking forward to meeting more people and making new friends. On the other hand, Specialist Hofmann thought the evening was somewhat of a date.

Specialist Hofmann introduced Specialist Knoll to appellant, and she and appellant immediately hit it off. They were both from the same area and had common interests. Specialist Hofmann lingered around the conversation for a bit, but eventually went to hang out with other people. Specialist Knoll ended up talking to appellant for the remainder of the night, and the two exchanged numbers. Specialist Hofmann reappeared when the party was winding down, and asked if Specialist Knoll needed a ride, to which she responded she would figure something out. Specialist Hofmann went home alone.

Appellant and Specialist Knoll continued to talk and hang out more and more throughout the ensuing weeks. Specialist Hofmann also continued texting with Specialist Knoll and they grabbed lunch a few times and saw each other at work events and some parties, but their communication became less and less frequent. Specialist Hofmann, generally a very upbeat person, became quieter and more reserved during this time. His friends, although they did not think it was anything serious, began making more of an effort to spend time with him. By the end of February, appellant and Specialist Knoll were very obviously in a relationship, and things were by all accounts going well. Specialist Hofmann heard through the grapevine that Specialist Knoll really loved that appellant was deep down a peaceful and gentle person.

In March of 2023, Specialist Hofmann began dating an old friend from high school. They continued a long-distance relationship and saw each other every few weeks. Specialist Hofmann, by this time, had become more like his old self. However, he would occasionally still ask people in his unit how the relationship with appellant and Specialist Knoll was going.

Following appellant's misconduct with the classified documents, things became significantly harder on the entire unit. The security protocols for work, already arduous, became even more time-consuming. Getting into and out of the SCIF took three times as long as it used to, and the unit's leadership was regularly checking in with all soldiers. While appellant had been generally well-liked, frustration in the unit grew as his peers had to sacrifice time with family and friends to accommodate the increased security measures.

In the midst of all this, appellant and Specialist Hofmann ran into each other one day outside the barracks. It is unclear what exactly happened between the two individuals next. However, during breakfast at the dining facility [DFAC] the next

day, Private First Class Josiah Taylor heard Specialist Hofmann tell his roommate that appellant had “chucked a water bottle at” him out of nowhere the preceding night. Private First Class Taylor did not get a good look at Specialist Hofmann. Following breakfast, Specialist Hofmann (as well as the majority of the unit) began a two-week summer block leave.

Specialist Hofmann returned home to his family and spent a lot of time with his girlfriend. However, as Specialist Hofmann prepared to return to Fort Carson, his girlfriend broke off the relationship. She believed Specialist Hofmann was a decent guy, and enjoyed his company, but she always felt like he was somewhat detached and not super interested. Just prior to getting back to his unit at Fort Carson, Specialist Hofmann texted Specialist Knoll that he hoped she had a good leave and that he was looking forward to seeing her again.

Upon everyone’s return from block leave, CID conducted a canvas interview of individuals in appellant’s unit looking for information on the spillage of classified material. The command took care to not violate appellant’s rights under Article 13, UCMJ, but everyone in the unit (besides appellant) was made to speak to CID. The commander exhorted everyone to tell the truth. During his interview with CID, Specialist Hofmann made clear he did not know anything about appellant sneaking a phone into the SCIF. However, the agent then asked if there was anything else Specialist Hofmann believed they should know. After hesitating, Specialist Hofmann told the CID agent about the fight. The CID agent referred this information to the chain of command, who eventually preferred charges against appellant for assault consummated by battery under Article 128, UCMJ.

At trial, the government called Specialist Hofmann as a witness. He testified as follows: He ran into appellant in the stairway the day before beginning summer block leave. After getting into a heated argument with appellant, appellant then used his right hand and closed fist to deliver a cross directly to Specialist Hofmann’s left eye. During cross-examination, the defense elicited that Specialist Hofmann had feelings for Specialist Knoll. Specialist Hofmann also admitted to the defense counsel that he had been jealous of appellant, and that the extra security precautions had caused him to miss time with friends (both of which he blamed appellant for).

Following this, the government called Private First Class Taylor as a witness. The trial counsel asked him if Specialist Hofmann said anything of note the day summer block leave started. The defense objected to hearsay. The government responded that it was a prior consistent statement under Military Rule of Evidence 801(d)(1)(B)(i). The military judge, without excusing the panel members under Article 39(a), UCMJ or asking either side for a proffer, stated “overruled.” The government then re-asked Private First Class Taylor if Specialist Hofmann said anything. Private First Class Taylor testified that Specialist Hofmann said that appellant “chucked a water bottle” at him.

LAW AND DISCUSSION

I. The Evidence on Appellant's Phone

A. Standard of Review

A military judge's decision to suppress evidence, or not, is reviewed for an abuse of discretion. *United States v. Black*, 82 M.J. 447, 451 (C.A.A.F. 2022).

B. Law

1. Common Authority

The Fourth Amendment to the United States Constitution protects against “unreasonable searches and seizures.” U.S. Const. amend. IV. A search is not unreasonable if “voluntary consent has been obtained.” *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). In some situations, “permission to search [may be] obtained from a third party who possessed common authority over or other sufficient relationship” to the property. *United States v. Matlock*, 415 U.S. 164, 171 (1974). “Common authority is ‘mutual use of the property by persons generally having joint access or control for most purposes.’” *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007) (quoting *Matlock*, 415 U.S. at 171 n.7).

This standard is also codified in Military Rule of Evidence [Mil. R. Evid.] 314. “A person may grant consent to search property when the person exercises control over that property.” Mil. R. Evid. 314(e)(2). The government bears the burden of proving “by clear and convincing evidence that a third party has joint access and control to the degree that such control confers a right to consent to search.” *Black*, 82 M.J. at 451 (citing Mil. R. Evid. 314(e)(5)).

2. Inevitable Discovery

When the government finds evidence through an unlawful search, it may not need to be excluded “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . .” *Nix v. Williams*, 467 U.S. 431, 444 (1984) [*Williams II*]. This standard is also laid out in Mil. R. Evid. 311(c)(2) and (d)(5)(A).

Our superior court has made clear that this standard requires that the government demonstrate it possessed or was actively pursuing leads that would lead to the evidence. *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014). It would not be enough for the government to present “[m]ere speculation and conjecture” as to the inevitable discovery of the evidence” *Id.* (quoting *United States v. Maxwell*, 45 M.J. 406, 422 (C.A.A.F. 1996)).

C. Discussion

1. Specialist Jandreau possessed common authority over appellant's phone.

Appellant turned over his phone's passcode to Specialist Jandreau, instructed him to use it for numerous purposes, and permitted him to use it for others. In so doing, appellant "assumed the risk that [Specialist Jandreau] would allow someone else to look" at the pictures on the phone. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

We acknowledge that the Court of Appeals for the Armed Forces [CAAF], our superior court, has held that a military judge did not abuse his discretion when ruling that a third party's access could be impliedly limited. *Black*, 82 M.J. at 451–52. However, this case is distinguishable from *Black*. As an initial matter, here the military judge ruled in favor of the government and found Specialist Jandreau had common authority. Additionally, in *Black*, the third party was only told he could use Black's phone for specific purposes. *Id.* at 451. The third party exceeded the scope of that permission by looking at the photographs on Black's phone. Here, however, appellant did not, explicitly or implicitly, limit Specialist Jandreau's access to the phone. On the contrary, he continued to encourage—and permit—Specialist Jandreau to use the phone for broader and broader purposes, indicating more and more authority conferred on Specialist Jandreau.

For example, appellant first invited Specialist Jandreau to look at his photographs when they were determining what pictures to post to social media. This demonstrates that Specialist Jandreau was given access to the folder containing appellant's photos. Then, when Specialist Jandreau took the phone to call for a taxi, appellant told Specialist Jandreau the passcode for the phone, giving him access to all of its contents. The dissent notes, correctly, that appellant only provided the phone's passcode in trivia format. However, as the commander's ability to access the phone with the passcode demonstrated, it was the correct passcode. Had Specialist Jandreau not thought to use the facial recognition feature to access appellant's phone, he could have simply asked anyone else at the bar to look up the year of Thunder Run to gain access. The provision of the passcode in trivia format was not intended to limit access, but perhaps even to help Specialist Jandreau remember it in the future—once he passed the test of military history.

Once Specialist Jandreau was in the phone, appellant again explicitly encouraged him to roam around further, and this time he asked Specialist Jandreau to access his private bank information. The willingness with which appellant provided Specialist Jandreau access to his personal finances is further evidence of how much he trusted Specialist Jandreau and how willing he was to give him total access to the phone. Once Specialist Jandreau was in the phone, as in *Rader*,

nothing else in the phone was “password protected, encrypted, or subject to any other technological impediment to review” 65 M.J. at 34.

The dissent is correct that, after Specialist Jandreau threatened to delete the relevant photographs, appellant did lock the phone and explicitly place a restriction on Specialist Jandreau’s authority over the photos. However, this restriction was merely to not delete the relevant photographs. Appellant did not tell Specialist Jandreau not to look at, or show anyone else, the photos. He likewise did not tell Specialist Jandreau not to go on the phone anymore nor try to take the phone away. We have previously determined that after someone with common authority authorizes a third party to access a phone, a change in circumstances is not sufficient to revoke the authorization or the common authority. *United States v. Brinkman-Coronel*, 2024 CCA LEXIS 131, at *19–20 (Army Ct. Crim. App. 22 Mar. 2024) (unpub.). We do the same here with a simple demand to not delete; common authority to access the phone was otherwise authorized.

Finally, appellant allowed Specialist Jandreau to unlock the phone multiple times. The only restriction he later placed on the phone was requesting that Specialist Jandreau turn the volume down. At this time, he was perfectly fine with Specialist Jandreau doing whatever he wanted on the phone without supervision. In sum, appellant granted Specialist Jandreau common authority over the phone and embraced the risk that Specialist Jandreau would allow others access to the phone.

2. Even if Specialist Jandreau did not have common authority over appellant’s phone, the evidence would have been inevitably discovered.

While by no means a textbook investigation by CID, there is ample evidence in the record to assure us that investigators would have inevitably discovered the pictures on the phone.

As an initial matter, the serious nature of the offense—combined with Special Agent Cavanaugh’s testimony that he would have sought a search authorization—is enough to conclude that a search authorization, if necessary, would have been sought. Moreover, there is more than sufficient evidence to satisfy the low threshold of probable cause required for that would-be search authorization to have been granted. Appellant screamed about having sensitive documents on his phone and waved it around a bar full of people. Because a search authorization would have been sought and granted, we now turn to the issue of whether the evidence would have been discovered.

There are three ways that the government, with a search authorization, could have searched appellant’s phone. The first is, if presented with a locked phone by the commander, obtaining the passcode. The second is by using the facial recognition feature. The third is by a brute force entry. Any of these techniques

would have been independently sufficient for the government to obtain the evidence it was seeking. And each would have worked.

We can look to Captain Marsh's initial interaction with Specialist Jandreau to surmise how CID would have reacted when presented a locked phone. The first thing Captain Marsh asked, upon being handed the phone by someone, was if that person knew the passcode. Had Captain Marsh not already taken the step of unlocking the phone, Specialist Agent Cavanaugh, a detective, would have asked him the same question. It is worth noting here that a concern about forgetting the random four number sequence is also reduced, given that appellant revealed his passcode not just as the numbers, but as a reference to a more memorable historic event. Therefore, Specialist Jandreau and Captain Marsh, if asked, would have been more likely to remember and relay it.

Even had CID failed to ask about the passcode prior to losing the ability to speak with Captain Marsh and Specialist Jandreau, it would have attempted to unlock the phone using its facial recognition feature. While we acknowledge that CID did not testify that it knew about the facial recognition at the time, it had no reason to then. The phone was unlocked and available for use. With such a high-profile case, it is highly likely CID would have considered trying facial recognition.

Finally, if both of those methods failed, CID would have sent the phone to be cracked through brute force. While the time this would have taken is unclear, the Supreme Court in *Williams II* determined that 200 volunteers combing through 3 counties would have inevitably discovered a body. While we recognize over 10,000 4-digit combinations exist, this does not detract from the fact that the machine would have eventually succeeded. Given all three of these possible means of entry, we conclude that—even had Specialist Jandreau lacked common authority over the phone—the evidence would have been inevitably discovered.

II. Prior Consistent Statement

We similarly find that the military judge did not abuse his discretion in admitting appellant's statement at the DFAC as a prior consistent statement. The statement was not hearsay under Mil. R. Evid. 801(d).

A. Standard of Review.

A military judge's ruling to admit evidence is reviewed for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019).

B. Law.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Mil. R. Evid. 801(c). Generally, hearsay is not admissible at a court-martial. Mil. R. Evid. 802. However, a prior statement of a witness is not hearsay when: (1) “[t]he declarant testifies and is subject to cross-examination about a prior statement”; (2) “the statement is consistent with the declarant’s testimony”; and (3) the statement is “offered to rebut an express or implied charge that the declarant recently fabricated [the testimony] or acted from an recent improper influence or motive in so testifying.” Mil. R. Evid. 801(d)(1)(B)(i).

Additionally, to be admissible under Mil. R. Evid. 801(d)(1)(B)(i), the statement must “precede any motive to fabricate or improper influence it is offered to rebut.” *Frost*, 79 M.J. at 110. If there are multiple motives to fabricate or improper influences, the statement does not need to precede all motives or influences, but just the one it is offered to rebut. *Id.* (citing *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998)).

C. Discussion.

All the requirements of Mil. R. Evid. 801(d)(1)(B)(i) are satisfied here. Specialist Hofmann testified and was subject to cross examination, the statement heard by Private First Class Taylor was generally consistent with how Specialist Hofmann testified at trial, and Specialist Hofmann’s motive to fabricate arose after he made the statement heard by Private First Class Taylor.

1. Specialist Hofmann’s earlier statement, overheard by Private First Class Taylor, was sufficiently consistent with Specialist Hofmann’s testimony at trial.

In order to be admissible, a prior statement need only “be ‘generally consistent’ with the declarant’s testimony at trial” *United States v. Finch*, 79 M.J. 389, 398 (quoting *United States v. Muhammad*, 512 F. App’x 154, 166 (3d Cir. 2013)). Here, while we acknowledge that the statements are not identical, that is not required. *See Finch*, 79 M.J. at 395 (quoting *United States v. Vest*, 842 F.3d 1319, 1329 (1st Cir. 1988)). Rather, the statement here is sufficient to demonstrate Specialist Hofmann did not recently fabricate the assault.

The prior consistent statement offered by Private First Class Taylor helped prove that Specialist Hofmann was injured around the same time he testified to being injured at trial. It also corroborated that appellant was the cause of this injury. Our superior court has determined that testimony is not sufficiently consistent when it is evidence of completely separate occurrences, like the subsequent remedial measures of another parent in *Finch*. 79 M.J. at 398. That is not what we have here.

Rather, here we have the statement of the declarant stating that the same individual injured him around the same time, but in a somewhat different manner.

We have previously held that using slang to describe events does not make a prior statement insufficiently consistent. *United States v. Fleming*, 2022 CCA LEXIS 661, at *22 (Army Ct. Crim. App. 15 Nov. 2022). Similarly, here, a declarant speaking with friends or family may speak differently and more casually about a traumatic event. They may engage in hyperbole or take dramatic license with a story. Then, when a court-martial is convened with all of its formality (and in front of a panel full of significantly senior personnel), the declarant may shift to a more professional description of an event. This shift does not detract from the prior statement or make it less consistent for purposes of Mil. R. Evid. 801(d)(1)(B)(i).

2. Specialist Hofmann's motive to fabricate developed after he made his statement to Private First Class Taylor.

Specialist Hofmann's feelings for Specialist Knoll developed into a motive to fabricate at the end of summer block leave. Before that, when Specialist Hofmann made the statement that was overheard by Private First Class Taylor, Specialist Hofmann was in a committed relationship (and by all accounts was acting like himself). However, following the breakup, Specialist Hofmann again turned his attention to Specialist Knoll. He demonstrated his interest in Specialist Knoll by texting her at the end of leave. It is then that Specialist Hoffman could have felt he had something to gain by causing harm to appellant.

While we acknowledge that the military judge did not make specific findings of fact, or elaborate on his conclusions of law, we do not find this to be fatal. In *Allison*, the military judge likewise did not make a factual finding about when the motive to fabricate arose. 49 M.J. at 57. Nonetheless, our superior court determined he did not abuse his discretion by admitting the evidence. *Id.* at 58. Likewise, here the record supports that the motive to fabricate arose after Specialist Hofmann's initial statement.

The United States Court of Appeals for the Third Circuit takes a very permissive approach, noting that "[t]he promotive requirement will be satisfied if a district court can reasonably determine from the record a range of time when a motive to fabricate could have arisen after the prior consistent statement." *United States v. Frazier*, 469 F.3d 85, 93–94 (3rd Cir. 2006). While we see no need to specifically endorse this test, in this case it is not hard to see how Specialist Hofmann's motive to fabricate would have come about. As mentioned, when he became single again, he developed a reason to drive a wedge between appellant and Specialist Knoll. But the statement overheard by Private First Class Taylor came first (prior to any such motive).

Additionally, there is no evidence that Specialist Hofmann sought out an opportunity to get appellant in trouble with this information. Rather, it merely came about in an otherwise routine interview with CID. As in *United States v. Caracappa*, it would have been a significant leap for Specialist Hofmann's motive to fabricate to develop even before his girlfriend broke up with him and especially before appellant got caught bringing his phone into the SCIF. 614 F.3d 30, 40 (2d Cir. 2010).³

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.⁴

Judge UTLEY concurring;

Judge WILLIAM, dissenting:

I respectfully dissent from my colleagues' opinion on both the issue of the suppression of the evidence found on appellant's phone and the admission of Specialist Hofmann's prior statement.

I. The evidence from appellant's phone should have been suppressed.

A. Specialist Jandreau did not have common authority over appellant's phone.

Appellant was drinking when Specialist Jandreau used and handed over appellant's phone. All analysis should be conducted through that lens.

The majority attempts—in vain—to distinguish the instant case from the binding precedent by our superior court in *United States v. Black*, 82 M.J. 447 (C.A.A.F. 2022). But this case is indistinguishable. As in *Black*, the third party was permitted to use the phone only for specific purposes and a specific period of time. Specific purposes similarly governed Specialist Jandreau's access here. This is a far cry from the common authority in cases like *United States v. Matlock*, 415 U.S. 164, 169–70 (1974) (allowing admission of evidence found in a diaper bag that was in a bedroom closet when an individual with common authority over the bedroom gave consent to search the bedroom).

³ As the government at trial did not propose another avenue of admissibility, we decline to consider one here.

⁴ Given the nature of the evidence presented in this case, we do find it worth mentioning that were we to have agreed with appellant that the military judge committed error in either instance, we would find prejudice and set aside the findings and authorize a rehearing.

The majority first draws attention to the fact that appellant invited Specialist Jandreau to look at photos on the phone to determine what to post to social media. However, the majority fails to consider the fact that appellant did not invite Specialist Jandreau to view *any* photograph contained on appellant's phone—only the pictures taken of the group of friends from *that day*. By expanding the idea of what Specialist Jandreau was actually permitted to view, and did in fact view, to an entire category of what could have been viewed, the majority conflates ability with permission. See *United States v. Wicks*, 73 M.J. 93, 100 (C.A.A.F. 2014) (“[I]f one likens turning on a cell phone to opening a container, then everything within the cell phone would lose its privacy protections where the private party merely turned the phone on before turning it over to the government.”).

As an initial matter, appellant never actually gave Specialist Jandreau the passcode to the phone. Instead, he provided a riddle *that was never passed*. The majority surmises the riddle may have been intended to help Specialist Jandreau remember the passcode, but appellant may have just as likely believed that Specialist Jandreau could not get the answer. As it was, the only way Specialist Jandreau got into the phone was by surreptitiously using the facial unlock feature.

Moreover, even had appellant provided the actual passphrase to Specialist Jandreau, it would not have mattered. Even though he provided the key to the house, he only gave Specialist Jandreau permission to access certain rooms—the bank account and the pictures taken that day. He did not specifically give permission to Specialist Jandreau to watch a movie (and telling Specialist Jandreau to turn down the volume was hardly a ratification of this trespass).

Most importantly, appellant never gave Specialist Jandreau access to the specific pictures at issue. In fact, even while intoxicated, appellant took back his phone and relocked it when Specialist Jandreau threatened to delete the photos. This expression of non-consent demonstrates that Specialist Jandreau never had permission to be where the incriminating pictures were.

B. The data on appellant's phone would not have been inevitably discovered.

The government did not prove that it was taking steps that would have led to the discovery of the evidence on appellant's phone. While I acknowledge that the crimes that allegedly occurred here are serious and involve national security, Special Agent Cavanaugh testified only that it was likely he would have sought a search authorization. While this was more than the government had in *Black*, it is not definitive. 82 M.J. at 453–54.

Additionally, the lack of a search authorization is not the only issue plaguing inevitable discovery. A way to enter the phone must be known or found. The majority concludes that investigators would have asked about the passcode if the

phone was locked, because it was what Captain Marsh did. As in *Black*, this is not “illogical” but there is not enough in the record to support it. *Id.* And when considering how Special Agent Cavanaugh conducted the investigation generally, he should not be given the benefit of the doubt.

Likewise with the facial recognition feature. Here, Special Agent Whitting testified that CID would have used it had they known about it. However, the key is that CID did not know about it, and no one testified that they would have discovered it. As with the discovery of the passcode, “‘mere speculation and conjecture’ as to the inevitable discovery of the evidence is not sufficient when applying [the inevitable discovery] exception.” *Wicks*, 73 M.J. at 103 (quoting *United States v. Maxwell*, 45 M.J. 406, 422 (C.A.A.F. 1996)).

Finally, regarding the brute force entry into the phone, there is not sufficient evidence in the record to determine this would have been done, let alone worked. The government would have had to expend time and resources to be able to enter a locked phone. This is something it may have been willing to do. But it also may have been something it was unwilling to do, depending on those constraints. Given that the government did not know those variables, we cannot determine it would have invested them. For these reasons, I cannot conclude the evidence in the phone would have been inevitably discovered. I therefore believe the military judge abused his discretion in admitting the evidence from appellant’s phone.

II. The military judge erred in admitting Specialist Hofmann’s previous statement as a prior consistent statement.

The military judge declined to hear arguments from both parties as to their positions and did not provide any findings of fact either written or orally. While this is not required, a decision without them is entitled to little deference. *See United States v. Finch*, 79 M.J. 389, 397 n.1 (C.A.A.F. 2020). Specialist Hofmann’s statement was not sufficiently consistent with his statement at trial, and it is not clear that his motive to fabricate developed after this statement. Therefore, the statement should not have been admitted.

A. Specialist Hofmann’s previous statement was inconsistent with his testimony at trial.

Private First Class Taylor heard Specialist Hofmann say that appellant “chucked a water bottle” at him. At trial, Specialist Hofmann stated that appellant, using his right hand and a closed fist, delivered a cross directly to Specialist Hofmann’s left eye. These statements are not the same. I recognize that our superior court has held that a prior statement need not be identical. *Id.* at 398. But the majority cannot transform an apple into an orange just because both are fruits. Private First Class Taylor overheard a completely different mechanism of injury than what Specialist Hofmann testified to. In fact, it is more akin to a prior inconsistent

statement. *See* Dep't of the Army, Pam 27-9, Legal Services: Military Judges' Benchbook, para. 7-11-1 (2020).

I acknowledge that this prior statement furthered the government's theory of the case in that it supported that Specialist Hofmann previously stated that appellant was the cause of the injury and it occurred at the relevant time. But satisfying Military Rule of Evidence [Mil. R. Evid.] 401 is not enough. I also acknowledge that it is possible that Private First Class Taylor misheard some of the conversation. But, if that was the case, the government bears the burden of proving it. While the military judge's snap decision may have made that less feasible, it does not reduce the government's obligation as the proponent of the evidence. *See Finch*, 79 M.J. at 396 (citing *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001)).

B. Specialist Hofmann's motive to fabricate developed before any scuffle occurred.

As the Supreme Court held in *Tome v. United States*, "prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited." 513 U.S. 150 (1995). Instead, the statement must "predate[] the motive" in order to effectively and properly rehabilitate a witness. *Id.* *See also* Mil. R. Evid. 803(d)(1)(B)(i). In determining which motive is at issue, the Court looks at the entire defense cross-examination, case, and proffer to determine if the "other" motives were truly raised by the defense/at-issue, or if the government is stretching to try to smuggle in hearsay evidence under the guise of a prior consistent statement. *United States v. Frost*, 79 M.J. 104, 110 (C.A.A.F. 2019) (citing *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998)).

Summer block leave was not the point at which Specialist Hofmann developed feelings for Specialist Knoll. The facts developed in the record establish that as early as January 2023, Specialist Hofmann believed he was on a date with Specialist Knoll. She apparently did not see it that way. That very same night—when Specialist Hofmann was courting Specialist Knoll—she instead began her romantic interest in appellant. Specialist Hofmann was a first-hand witness to this budding relationship. According to his friends, around this time Specialist Hofmann's demeanor changed. His interest in Specialist Knoll was not a new motive to fabricate, but the same motive he would have always had from his original crush; the fact that it manifested itself at different times does not transform it into a different motivation.

As mentioned earlier, the military judge did not help his case when he declined to make findings of fact. Were he to have determined, on the record with explanation, the motive to fabricate, when it developed, or anything else, then perhaps, even though I may have disagreed with the military judge, I may not have

determined his findings of fact to be clearly erroneous. Instead, “the [military judge] neither cited to nor referenced [anything] in reaching [his] decision to overrule [appellant’s] objection.” *United States v. Trujillo*, 376 F.3d 593, 610 (6th Cir. 2004).

I understand that Specialist Hofmann may have experienced more pain when his girlfriend dumped him. But his interest in Specialist Knoll occurred much earlier. And even Specialist Hofmann’s girlfriend could tell that he was detached during their relationship. Moreover, Specialist Hofmann continued to ask about appellant’s relationship with Specialist Knoll. While the breakup with his girlfriend may have provided Specialist Hofmann with an opportunity to hurt appellant, it did not provide a new motive. *See United States v. Awon*, 135 F.3d 96, 100 (1st Cir. 1998) (holding that the motive to fabricate—leniency—was the same when the defendants spoke to the police as when they testified at trial).

Considering the above, I respectfully dissent.⁵

FOR THE COURT

⁵ I agree with the majority’s candid acknowledgement that, were they to find error in either instance, they would also find prejudice. I therefore see no need for an additional prejudice analysis.