IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee,	)	Reply Brief on Behalf of Appellant
v.	)	Crim.App. Dkt. No.: 20130822
Lieutenant Colonel (O-5) **Sean M. Ahern**, United States Army, Appellant.	)	USCA Dkt. No.: 17-0032/AR

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

Argument

1. The granted issue is not academic because the lower court did not make any "alternative holdings."

The "alternative holdings" posited by the Government are either part of the Army Court's holding that there was no plain error or they are dictum. They are not holdings in their own right. With respect to the issue presented, the lower court made two holdings: that (1) Mil. R. Evid. 304(a)(2) is triggered by an investigation when the accused is aware of the investigation (JA at 11); and (2) there was no plain error (JA at 7). The Army Court's statements regarding the clarity of the law and the time when the admissions by silence were made relative to the beginning of the investigation explain the lower court's conclusion that there was no plain error—they do not serve as separate holdings on their own. *See Seminole Tribe of*

Florida v. Florida, 517 U.S. 44, 67 (1996). Its statement that the trial counsel's arguments did not materially prejudice Appellant's substantial rights is dictum because that determination did not play a role in the disposition of the case. There was no need for the lower court to evaluate prejudice once it made the determination that no error occurred. *See Id.* Indeed, there could not be prejudice because there was no error according to the lower court.

But even assuming the above were "holdings" as the Government posits, they were properly appealed. The overall question of whether the lower court "erred" in its application of the law encompasses the plain error concerns regarding the clarity of the law and the timing of the admissions to which the Government points. And Appellant asserted that the lower court's action prejudiced his case in both his supplement to his petition for review and in his brief.

2. The Government did not argue that the issue presented was waived at the lower court nor did it appeal or cross-certify the lower court's application of forfeiture vice waiver.

The Government, on the other hand, neither raised nor certified the waiver question it now asserts before this Court. In the lower court, the Government did not assert waiver of the issue, it claimed only that the use of Appellant's silence was proper because Appellant did not "know he was under investigation." (Appendix 1 at 43-46.) The lower court examined the issue, agreed with the Government, and held that there was no plain error. (JA at 7.) In doing so, it

necessarily held that the issue was forfeited rather than waived as there would have been no need to look for plain error had the issue been waived. This conclusion—that the lower court found forfeiture vice waiver—is bolstered by a plain language reading of the lower court's opinion, which has a section titled "forfeiture by failing to file a motion under Mil. R. Evid. 304." (JA at 7.) Just like the "alternative holdings" discussed above, the determination that the issue was forfeited vice waived was necessarily decided as part of the lower court's determination of the issue now before this Court.

Not only did the Government fail to raise the issue of waiver in the first place, it also failed to appeal the issue or cross-certify it. When Appellant filed his petition and supplement to his petition, the Government could have raised the issue in a reply. It chose not to and instead expressly relied "on its response filed with the Army Court of Criminal Appeals." (Appendix 2 at 1.) As discussed above, that brief did not argue that the issue was waived by Appellant's failure to file a motion at trial. This Court then granted review of Appellant's case. After that, the 30-day deadline for the Judge Advocate General of the Army to cross-certify any issues he might believe were germane to the case—for example, the question of whether the issue was waived at trial vice forfeited—came and went without action by the Government. Under the Government's own argument that "[w]hen a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the

case," this consistent and intentional inaction with respect to first raising and then preserving the waiver question would seem to make forfeiture vice waiver the law of the case. *See* Brief on Behalf of Appellee at 5 (citing *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006)).

3. Objection to the use of silence as an admission is not an objection made under Mil. R. Evid. 304, it is a relevance objection made under Mil. R. Evid. 402.

Notwithstanding the above, the objection to the inappropriate use of silence is a relevance objection and not an objection governed by Mil. R. Evid. 304(f)(1). The pertinent portion of Mil. R. Evid. 304(f)(1) addresses objections made under "this rule," which is a reference to paragraph (a) of the rule. That paragraph, titled "General Rule," provides that involuntary statements from the accused are inadmissible at trial if a timely objection or motion is made. Mil. R. Evid. 304(a). Subparagraph (a)(1)(A) goes on to define "involuntary statement" as statements made in violation of the "self-incrimination privilege or Due Process clause of the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(a)(1)(A). Combined, subparagraph (f)(1), the rule's definitions, and paragraph (a) impose a procedural timing requirement on any objection or motion that a statement was made involuntarily or otherwise in violation of a defendant's rights to remain silent. But by its own terms it applies only to involuntary statements.

Silence in the face of an accusation is different from an involuntary statement. And subparagraph (a)(2) of Mil. R. Evid. 304 is not a rule that is meant to impose procedural requirements on a defendant. Instead, it serves as a definition. It defines the legal relevance of silence in the face of an accusation made under specific conditions. As relevant here, it states that silence in the face of an accusation is not an admission of the truth of the accusation if the accusation is made when the person accused is under investigation. Mil. R. Evid. 304(a)(2). As this Court explained in Cook the "gist" of the rule "is that silence by an accused who is under investigation will not logically support an inference of guilt." *United States v. Cook*, 48. M.J. 236, 240 (C.A.A.F. 1998). As the Government notes, such "silence is therefore *not relevant*." Brief on Behalf of Appellee at 11 (emphasis added). Relevance objections are made under Mil. R. Evid. 402(b), which states that "irrelevant evidence is not admissible." Thus, an objection to the use of a defendant's silence falls under Mil. R. Evid. 402 not Mil. R. Evid. 304.

This conclusion yields a logical result in that it does not require a defendant to preternaturally object to the Government's misuse of evidence before it occurs. As an example, assume there is a case with a voluntarily obtained and video recorded confession. Such a confession may contain many conversational pauses (i.e., "silences") between the interrogator and the subject. Since the confession was obtained voluntarily, it would not be appropriate to object to the admission of the

recording as an involuntary statement under Mil. R. Evid. 304. But if and when the Government attempted to argue that one of the recorded "silences" was an admission, it would become appropriate to object to the argument as improper because the subject's silence was irrelevant under Mil. R. Evid. 402. Since a defendant could not know that the Government would misuse evidence in this way until it attempted to do so, it would not make sense to require the defendant to prematurely object to the misuse that he could not know would occur.

Conclusion

The lower court's application of the rule in question was plain error that materially prejudiced Appellant's case. Accordingly, he now prays that this honorable Court will set aside the findings and the sentence here.

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Appendices

1. Brief on Behalf of Appellee before the Army Court of Criminal Appeals.
2. Memorandum from the Government to the Clerk of Court on October 25, 2016.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Ahern,* Army Dkt. No. 20130822, USCA Dkt. No. 17-0032/AR, was electronically filed brief with the Court and Government Appellate Division on January 23, 2017.

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APPENDIX 1

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee	BRIEF ON BEHALF OF APPELLEE
v.	**Docket No. ARMY 20130822**
Lieutenant Colonel (O-5) **SEAN M. AHERN,** United States Army, Appellant	Tried at Fort McNair, District of Columbia, on 17 June, 8 July, 6 August, 5 September, and 16-20 September 2013, before a general court-martial convened by Commander, Headquarters, Military District of Washington, Colonel James Herring and Colonel Michael Hargis, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error

I.

TRIAL COUNSEL'S ACTIONS DURING THE TRIAL WERE IMPROPER AND MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS.

II.

IT WAS PLAIN ERROR WHEN THE MILITARY JUDGE ALLOWED TRIAL COUNSEL TO ARGUE THAT APPELLANT FAILED TO DENY SEVERAL PRETRIAL ALLEGATIONS "BECAUSE HE WAS GUILTY."

III.

IT WAS PLAIN ERROR WHEN THE MILITARY JUDGE PERMITTED TRIAL COUNSEL TO ARGUE THAT APPELLANT'S CONSULTATION WITH A CRIMINAL DEFENSE ATTORNEY WAS INDICATIVE OF HIS GUILT.

IV.

IT WAS PLAIN ERROR WHEN THE MILITARY JUDGE ALLOWED TRIAL COUNSEL TO ELICIT FROM SS THAT THE CHARGED INCIDENTS OF MISCONDUCT WERE NOT "THE ONLY INSTANCES OF ABUSE" APPELLANT HAD PERPETRATED ON HER AND THAT THERE WERE "MORE INSTANCES" OF ABUSE WITH WHICH APPELLANT WAS NOT CHARGED.

V.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE REFUSED TO ALLOW APPELLANT TO CROSS-EXAMINE MRS. SA ABOUT A PRIOR JUDICIAL DETERMINATION OF HER CREDIBILITY.

VI.

THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUSTAIN CONVICTIONS FOR THE CHARGES AND SPECIFICATIONS.

Table of Authorities

United States Supreme Court

United States Court of Appeals for the Armed Forces/Court of Military Appeals

Army Court of Criminal Appeals/Army Court of Military Review

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Statement of the Case

A panel of officers sitting as a general court-martial convicted Lieutenant Colonel Sean M. Ahern (appellant), contrary to his pleas, of one specification of aggravated sexual assault of a child, one specification of aggravated sexual assault, one specification of assault consummated by battery, three specifications of indecent acts with a child (one being on divers occasions), and one specification of child endangerment, under Articles 120, 128, and 134, Uniform Code of Military

Justice, 10 U.S.C. §§ 920 (2006), 920 (2006 & Supp. IV 2010), 928 (2012), 934 (2012) [hereinafter UCMJ]. (Charge Sheet; R. at 119, 1192). The court sentenced appellant to be confined for seventeen years and six months and to be dismissed from the service. (R. at 1260). The convening authority approved the sentence. (Action).

Statement of Facts

1. The evidence against appellant

At trial the victim, Ms. SS, established the following facts through her testimony. Her mother and father divorced in 2000 when she was six years old. (R. at 605). After a short time with her mother in Florida, she began living with her father in Maryland. (R. at 605). When she was ten years old her mother married appellant and moved nearby in Maryland. (R. at 607-08, 611-12, 652). Ms. SS went to live with her mother and appellant for a short period in a "trial run." (R. at 607). One of appellant's rules for the children at his house is that they may not lock the doors. (R. at 652).

One night during the trial run Ms. SS was laying in her bed getting ready to go to sleep and watching television, when appellant entered her room. (R. at 627-29). Appellant gave Ms. SS a packet of children's gummy snacks and laid on the bed with her. (R. at 627). Appellant asked Ms. SS, "Have you ever slept

without your pants on?" (R. at 628). Ms. SS replied that she had not, and appellant suggested she try it. (R. at 628). Confused, Ms. SS took off her pants. (R. at 628). Next, appellant asked her if she had ever slept without her underwear. (R. at 628). Ms. SS replied again that she had not. (R. at 628). Appellant asked her if she would like to try it, and this time she said that she would not, but appellant told her to do so anyways, and she complied. (R. at 628). Ms. SS rolled over on her side and pretended to go to sleep. (R. at 628). At this point appellant began touching her vagina without penetrating her. (R. at 628, 630). Ms. SS explained that she did not react but continued to pretend to be asleep and that, after it was over, she did not tell anyone because, at age ten, she did not know what was happening or if it was wrong. (R. at 630-31).

Later the same year, after the trial run had ended, Ms. SS went back to living with her father but began visiting her mother's house occasionally. (R. at 631-32). One night, while Ms. SS was sleeping, she woke up to the sound of her door opening. (R. at 632). She pretended to continue to sleep and someone began taking off her pants and underwear. (R. at 632). She felt someone hit the bed and heard appellant say "shush." (R. at 632). She did not know to whom appellant said "shush." (R. at 633). Appellant began touching Ms. SS in the same way as

before, on her vagina without penetrating her. (R. at 633, 743).

In the fall of the next year, when Ms. SS was eleven, Ms. SS was again visiting her mother's house. (R. at 643). Appellant required Ms. SS and her siblings to call him when they finished washing themselves so that he could "inspect" them and ensure they had showered "correctly." (R. at 643-44). Ms. SS finished showering and called appellant. (R. at 644). Appellant instructed Ms. SS to get on all fours. (R. at 644). Appellant left Ms. SS naked on the floor on all fours and returned with an object. (R. at 644). Appellant inserted the object into Ms. SS's anus, left it there for a moment, removed it, threw it in the trashcan, and said, "[T]hat is how you get it clean." (R. at 644). At the time, Ms. SS did not know what the object was because she had not yet begun menstruating. (R. at 646). Later, she realized it was a tampon. (R. at 646).

A few months later, around Christmas of 2005 when Ms. SS had just turned twelve, she was again sleeping at her mother's house, this time in a different bedroom. (R. at 647-48). She again heard the door open but again pretended to sleep. (R. at 648). Appellant took off her pants and underwear and began touching her again. (R. at 648). This time he got in bed with no pants on and pulled her on top of himself. (R. at 648). He began rubbing his penis on her legs and vagina and tried to

insert his penis, but could not. (R. at 648-49). He left the room and returned with a vibrating toothbrush and placed it on her vagina. (R. at 649).[1] Ms. SS explained that she knew the incidents were not dreams because on several occasions when she woke up in the morning her underwear was inside out. (R. at 650).

The next spring, when Ms. SS was still twelve, appellant again entered Ms. SS's room while she was sleeping. (R. at 651-52). Ms. SS awoke but pretended to be asleep again. (R. at 649). Appellant stood over her bed and then tried to take her pants off, touching her body in the process. (R. at 649-50). This time, however, Ms. SS rolled over and coughed, as if her sleep had been disturbed, and appellant left the room. (R. at 652).

In June of 2008, when Ms. SS was fourteen, she moved permanently to her mother's house, now in Alabama. (R. at 653, 655-56). In November, appellant entered her room and took her pants and underwear off. (R. at 657). He laid on the bed and pulled her on top of himself, forcing his penis into her vagina. (R. at 657). This hurt Ms. SS and she did not like it, so she

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[1] Ms. SS clearly testified that appellant never inserted the toothbrush into her vagina, and the defense impeached her with a prior inconsistent statement relating to the timing of the toothbrush incident in relation to the other incidents of abuse that night. (R. at 649, 759-60). The court found appellant not guilty of a specification of indecent acts with a child that alleged appellant *inserted* the toothbrush, but guilty of rubbing his genitals on Ms. SS. (Charge Sheet; R. at 1192).

squirmed and tried to move away. (R. at 657). When appellant finished he left the room and returned with paper towels. (R. at 657). He cleaned Ms. SS off and left the room. (R. at 657). Ms. SS testified that this was the first time she ever "had intercourse." (R. at 658). She felt violated and scared, and the next morning she found blood in her underwear. (R. at 659, 661).

The next day, while Ms. SS, her little brother, and appellant were watching television, appellant told Ms. SS to go to her room and take a nap. (R. at 661). Appellant entered the room, locked the door behind himself, and crawled into bed with Ms. SS. (R. at 661). He tried to take off Ms. SS's pants and Ms. SS tried to get away, when her little brother knocked on the door and said, "Daddy[,] what are you doing?" (R. at 661-62). Appellant instructed Ms. SS to tell her brother that he would be out in a minute, but Ms. SS just rolled over and pretended to sleep, and appellant left the room. (R. at 662).

In 2010, after Ms. SS had turned sixteen, she had a conversation with her mother about her desire for a new cell phone. (R. at 662). Ms. SS wanted a new phone even though she had just gotten one, and her mother was resistant to the idea. (R. at 662). Appellant interjected, and told Ms. SS's mother she should get Ms. SS the phone. (R. at 662). However, as he did so, he motioned with his eyes toward her bedroom, a gesture

she took to mean that he wanted to have sex with her. (R. at 662-64). That night, appellant entered Ms. SS's bedroom again and took off her pants and underwear. (R. at 664). He pulled her on top of himself and penetrated her vagina with his penis. (R. at 664). After a while, Ms. SS moved herself off of him and pretended to sleep, holding her legs together so that he could not open them. (R. at 664). Appellant put Ms. SS's underwear and pants back on, said, "You owe me," and left the room. (R. at 664).

Ms. SS explained that she did not tell anyone of the abuse because when it began, at age ten, she did not even realize it was wrong. (R. at 630-31). She thought it was normal and not something she wanted to talk about or tell her mother. (R. at 631, 641). Her parents had never talked to her about what is a "good touch" versus what is a "bad touch." (R. at 631). She explained that she asked to live with her mother in 2006 because she missed her mother and wanted to live with her, even though that meant living with appellant. (R. at 641-42). By that time her mother and appellant had two children of their own, Ms. SS's little brothers, and she felt that there were two families. (R. at 642). A sixth grader, she believed that if she were to live with her mother's family appellant would view her as family, instead of as an object, and that the abuse would therefore stop. (R. at 642). When she was not at first allowed to move

to her mother's house, she asked to again when her relationship with her father, who had himself remarried a woman with two daughters, had become strained. (R. at 653-54). Then thirteen, she felt she was a teenage girl with no relationship with her mother. (R. at 654-55). When the abuse continued in Alabama, and appellant actually penetrated her with his penis for the first time, she did not tell her mother because she wanted to feel normal, and wanted the abuse to stop, but did not want anyone to know about it. (R. at 659).

Her thoughts on reporting began to change in her junior year of high school. She had a boyfriend at the time, Mr. RB, and Mr. RB knew that she did not like appellant. (R. at 675). On the way to school, Mr. RB saw that she was receiving text messages from appellant. (R. at 675). Mr. RB tried to look at them and Ms. SS prevented him. (R. at 675). She realized, then, that she was hiding something from Mr. RB and, in a sense, lying to him, and did not want to any longer. (R. at 675). She texted appellant and told him that she did not want to keep the fact of the abuse from her boyfriend any longer and that she wanted to tell her mother. (R. at 675-76). Appellant told her to come home from school. (R. at 675-76). He told her if she said anything he would go to jail and her mother would lose custody of her little brothers and be forced to move into a small apartment. (R. at 676). This scared Ms. SS, and she

decided not to tell her mother. (R. at 676). Appellant did not abuse her again, however. (R. at 676).

Eventually, Ms. SS tired of hiding the fact of the abuse from her boyfriend, and was fighting with him about whether she was hiding something from him. (R. at 682-83). She manufactured a way of making appellant tell her mother himself. She sent a text message to appellant that said "I told [Mr. RB]. You need to tell her." (R. at 683). When she sent the text she realized its import, and came downstairs, crying, to where her mother was. (R. at 683). As soon as her mother could ask her what was wrong, the phone rang and her mother picked it up. (R. at 683).

Ms. SS's mother, Mrs. SA, testified that the call was from appellant. (R. at 244). She went to her bedroom and shut the door. (R. at 244). Appellant said, "There is something we need to talk about." (R. at 245). He said that he had been "inappropriate" with Ms. SS and that he had touched her. (R. at 245). Mrs. SA said, "What do you mean by you 'touched' her?" (R. at 245). Appellant replied, "Well, you know what I am talking about." (R. at 245). Appellant said that it had happened six months prior for a short period of time, but that he had had sex with Ms. SS three times. (R. at 245). He said that it started out with him touching her and her touching him, but that eventually he would sneak out of their room on Saturday

night after Mrs. SA was asleep and go into Ms. SS's room. (R. at 245). Mrs. SA accused appellant of incest, and appellant responded that it was not incest because Ms. SS is not his daughter. (R. at 245-46). Mrs. SA said that even if it was not incest, he had raped Ms. SS. (R. at 246). Appellant replied, "No[,] it wasn't really rape. She didn't complain. She was agreeable to it." (R. at 246). Mrs. SA said that it did not matter because Ms. SS was fifteen and he was in the house as her father. (R. at 246). Appellant "downplayed" his crime after this. (R. at 246). Mrs. SA said she was going to talk to Ms. SS, and appellant asked if she would call the police. (R. at 246). Mrs. SA said that she did not know yet, and appellant replied that if she did he would buy a gun and kill himself. (R. at 246).

After Ms. SS's mother got off the phone with appellant, she came to Ms. SS crying and said, "I'm so sorry." (R. at 683). Ms. SS said that she would go get fast food for her little brothers for dinner, but instead drove to Mr. RB's house. (R. at 684). Ms. SS disclosed to Mr. RB what appellant had done to her, which led to his going on an emotional tirade that ended back at Ms. SS's house with Mrs. SA comforting him in the street. (R. at 684-85).

The next day the mother and daughter had a conversation on the back porch about the abuse. (R. at 683). Ms. SS told her

mother that she did not want to report appellant. (R. at 683-84). She explained at trial that it was because she lived in a small town and she wanted to maintain her reputation as a "good kid," and not be known only as a victim of crime. (R. at 684).

After this, appellant was not supposed to be back in the house, and he was not living with the family for the most part anyway. (R. at 237, 688). However, Ms. SS's mother did not enforce this and allowed appellant to visit the family for Halloween. (R. at 686-88). Ms. SS hid in her room with the door locked. (R. at 688). Appellant tried to enter anyway, and scolded her through the door for having it locked. (R. at 688). Ms. SS stayed locked in her room. (R. at 688).

Ms. SS purchased a cheap cell phone she was not supposed to have so that she could text her boyfriend. (R. at 689). Her mother caught her with the phone and made her hand it over. (R. at 689). Ms. SS became very upset by this because of some personal photographs that were on the phone, and called her father. (R. at 689-90). Her father sensed that something was wrong outside of the fight about the cell phone and, after some prodding, asked, "Has Sean touched you?" (R. at 690). She responded that he had. (R. at 690). The next day, Ms. SS's parents made her pack a bag and board an early-morning flight to her father's house in Maryland, where she was to stay permanently. (R. at 693). Ms. SS explained that, despite her

anger at her mother for allowing appellant back in the house, she was sad to leave her boyfriend, friends, high school, and little brothers. (R. at 693). This was the only moment in the trial that Ms. SS began crying. (R. at 694).

After Ms. SS arrived in Maryland, her father did not call the police, but instead sent her to a therapist. (R. at 695). When Ms. SS told the therapist what appellant had done to her, the therapist responded that she would report it to authorities. (R. at 695). Ms. SS told the therapist she accepted that, but did not want to give the therapist details about the abuse, and instead gave a watered-down version of the facts. (R. at 695). Ms. SS's father testified that he followed up with the therapist about her report to the authorities, but nothing ever came of it. (R. at 556-57). Ms. SS waited to be contacted by a police officer, but none ever came. (R. at 705).

Eventually, Ms. SS's mother divorced appellant. (R. at 706). When Ms. SS heard this she sought her mother's permission to finally make a report. (R. at 706). When Ms. SS saw the effect appellant still had on her mother and little brothers she determined to report the abuse. (R. at 708). While she originally thought that appellant would only attack her because she was a girl, she also came to fear for her little brothers' safety. (R. at 709). This testimony was met with no objection from the defense. (R. at 709). In July of 2012, Ms. SS

reported to the local police. (R. at 709, 712). Ms. SS was nineteen at the time of trial and attending Mississippi State University, studying meteorology. (R. at 603).

The government also called Mrs. SA, Ms. SS's father, and Mr. RB, each of whom corroborated key details of Ms. SS's testimony, such as where Ms. SS slept, the conversation about a new cell phone, and the circumstances under which Ms. SS revealed the abuse to each of them. (R. at 230, 318, 521-22, 569-70). Mrs. SA testified that after appellant confessed on the phone, she asked Ms. SS if what he said was true, and Ms. SS said that it was. (R. at 247). Mrs. SA also testified that shortly after Ms. SS tried to text message appellant about his offenses, he met with her and asked what she had done and whether she was wearing a "wire." (R. at 311). Ms. SS's father also testified that Ms. SS told him that appellant molested her. (R. at 543). When Mr. RB described his emotional reaction to hearing what appellant had done to Ms. SS, the defense did not object (Mr. RB did not testify as to *what* Ms. SS told him that made him react in this way, only that he reacted in response to something Ms. SS told him). (R. at 569-70).

The government also called an expert witness on victim behavior, Dr. Matthew Soulier, a child forensic psychiatrist from the University of California-Davis. (R. at 915). Dr. Soulier testified that many children who are victims of sexual

abuse are hesitant to report the abuse, especially when it is at the hands of someone they know, and that many victims are able to be resilient and carry on with their lives despite the abuse. (R. at 922-23). He also testified that child victims will sometimes return to the people who abused them for a variety of reasons, including the desire to preserve other relationships. (R. at 924). Applying these principles to Ms. SS's testimony, Dr. Soulier found Ms. SS's testimony to be consistent with his understanding of children's psychological reaction to being sexually abused. (R. at 925-26). Dr. Soulier also testified that child victims will often believe that the abuse they are suffering is normal. (R. at 929). Highlighting Ms. SS's testimony regarding the foreign objects appellant used to abuse her, the tampon and toothbrush, Dr. Soulier opined that her knowledge of such activities was "sexually developmentally inappropriate," meaning that a child would not be likely to link such activities to sex. (R. at 930).

After the court closed for deliberations, the panel requested a transcript of the proceedings under Article 32, UCMJ. (R. at 1149). A verbatim transcript of Ms. SS's testimony at that proceeding was admitted without defense objection. (R. at 1170; Def. Ex. QQ). Ms. SS's testimony at the Article 32 proceeding was substantially consistent with her trial testimony. (Def. Ex. QQ).

As appellant points out in his brief, Ms. SS viewed appellant as a strict disciplinarian. (Appellant's Br. 1; R. at 623-25). Appellant also limited Ms. SS's contact with her boyfriend. (R. at 669, 680). Additionally, after appellant and Mrs. SA learned that Ms. SS had visited a therapist, they visited a criminal defense attorney together. (R. at 299). While there, Mrs. SA told the attorney that she believed appellant to be innocent. (R. at 403). Mrs. SA explained at trial that she felt she had to support appellant to protect him, herself, and her remaining children, and that Ms. SS was then safe from appellant because Ms. SS was out of the house. (R. at 301).

Finally, Mrs. SA's divorce from appellant was characteristically unpleasant. (R. at 304). As appellant points out in his brief, Ms. SS's decision to report appellant's abuse to the police came after a particularly heated confrontation between Mrs. SA and appellant stemming from the divorce. (Appellant's Br. 4, 39; R. at 303-04, 309). However, as Ms. SS explained at trial, appellant made her little brother cry during this confrontation. (R. at 708). Explaining her decision to finally report after the divorce, she testified, "[A]t that point I was thinking to myself, [appellant] does not have my Mom to control anymore in the house. He doesn't have me

to control. He has taking [sic] all of that out on that little boy and I don't like that at all." (R. at 708).

2. The trial counsel and military judge at trial

Prior to trial, the government moved to admit evidence under Military Rule of Evidence [hereinafter Mil. R. Evid.] 404(b) that appellant had made use of phone sex lines that specialized in children and incest. (App. Ex. VIII). The military judge denied this motion, and the evidence never made it in front of the panel. (R. at 116).

During the trial counsel's opening statement, he began, "Panel members, the accused, took something from [Ms. SS]. He took her virginity. He took her security. And he took her childhood. And he took these things when he sexually assaulted her on numerous occasions between ages 10 and 16 years old." (R. at 180). The defense did not object. (R. at 180). Ms. SS ultimately testified without objection from the defense that, when appellant sexually assaulted her, he took her virginity, and that she felt that he had taken her childhood from her. (R. at 658, 718).

Before trial on the merits began, the military judge instructed the members, "During the trial, when I sustain an objection, you are to disregard the question and the answer." (R. at 131). During the trial counsel's direct examination of Ms. SS the defense objected three times on the ground that the

question at issue was a leading question, and the military judge sustained each objection. (R. at 682, 698, 700). After the third time, the military judge held a session outside the presence of the panel members, excoriated trial counsel for asking leading questions, and threatened to have the assistant trial counsel take over the examination should the trial counsel lead further. (R. at 701-03). As appellant recognizes, the military judge did not sustain another leading objection during the direct examination of Ms. SS. (Appellant's Br. 12).

During the Article 32, UCMJ, proceeding, Ms. SS testified only about the charged offenses, and the defense impeached her with a prior inconsistent statement wherein she said that there had been between twenty-four to forty-eight instances of abuse. (Def. Ex. QQ, pp. 77-79). Ms. SS explained that she was only testifying about the instances of abuse that she could remember vividly, but that others occurred. (Def. Ex. QQ, p. 78). Before trial, the government filed a motion to admit evidence of uncharged acts of sexual abuse of Ms. SS that occurred while appellant was not on active duty, and were thus outside of the court-martial's subject matter jurisdiction. (App. Ex. V). The defense did not oppose the motion and it was granted. (R. at 50). At trial, during Ms. SS's direct examination, the following exchange occurred between the trial counsel and Ms. SS:

> Q. All right. Now we are going to talk about the incidents of abuse. And the first thing we are going to ask you is the things that [appellant] had been charged with, are those the only instances of abuse?
>
> A. No.
>
> Q. Are there more instances?
>
> A. There were more instances, but the incidents that I have told—have been telling about is the ones [sic] that I remember the most of.

(R. at 626). The defense did not object to this line of questioning. During the cross-examination of Ms. SS, the defense impeached her with her prior inconsistent statement regarding the number of instances of abuse similar to how defense counsel did so at the Article 32 proceeding. (R. at 778-82).

Mrs. SA maintained a divorce action parallel to appellant's court-martial. (Def. Ex. UU for identification).[2] During the course of this divorce, Mrs. SA sought a protective order from a state court to prevent or control his visitation of their biological children, Ms. SS's little brothers. (Def. Ex. UU for identification). During a hearing on the motion for a protective order, having been asked why she did not mention appellant's abuse of Ms. SS earlier in the proceedings, Mrs. SA testified, "The state's attorney was beginning their

[2] Appellant refers to Def. Ex. UU for identification as "Def. Ex. UU," as if it was admitted as evidence at trial. (Appellant's Br. 30). It was referred to but not admitted. (R. at 463).

investigation on Mr. Ahern and they asked that I not inform him that the investigation was going on." (Def. Ex. UU for identification, p. 11). At the end of the hearing, the presiding judge stated:

> I've considered the testimony, I've considered the credibility of the witnesses and their various motivations. Considering the time line it's been presented it is a very disturbing case. It's not a—you know it's a sad case and it's a case that doesn't have a lot of clear answers to it . . . . He have here today the petition of [Mrs. SA] trying to get a controlled contact, or controlled visitation or custody order on an emergency basis based on allegations being formally filed against her husband in the nature of a court marshal [sic]. And that's all we have, we not have heard [sic] any evidence of abuse of the children . . . . I haven't heard from either one of them . . . . And you know I—the one thing I keep coming back to as I've already indicated is the agreement of [Mrs. SA] to consent to shared custody or visitation of the children in the pendente lite order . . . . When she knew of the allegations that were pending against her husband, the investigation, and she says well she was cooperating with the investigation of the state. That just doesn't wash. Any mother that's truly concerned is not going to stand idly by, putting her children in the hands of a monster. And you know I don't know whether or not Mr.—you know we certainly, this court is not here to decide the allegations against Mr. Ahern. But with regard to what the court has to do today and following the law of temporary protective, of final protective orders. I must find by clear and convincing evidence that there's some type of abuse that had occurred or has been threatened to occur and I really don't know

> that I can find that there's abuse that is likely to occur and I certainly can't find that. So [Mrs. SA] today, has not carried her burden of proof and I'm denying her petition.

(Def. Ex. UU for identification, pp. 15-16).

At trial, defense counsel attempted to impeach Mrs. SA by asking her whether the judge found her to be credible. (R. at 450). The military judge sua sponte interrupted defense counsel and prevented Mrs. SA from answering the question. (R. at 450). At a session outside of the members' presence, the military judge noted that Mrs. SA's attempts to use the court-martial in the state court proceedings were admissible as evidence of bias. (R. at 454). He also noted that the defense could ask the witness "isn't it true that you made a false statement in front of Judge so and so and such and such court . . . ." (R. at 474). He further noted, with defense counsel's agreement, that, even if he were to allow inquiry into whether the judge had found Mrs. SA to be incredible, defense counsel would be "stuck" with the witness's answer, and unable to admit the transcript. (R. at 471). The military judge ruled as follows:

> Based on Defense Exhibit UU [for identification] it appears that the determination by the Judge was that the testimony of [Mrs. SA], her explanation for the request for the additional Protective Order didn't wash. It is not a specific determination that she is not credible. It is merely that her explanation didn't, in other terms, make sense to that particular

> Judge. So I don't find that to be a specific determination that she is not credible. Even if we assume for the sake of argument that it was a determination that she was not credible, it would relate to the specific matter. Not a general determination that she is not credible. It does appear that it is [sic] the subject matter in that case and the subject matter in this case are similar. They both are related to the existence of allegations of sexual assault. [Mrs. SA] was under oath. That in that particular case it was a significant matter in this case. While there is a time lapse between that instance and this instance, it does not appear that that is a significant instance given the fact that the divorce proceedings and motive are still on-going. However . . . the Judge admits that he hasn't heard all of the evidence. He doesn't know all of the factors.

(R. at 476-77).

Additionally, the military judge found that the probative value of the evidence was "substantially outweighed by confusion of the issues and the high probability that the members would rely upon that evidence to substitute the Judicial determination of credibility for their own determination of credibility of this particular witness," under Mil. R. Evid. 403. (R. at 477). On these bases, the military judge precluded defense counsel's proffered question. (R. at 477). The military judge proposed an instruction for the members that they may consider the state proceedings for their tendency to show bias or a motive to fabricate on the part of Mrs. SA, but not to substitute the

other judges' credibility determination for their own, but both parties waived this instruction. (R. at 482-83).

Before Dr. Soulier testified, the defense objected that they were not "notified" by the government's request for the witness to the convening authority that he would testify about Mrs. SA's delayed reporting of the abuse. (R. at 889). The military judge precluded the government from eliciting that information. (R. at 904).

Ms. SS's report to police, which initiated an investigation of appellant, occurred on 5 July 2012. (R. at 309). Several months earlier, on 30 March 2012, Mrs. SA sent an email to appellant in which she accused him of adultery, referring to his abuse of her daughter. (Def. Ex. V). Appellant responded the same day but did not address this charge of adultery. (Def. Ex. V). During his closing argument, trial counsel argued that appellant's failure to respond to his wife's accusation showed his guilt, and the defense did not object. (R. at 1059).

On the day that Ms. SS reported, in cooperation with the police, she sent a pretext text message to appellant regarding his crimes in the hope that he would respond with incriminating admissions, and the defense admitted this text message at trial. (R. at 862-64; Def. Ex. BBB). During his closing argument, the trial counsel argued that appellant's failure to respond to his

step-daughter's accusation of sexual abuse amounted to evidence of his guilt. (R. at 1059).

Mrs. SA also conducted a pretext phone call with appellant in cooperation with police that was recorded and admitted into evidence. (R. at 310-11, 956-75; Pros. Ex. 3). During the call, when Mrs. SA confronted appellant about the abuse, appellant deflected and refused to engage in the conversation further. (R. at 971-75; Pros. Ex. 3). Before trial, the government moved for the admission of the call. (App. Ex. VII). The defense did not oppose the motion, nor did it object to the admission of the tape at trial. (R. at 49, 956). During trial counsel's closing argument, he argued that appellant's response during the call was evidence of his guilt. (R. at 1058-59). The defense did not object.

Also during closing argument, trial counsel accounted for the lack of direct evidence outside of Ms. SS's testimony by arguing that there will rarely be eyewitnesses to sexual assaults. (R. at 1053). Trial counsel explained, "No one is going to be sexually assaulted in this room right now but a Soldier will be sexually assaulted in the barracks room tonight alone with her perpetrator." (R. at 1053). The defense did not object. Additionally, seeking to discredit evidence that Ms. SS's older brother had been kicked out of their home by appellant and Mrs. SA because he had been searching for

pornography, the trial counsel argued that a teenager would not search for other teenagers having sex, he would search for adult women having sex with teenagers, such as "an 8th grade teacher who is a pedophile." (R. at 1055). There was no objection to this argument. Trial counsel began to use the word "pedophile" one more time, but the military judge cut him off, and instructed the panel to disregard any argument that anyone was a pedophile or that any soldier would be sexually assaulted that night. (R. at 1056-57).

At trial, Mrs. SA testified regarding her and appellant visiting a criminal defense attorney together. (R. at 299). Mrs. SA explained their joint plan to hide the abuse from Ms. SS's father and police: they would say that Ms. SS had become a wild teenager who was not getting her way in their home, and thus made up allegations out of anger toward appellant. (R. at 300-01). Trial counsel's closing argument built on a theme of "footprints in the sand" indicating circumstantial evidence. (R. at 1052). In support of this theme, he made the following argument:

> There is a third set of footprints and there is really two sets of footprints in this one, and it is [appellant] and [Mrs. SA]. Everything these two individuals do is an indicia [sic] of guilt. They visit a criminal defense attorney together. Why? Every time a new person discovers the abuse they act in concert to prevent [Ms. SS] from saying anything to anyone. In September

> [Mr. RB] finds out and what did they do? They isolated her from [Mr. RB]; the two of them together. In March [Ms. SS's father] finds out . . . . And what did they do? They put [Ms. SS] on a plane, depriving her of the people she loves; her two younger brothers and [Mr. RB], they put pressure on her not disclose [sic] or she will suffer losses . . . . There are indicias [sic] of guilt and they are in [certain trial exhibits].

(R. at 1057-58). The defense did not object.

Argument

Trial counsel did not commit prosecutorial misconduct or make improper argument because he did not plainly violate a legal norm or standard to appellant's prejudice, because appellant's non-denials of abuse were relevant and not protected by the Constitution or statute, and because trial counsel's reference to appellant's consultation with an attorney was directed at showing Mrs. SA's complicity in covering up his crime and did not ask the panel to draw an adverse inference from his use of an attorney. The military judge did not abuse his discretion in restricting defense counsel from asking Mrs. SA whether the state judge had found her to be credible because military courts do not permit parties to smuggle in extrinsic evidence of prior acts of untruthfulness during cross-examination, because the question called for hearsay, and because the dangers of unfair prejudice and confusion of the issues substantially outweighed the probative value of the

evidence. Finally, the evidence is factually and legally sufficient because it shows appellant's guilt beyond a reasonable doubt.

A. Trial counsel did not plainly commit prosecutorial misconduct or make improper argument.

Where there has been no objection at trial courts review claims of prosecutorial misconduct for plain error. *United States v. Hornback*, 73 M.J. 155, 159 n.3 (C.A.A.F. 2014). "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Id.* at 159 (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)) (alterations in original). The test for prosecutorial misconduct is (1) whether there has been "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics standard,"[3] and (2) whether there has been prejudice. *Id.* at 160 (citing *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). Courts balance three factors in considering prejudice: "(1) the severity of the misconduct, (2) the

[3] Appellant only makes reference to the cases' "propriety and fairness" language. (Appellant's Br. 7). Stepping "beyond the bounds of propriety and fairness" is an accurate legal description of what a prosecutor has done when he or she commits misconduct and is a proper guidepost for a court reviewing such claims; however, the applicable legal *test* is whether the prosecutor has violated a legal norm or standard. *Id.* at 159. Appellant makes no effort in his brief to identify any legal norm or standard he claims trial counsel violated.

measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* (citing *Fletcher*, 62 M.J. at 184). A trial counsel's "repeated violations of rules of evidence can constitute prosecutorial misconduct." *Id.* (citing *United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994)). The prosecutorial misconduct inquiry is objective; the trial counsel's subjective intent is irrelevant. *See id.*

1. Trial counsel's efforts to admit evidence that the panel never heard did not constitute prosecutorial misconduct.

Appellant claims that trial counsel's pretrial motion to admit evidence of appellant's use of phone sex lines and attempt to elicit evidence from Dr. Soulier about Mrs. SA's delayed reporting were prosecutorial misconduct. (Appellant's Br. 8-9, 14-15). Somewhat obviously, even assuming for the sake of argument that these efforts to admit evidence were improper,[4] evidence that never came before the fact finder cannot have prejudiced appellant, and so cannot be prosecutorial misconduct. Perhaps recognizing this, appellant seeks to tie these efforts

[4] It is far from clear that any legal norm or standard was violated by trial counsel's effort to elicit testimony about Mrs. SA from Dr. Soulier, even though the trial counsel's request to the convening authority did not mention such testimony. No authority requires the trial counsel to notify the defense of the subject matter of his expert witness's testimony. A trial counsel must explain the need for the expert to the convening authority so that he can ensure good stewardship of government resources, not to provide the defense with discovery. *See* Rule for Courts-Martial [hereinafter R.C.M.] 703(d). The trial counsel must provide the names and addresses of each of the witnesses he intends to call, but not the substance of their expected testimony. *See* R.C.M. 701(a)(3). Otherwise, the trial counsel must simply provide equal access to his witnesses, and the defense counsel must determine the substance of their expected testimony through pretrial interviews. *See* R.C.M. 701(e); UCMJ art. 46.

to an overall effort on the part of trial counsel to purposely trample appellant's rights at trial. (Appellant's Br. 8). However, the prosecutorial misconduct inquiry is objective and the trial counsel's subjective intent is irrelevant, *id.*, and these two efforts to admit evidence are thus irrelevant to this court's inquiry.

2. Trial counsel's opening statement, questions of Ms. SS regarding the loss of her virginity and childhood, questions regarding Ms. SS's concern for her brothers, and questions regarding Mr. RB's emotional response were not prosecutorial misconduct.

Trial counsel's opening statement and questions of Ms. SS about her childhood and virginity were not improper because the evidence was admissible to show Ms. SS's reasons for reporting. Where there is no objection to the admission of evidence, courts review only for "a plain error that materially prejudices a substantial right . . . ." Mil. R. Evid. 103(f). A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v.* Harrow, 65 M.J. 190, 201 (C.A.A.F. 2007) (citing *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003)). All relevant evidence is generally admissible. Mil. R. Evid. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Mil. R. Evid. 401.

Here, Ms. SS's testimony regarding the loss of her virginity and childhood made two facts of consequence more probable, that she accurately recalled appellant's sexual assault of her, and that her motivation for reporting the abuse was because she felt victimized by appellant. A witness is more likely to accurately remember an assault if it constitutes the first time she has ever "had intercourse" (to use Ms. SS's words). (R. at 658). Additionally, Ms. SS's testimony about her loss of virginity and childhood, as reasons for her report and testimony, directly contradicted the defense's assertion that she reported appellant to manufacture a divorce between appellant and her mother or to exact revenge on appellant for being too strict. Appellant complains on appeal that this evidence had an unfair emotional effect on the panel, but with no objection made at trial, he must show that the military judge plainly abused his discretion in finding that the evidence's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members . . . ." Mil. R. Evid. 403. With no objection from the defense, this court presumes the military judge completed this analysis, and grants the trial judge great deference in applying the balancing test. *See United States v. Williams*, 75 M.J. 621, 2016 CCA LEXIS 128, at *12 (Army Ct. Crim. App. 2016) (noting that military judge cannot be expected to conduct balancing test

on the record in the absence of an objection). Appellant cannot show such a plain and obvious abuse of discretion here. Accordingly, the testimony was admissible, and trial counsel did not commit misconduct in eliciting it.

Nor was it misconduct to mention this admissible evidence in his opening statement. A trial counsel may introduce his theme by announcing what he believes the evidence will show at trial, even if that theme has emotional or psychological appeal. *See United States v. Garren*, 53 M.J. 142, 143 (C.A.A.F. 2000). In *Garren*, the trial counsel began his opening statement by saying "this case is about an NCO who has refused to accept responsibility for his actions." 53 M.J. at 143. Trial counsel went on to detail inconsistencies in appellant's pretrial statements. *Id.* The defense made no objection, but on appeal argued that the trial counsel made improper comment on the appellant's right to plead not guilty. *Id.* Reviewing for plain error, the court found that "[t]he opening statement was fair comment on what trial counsel expected to show . . . ." *Id.*

This case is like *Garren*. Trial counsel here gave a brief introduction of his theme that was tied to what he expected to show, and in fact did show through Ms. SS's testimony. Like in *Garren*, there was no plain error here.[5]

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[5] Far from being prosecutorial misconduct, a trial advocate's introduction of his or her theme during opening statements is a recommended practice. Steven

Similarly, trial counsel did not commit misconduct by asking Ms. SS whether she feared for her brothers' safety. Trial counsel engaged in an exchange with the witness about her reasons for reporting appellant's abuse. (R. at 706-709). One of the reasons she gave was that she feared for her little brothers' safety. (R. at 709). This testimony made it "more probable" that Ms. SS reported appellant's abuse because of concern for her brothers, and "less probable" that Ms. SS reported to manufacture a divorce or obtain revenge against appellant. Mil. R. Evid. 401. These were central facts of consequence at trial, and thus the evidence was relevant. Appellant cannot show that the military judge plainly or obviously abused his discretion in finding that the probative value of this evidence was not substantially outweighed by the pertinent countervailing interests, and thus trial counsel did not violate any legal norm or standard in eliciting this testimony. *See* Mil. R. Evid. 403; *Hornback*, 73 M.J. at 160.

In the same vein, trial counsel did not commit misconduct by eliciting Mr. RB's response to Ms. SS's report of sexual abuse. Ms. SS testified that she wanted to tell her mother what appellant had done to her so that she could then tell her boyfriend, from whom she felt she was hiding the abuse in a manner that negatively affected their relationship. (R. at 682-

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Lubet, *Modern Trial Advocacy: Analysis and Practice* 9-10, 424-25 (3rd ed. 2004); Thomas A. Mauet, *Trial Techniques* 63-64 (8th ed. 2010).

83). Her testimony that she told her mother and then told her boyfriend further showed her motive for reporting, and this fact was corroborated by the testimony of Mr. RB and Mrs. SA. The corroboration of the circumstances under which Ms. SS reported made it more probable that she reported (in part) to smooth over her relationship with her boyfriend, and less probable that she reported to manufacture a divorce, both central facts of consequence at trial. Mr. RB's recollection of his emotional reaction made it more probable that he accurately recalled the exchange. With no objection, appellant cannot show that the military judge plainly abused his discretion in the application of the Rule 403 balancing test; Mr. RB's testimony was admissible, and trial counsel did not commit misconduct by eliciting it.

3. The trial counsel did not commit misconduct by asking Ms. SS three leading questions.

"Leading questions should not be used on the direct examination of a witness except as necessary to develop the witness's testimony." Mil. R. Evid. 611(c). The defense objected to each of trial counsel's three leading questions of Ms. SS and the military judge sustained all three objections. (R. at 682, 698, 700). However, appellant falls far short of showing prejudice. Applying the *Hornback* factors, first, the "misconduct" of asking leading questions was far from severe.

As the applicable rule establishes, leading questions "should" not be used, and may be used if necessary to develop testimony. Mil. R. Evid. 611(c). The concern is only that counsel will "testify" to a matter to which the witness would not otherwise testify. Here, the defense objected before the witness could answer the leading questions and there were only three. Trial counsel's examination was therefore hardly "severe."

Second, the military judge took effective measures to cure the leading questions. Each question was objected to by the defense before the witness could respond. The military judge sustained each objection and instructed the members at the outset that if an objection is sustained they must disregard both the question and answer. He stopped the trial counsel after the third objection, excoriated him for asking leading questions, and threatened to have the assistant trial counsel take over the examination. Trial counsel did not have another objection sustained for leading. Finally, as discussed in more detail below, the government's evidence was strong, and given the military judge's curative measures, no evidence came before the panel that would not have been admitted anyway. Accordingly, appellant has shown no prejudice and there was no prosecutorial misconduct.

4. Trial counsel did not commit misconduct by eliciting testimony that there were other instances of abuse.

There was no objection to this evidence so this court reviews only for plain error. Mil. R. Evid. 103(f).

> (1) . . . Evidence of a crime, wrong, or other act is not admissible to prove a person's character to show that on a particular occasion the person acted in accordance with the character.
>
> (2) . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by the accused, the prosecution must:
>
> (A) provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial; and
>
> (B) do so before trial—or during trial if the military judge, for good cause, excuses lack of pretrial notice.

Mil. R. Evid. 404(b). Courts apply a three part test in admitting evidence under Mil. R. Evid. 404(b):

> First, does the evidence reasonably support a finding by the court members that Appellant committed prior crimes, wrongs or acts? Second, what "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence? And last, is the "probative value . . . substantially outweighed by the danger of unfair prejudice?"

Harrow, 65 M.J. at 202 (citing *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006)). Additionally, where a party seeks to impeach a witness with extrinsic evidence of a prior

inconsistent statement, the witness must be given an opportunity to explain or deny the prior statement. Mil. R. Evid. 613(b).

Here, the evidence of appellant's other abuse of Ms. SS was admissible to show that she had not confused or fabricated her testimony. Knowing that the defense had previously impeached Ms. SS with her prior statement about the number of instances of sexual abuse, trial counsel asked her to explain why she was only testifying about a handful of the incidents.[6] Her testimony that there had been other instances of abuse "reasonably support[ed] a finding by the court members that Appellant committed prior crimes, wrongs or acts." *Harrow*, 65 M.J. at 202. Her explanation that she was only testifying about those instances she could remember vividly made it "less probable" that she had confused or fabricated her testimony. *Id.* Indeed, the Military Rules of Evidence explicitly contemplate a witness "explain[ing]" a prior inconsistent statement in this manner. Mil. R. Evid. 613(b). Appellant cannot show that the military judge plainly or obviously abused his discretion in balancing the probative value against other interests. *See Harrow*, 65 M.J. at 202. Having failed to object at trial, appellant cannot complain that there is no record of whether the defense requested notice under Mil. R. Evid. 404(b) or whether the

[6] Trial counsel's method of volunteering this weakness in his case during the direct examination of the witness is also a recommended practice for trial advocates. Mauet, *supra* note 5, at 114.

government provided such notice or had good cause for delayed notice, since "had appellant objected to [the evidence this court] would have a developed record on that very issue one way or the other." *Williams*, 75 M.J. at __, 2016 CCA LEXIS 128, at *12. Accordingly, the evidence was admissible under Mil. R. Evid. 404(b).

Even if the evidence were not admissible under Mil. R. Evid. 404(b), it would be admissible under Mil. R. Evid. 414. "In a court-martial proceeding in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accussed committed any other offense of child molestation. The evidence may be considered on any matter to which it is relevant." Mil. R. Evid. 414(a). Like its counterpart Mil. R. Evid. 413, Rule 414(a) "creates an exception to Rule 404(b)'s general prohibition against the use of a defendant's propensity to commit crimes . . . ." *United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000). *See also United States v. Dewrell*, 55 M.J. 131, 138 n.4 (C.A.A.F. 2001) (noting that Rules 413 and 414 should be analyzed in the same manner). To be admissible, (1) the accused must be charged with an act of child molestation, (2) the proffered evidence must be of the commission of another offense of child molestation, and (3) the evidence must be relevant. *United States v. Schroder*, 65 M.J. 49, 51 (C.A.A.F. 2007) (citing *Wright*, 53 M.J. at 482). The

military judge must also find that the evidence meets the Mil. R. Evid. 403 balancing test, applying multiple factors unique to Rules 413 and 414. *Id.* Procedurally, the government must provide notice to the accused of its intent to admit Rule 414 evidence five days before trial, or later for good cause shown. Mil. R. Evid. 414(b).

Here, even if the evidence of appellant's uncharged abuse of Ms. SS was not admissible under Mil. R. Evid. 404(b), it was still admissible to show propensity to molest children as an exception under Mil. R. Evid. 414(a). The evidence does not plainly or obviously fail to meet each of the threshold showings under *Schroder*, and appellant can make no showing that the military judge plainly abused his discretion in applying the balancing test. To the extent the record does not reflect that the military judge conducted the balancing test, the government's provision of notice to appellant, or the government's good cause for providing late notice, it is because the defense failed to object to make such a record. *See Williams*, 75 M.J. at __, 2016 CCA LEXIS 128, at *12. Because the government moved pretrial to admit other Rule 414 evidence, the defense was at least on notice that the government was in possession of such evidence and sought to admit it for propensity purposes. (App. Ex. V). Accordingly, the testimony was admissible for precisely the purpose appellant complains of,

and it was therefore not misconduct for trial counsel to elicit it.

5. Trial counsel's argument that appellant's silence showed his guilt was not plainly prosecutorial misconduct or improper argument because appellant did not know he was under investigation.

Whether there has been improper reference to an accused's right to remain silent is a question of law reviewed de novo, and when there is no objection at trial the review is for plain error only. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011). "Failure to deny an accusation of wrongdoing is not an admission of the truth of the accusation if at the time of the alleged failure the person was under investigation or was in confinement, arrest, or custody for the alleged wrongdoing." Mil. R. Evid. 304(a)(1)(C)(2).

However, outside of these circumstances, admissions by silence are recognized in military courts. *United States v. Cook*, 48 M.J. 236, 240 (C.A.A.F. 1998). Where an appellant is not subject to official questioning or custodial interrogation, neither Article 31(b), UCMJ, nor the Fifth Amendment apply, and the issue of the accused's silence is only an evidentiary question of relevance. *Id.* Here, in each of the three circumstances in which appellant remained silent or deflected the question, he was not in custodial interrogation or suspected of an offense by a person subject to the Code. *See United*

States v. Rios, 48 M.J. 261, 264-65 (C.A.A.F. 1998) (holding that Article 31 did not apply to pretext phone call between the appellant and his daughter). Accordingly, this case does not concern a statute or the Constitution, but only the application of Mil. R. Evid. 304(a)(1)(C)(2). As to Mrs. SA's email to appellant, it occurred several months before appellant was under investigation, and Mil. R. Evid. 304 therefore does not apply to trial counsel's argument on that email. (Def. Ex. V).

The remaining two comments by trial counsel that appellant challenges, regarding appellant's evasiveness with Mrs. SA and his failure to respond to Ms. SS's text message, were also not plainly in violation of Mil. R. Evid. 304. When an appellant has been apprehended and advised of his right to silence, it is not logically relevant that he invoked the right to silence; it is entirely neutral, an election equally likely to be taken by guilty and innocent accused alike. *Cook*, 48 M.J. at 240. On the other hand, when an accused is confronted by a private party, such as the victim of his crime, his failure to deny his crime is evidence of his guilt. *See United States v. Cain*, 5 M.J. 844, 848 (A.C.M.R. 1978); *United States v. Pearson*, 6 M.J. 953, 956 (A.C.M.R. 1979). In *Cain*, the victim of appellant's robbery confronted him about the crime, and the appellant failed to deny the charge. *Id.* Applying Rule 304's predecessor Manual provision, this court stated:

> If appellant had been in confinement, arrest, or custody or if at the time, he was under official investigation, the inference [of guilt] would not have arisen. But here, [the victim] was not an investigator or other official seeking to question appellant about the offense; he was the victim. Under such circumstances it is reasonable to infer that were appellant innocent, he would have denied the accusation.

Id. (citing *United States v. Armstrong*, 4 U.S.C.M.A. 248, 15 C.M.R. 248 (1954)).

Similarly, in *Pearson*, a victim of the appellant's crime confronted him, he failed to deny the crime, and this court held that trial counsel's argument that this showed his guilt was not improper. 6 M.J. at 955-56. *See also United States v. Wynn*, 23 M.J. 726, 728-29 (A.F.C.M.R. 1986) (holding there was no plain error where trial counsel argued that the appellant was guilty because he failed to respond to accusation from civilian exchange detective), *aff'd, United States v. Wynn*, 29 M.J. 143 (C.M.A. 1989) (per curiam) (declining to decide whether there was error but affirming on harmlessness grounds).

This case occupies an unsteady ground between the apprehended and warned appellant in *Cook* and the appellants in *Cain* and *Pearson*, who were not even under investigation yet. Here, as to appellant's evasiveness and non-responsiveness to Mrs. SA's questions and Ms. SS's text, appellant was in fact under investigation, but did not know it. The reasoning of

Cook, that a guilty person who knows he is under investigation is just as likely as an innocent person to elect silence, indicates that Rule 304 permits the inference that an innocent person who is in fact under investigation but does not know it would deny the accusation of a private party. Matters are further complicated by appellant's evasiveness, as distinguished from outright silence, in the face of his wife's questioning. *See United States v. Toohey*, 60 M.J. 703, 713 (N.M. Ct. Crim. App. 2004) (noting complexity of the question of law where the accused answers only certain questions or provides limited details and holding there was no plain error on the facts before the court), *rev'd on other grounds*, *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006). Accordingly, trial counsel's argument was not improper, and even if it was, given the ambiguity of the law in this area, it was not plain or obvious error.

6. Trial counsel's argument about appellant's consultation with an attorney was not plain error.

Where there is no objection at trial, a claim that a trial counsel improperly commented on the accused's constitutional rights is reviewed for plain error, given that an objection could have shed additional light on the meaning and intent of the argument. *Garren*, 53 M.J. at 143. A trial counsel may not argue that an accused is guilty because he exercised his right to counsel. *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F.

2007). Courts examine the prosecutor's comment within the context of the entire court-martial. *Id.* at 186 (citing *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000)). "[I]f a statement 'was an isolated reference to a singular invocation of rights' it may be harmless in the context of the entire record." *Id.* (quoting *United States v. Sidwell*, 51 M.J. 262, 265 (C.A.A.F. 1999)). While not determinative, the absence of a defense objection suggests that defense counsel and the military judge did not take the trial counsel's argument to be an improper comment on the accused's exercise of his constitutional rights. *Id.*

Where trial counsel's argument could have multiple meanings courts have not found plain error. *Garren*, 53 M.J. at 143. In *Garren*, the trial counsel argued that the case "was about an NCO who has failed to accept responsibility for his actions." *Id.* The appellant argued that this was an improper comment on his right to plead not guilty. *Id.* However, the trial counsel also tied his argument to evidence that the appellant had given inconsistent pretrial statements. *Id.* Reviewing for plain error, the court held that the trial counsel's argument was not an improper comment on the appellant's plea of not guilty, but instead "called attention to the appellant's inconsistencies in his statements to the criminal investigators." *Id.*

This case is like *Garren*. Like in *Garren*, trial counsel's reference to appellant's consultation with an attorney was part of a larger argument related to appellant's concerted effort with his wife to prevent Ms. SS from reporting his crimes, and simply introduced argument about other evidence in the case. The point of trial counsel's argument was not that appellant consulted with an attorney and was therefore guilty; the point was that appellant made Mrs. SA complicit in his plan to cover up the crimes, showing his consciousness of guilt. That neither the defense counsel nor the military judge said a word during this portion of trial counsel's argument suggests that it came across as an argument about a concerted effort to conceal a crime, not an accused who was guilty because he visited an attorney.[7] *Moran*, 65 M.J. at 186. Accordingly, trial counsel's introductory comment about appellant's consultation with an attorney was not plain and obvious error.

B. The military judge did not abuse his discretion in precluding defense counsel's question regarding the state court judge's credibility determination.

The military judge's decision to limit defense cross-examination or exclusion of evidence under Mil. R. Evid. 403 is

[7] The military judge was especially vigilant regarding trial counsel's closing argument, stopping him sua sponte when he used the word "pedophile" and instructing the panel to disregard the word and trial counsel's argument that a soldier would be sexually assaulted alone in her room that night. (R. at 1056-67). This curative action ensured that appellant was not prejudiced by these arguments, and indicates that if the military judge thought trial counsel was arguing that the panel should draw an adverse inference from appellant's exercise of the right to counsel, he would have stepped in.

reviewed for an abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 129-30 (C.A.A.F. 2000). The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion; "[t]he challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *Id.* at 130 (citing *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)).

The military judge's limitation on defense counsel's cross-examination was not an abuse of discretion in this case because defense counsel's proffered question was barred by Mil. R. Evid. 608(b), called for hearsay, and was not constitutionally required.

> Except for a criminal conviction under Mil. R. Evid. 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. The military judge may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness.

Mil. R. Evid. 608(b). Mil. R. Evid. 608(b) was modeled after its federal analogue, Fed. R. Evid. 608. *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter *MCM*], app. 22, A22-48. As the 2003 Advisory Committee note for the Federal Rule explains:

> [T]he extrinsic evidence prohibition of Rule 608(b) bars any reference to the

> consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis*, 183 F.3d 231, 257 n.12 (3[rd] Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's fourty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertions of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("[C]ounsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act[.]").

Fed. R. Evid. 608 advisory committee's note.

Despite the clarity of the Rule's language and the Advisory Committee's note, federal civilian courts are split on the admissibility of prior third-party determinations of credibility under Fed. R. Evid. 608(b). *See Davis*, 183 F.3d at 257 n.12 (holding counsel could cross-examine witness on facts underlying bad acts but not on the government's response to those acts); *United States v. Whitmore*, 384 F.3d 836 (D.C. Cir. 2004) (order denying motion for rehearing) (per curiam) (applying the Advisory Committee note). *But See United States v. Dawson*, 434

F.3d 389, 958-59 (7th Cir. 2006) (permitting counsel to ask the witness whether he had ever been found to be not credible by a judge); *United States v. Cedeno*, 644 F.3d 79, 83 (2nd Cir. 2011) (permitting cross-examination of witness on the basis of prior judicial determination of credibility in certain circumstances); *United States v. Woodard*, 699 F.3d 1188, 1195 (10th Cir. 2012) (following *Cedeno*); *United States v. Whitehead*, 618 F.2d 523, 529 (4th Cir. 1980) (permitting cross-examination of lawyer-witness as to facts underlying disbarment and the proceedings themselves).

This court's decision in *United States v. Wilson*, 12 M.J. 652 (Army Ct. Crim. App. 1981) (per curiam) puts this court squarely in line with the Advisory Committee and the Third and District of Columbia Circuits in holding that counsel cannot "smuggle" extrinsic evidence into court by asking the witness about it. In *Wilson*, the government sought to impeach the accused by asking him whether he had been punished for false official statement and larceny under Article 15, UCMJ. 12 M.J. at 653. This court first stated, "If the Government merely intended to ask the accused if he had made a false official statement and the facts surrounding that misconduct, it would have been admissible under Rule 608(b)." *Id.* However, this court held that "under Rule 608(b) the accused cannot be asked if he received Article 15 punishment." *Id.* Persuasively, this

court noted that Mil. R. Evid. 609 permits impeachment after the reliability guarantee of a criminal conviction, and that Article 15 punishments fall short of that reliability. *Id.* (citing *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981)).

Here, the military judge did not abuse his discretion in preventing defense counsel from asking Mrs. SA if a state judge had found her to be not credible because the question is prohibited by Mil. R. Evid. 608(b). Under the principles of the Advisory Committee note, *Davis*, *Whitmore*, and *Wilson*, to ask this question would have been to "smuggle" extrinsic evidence of a prior bad act before the court to show a character for untruthfulness, precisely what the Rule exists to preclude.

The cases holding otherwise are easily criticized and unpersuasive. *Dawson* was based almost entirely on policy arguments contrary to the Rule's text. Edward J. Imwinkelried, *Formalism Versus Pragmatism in Evidence: Reconsidering the Absolute Ban on the Use of Extrinsic Evidence to Prove Impeaching, Untruthful Acts that Have Not Resulted in a Conviction*, 48 Creighton L. Rev. 213, 228-29 (2015) (noting that *Dawson* and similar cases were decided on policy grounds, "ignored the text of Rule 608(b)," and were decided "in the teeth of both the text of Rule 608(b) and the 2003 Note."). *See also United States v. Dvorkin*, 799 F.3d 867, 883 n.38 (7th Cir. 2015) (noting criticism of *Dawson*). *Cedeno* and *Woodard* barely

mention Rule 608(b), and are best read as cases interpreting Fed. R. Evid. 403 and the Confrontation Clause—issues addressed further below. *Whitehead* was decided before the Rule was amended to apply only to "character for truthfulness or untruthfulness" rather than "credibility" generally. *See* Fed. R. Evid. 608 advisory committee's note. As such, it relied on cases that admitted prior judicial determinations to show bias and a character witness's deficient basis of knowledge. *Whitehead*, 618 F.2d at 529 (citing *United States v. Ruiz*, 579 F.2d 670 (1st Cir. 1968); *United States v. Bright*, 588 F.2d 504 (5th Cir. 1979)). Accordingly, in military courts a witness may not smuggle in extrinsic evidence of prior bad acts by asking about the extrinsic evidence on cross-examination.

Further, defense counsel's proposed question called for a hearsay response.[8] Hearsay is generally not admissible. Mil. R. Evid. 802. Hearsay is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Mil. R. Evid. 801(c). As the *Davis* court recognized, the question "What did the judge say about your testimony at the prior proceeding?" calls for a

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[8] The cases holding that Fed. R. Evid. 608(b) permits cross-examination on prior judicial determinations of credibility have not considered whether the evidence is hearsay. Peter Walkingshaw, Note, *Prior Judicial Findings of Police Perjury: When Hearsay Presented as Character Evidence Might not Be Such a Bad Thing*, 47 Colum. J.L. & Soc. Probs. 1, 14-15 (2013); *see, e.g.*, *Cedeno*, 644 F.3d at 83 n.3.

hearsay response: the judge's statement that the witness was not credible is an out-of-court statement offered to prove its truth, that the witness was not credible. *Davis*, 183 F.3d at 257 n.12. Accordingly, in this case, even if the question was proper under Rule 608(b), it was improper under Rule 802, and the military judge did not abuse his discretion in preventing the question.

Finally, the military judge did not abuse his discretion in ruling that the probative value of the question was substantially outweighed by the dangers of unfair prejudice and confusion of the issues, and did not violate appellant's confrontation rights. As before, a military judge may exclude evidence when its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. Mil. R. Evid. 403. Concededly, although a rule of evidence may prevent certain cross-examination, the limit on cross-examination may violate the accused's confrontation rights under the Sixth Amendment. *Davis v. Alaska*, 415 U.S. 308 (1974). However, the right to confrontation can properly be limited by balancing probative value against "the danger of 'harassment, prejudice, confusion of the issues, the witness' safety, or [evidence] that is repetitive or only marginally relevant.'" *United States v. Gaddis*, 70 M.J. 248, 252 (C.A.A.F. 2011)

(quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)) (alteration in original).

In the context of prior judicial determinations of credibility, the *Cedeno* court established five factors to consider in striking this balance: (1) whether the lie was under oath in a judicial proceeding or was made in a less formal context; (2) whether the lie was about a matter that was significant; (3) how much time had elapsed since the lie was told and whether there had been any intervening credibility determination regarding the witness; (4) the apparent motive for the lie and whether a similar motive existed in the current proceeding; and (5) whether the witness offered an explanation for the lie and, if so, whether the explanation was plausible. *Cedeno*, 644 F.3d at 83.

Here, the military judge first determined that the state court judge's determination was not a credibility determination at all, but was instead reflective of the fact that Mrs. SA's testimony did not make sense, making the probative value exceedingly low. (R. at 476-77). He went on to apply the Mil. R. Evid. 403 balancing test and the *Cedeno* factors on the record, and found that both favored excluding the evidence. (R. at 476-77).

Appellant has not shown that the military judge's determination was "'arbitrary, fanciful, clearly unreasonable,'

or 'clearly erroneous.'" *McElhaney*, 54 M.J. at 130 (quoting *Miller*, 46 M.J. at 65). The state court judge was tasked with determining by clear and convincing evidence whether appellant would abuse Ms. SS's little brothers. (Def. Ex. UU for identification, p. 16). In this regard, his determination that Mrs. SA's testimony about why she had not previously disclosed appellant's abuse of her daughter "[didn't] wash" was because "[a]ny mother that's *truly concerned* is not going to stand idly by, putting her children in the hands of a monster." (Def. Ex. UU for identification, p. 15) (emphasis added). His finding is best read as stating that Mrs. SA was apparently not particularly concerned that appellant would harm her other children since she did not say anything earlier, such that there was not clear and convincing evidence he would do so. The finding should not be read as stating that Mrs. SA had just lied to him under oath in open court. Accordingly, the military judge did not abuse his discretion in preventing defense counsel from asking Mrs. SA about the judge's determination.

C. The evidence is factually and legally sufficient.

The elements of aggravated sexual assault of a child are (1) that the accused engaged in a sexual act with a child and (2) that at the time of the sexual act the child had attained the age of twelve years but had not attained the age of sixteen years. *MCM*, app. 28 at A28-6. The elements of aggravated

sexual assault are (1) that the accused caused another person, who is of any age, to engage in a sexual act and (2) that the accused did so by causing bodily harm to another person. *Id.* The elements of assault consummated by battery are (1) that the accused did bodily harm to a certain person and (2) that the bodily harm was done with unlawful force or violence. *MCM*, pt. IV, ¶ 54b(2). The elements of indecent act with a child are (1) that the accused committed a certain act upon or with the body of a certain person; (2) that the person was under sixteen years of age and not the spouse of the accused; (3) that the act of the accused was indecent; (4) that the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and (5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States* (2005 ed.), pt. IV, ¶ 87b(1). Finally, the elements of child endangerment are (1) that the accused had a duty for the care of a certain child; (2) that the child was under the age of sixteen years; (3) that the accused endangered the child's mental or physical health, safety, or welfare through design or culpable negligence; and (4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed

forces or was of a nature to bring discredit upon the armed forces. *MCM*, pt. IV, ¶ 68ab.

Legal sufficiency is reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Here, Ms. SS testified to each element of each offense of which appellant was found guilty. On this evidence alone, it was not irrational for the panel to find appellant guilty. Accordingly, the evidence is legally sufficient.

Factual sufficiency is also reviewed de novo. *Washington*, 57 M.J. at 399. Under Article 66(c), UCMJ, this court must take "a fresh, impartial look at the evidence, giving no deference to the decision of the trial court . . . beyond the admonition . . . to take into account the fact that the trial court saw and heard the witnesses." *Id.* On factual sufficiency review, the court "applies neither a presumption of innocence nor a presumption of guilt." *Id.* "Article 66(c) limits the Courts of Criminal Appeals 'to a review of the facts, testimony, and evidence presented at trial, and precludes a Court of Criminal Appeals from considering "extra-record" matters when

making determinations of guilt, innocence, and sentence appropriateness.'" *United States v. Holt*, 58 M.J. 227, 233 (C.A.A.F. 2003) (quoting *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Where the evidence depends on the credibility of witnesses, this court has given increased deference to the court-martial. *United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127, at *12-14 (Army Ct. Crim. App. 29 Feb. 2016) (mem. op.) (citing *United States v. Johnson*, 30 M.J. 930, 934 (A.C.M.R. 1990)).

Here, appellant solely attacks the credibility of Ms. SS and Mrs. SA as the grounds for setting aside the findings of guilty, arguing that Ms. SS was biased by her dislike of appellant, that Mrs. SA was similarly biased by the divorce and custody proceedings, that Mrs. SA purportedly did not initially believe Ms. SS, and that Mrs. SA made a prior inconsistent statement. (Appellant's Br. 36-40). This court should reject these arguments and affirm the findings for three reasons. First, appellant's argument relies on the credibility of two witnesses, and this court is poorly positioned to judge their credibility, given that it did not see the witnesses' in court testimony to evaluate for the "pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial." *Crews*, 2016 CCA LEXIS 127, at *12. The panel saw Ms. SS testify that

she reported the abuse when she did because she felt victimized and wanted to protect her brothers, and Mrs. SA testify that she did not report it sooner only because she felt trapped and believed appellant would moot the issue by committing suicide. The panel apparently accepted that testimony. The testimony is compelling even with only a cold transcript and is supported by the consistency of Ms. SS's Article 32 testimony and the explanations of Dr. Soulier. This court is ill-equipped to scrutinize it differently.

Second, it is wholly irrelevant whether Mrs. SA initially believed Ms. SS. She did not testify at trial that she believed Ms. SS (as she surely would not have been permitted), so even if she disbelieved Ms. SS before, there is no inconsistency. Further, the primary utility of Mrs. SA's testimony is that she provided the court with appellant's admission as to the crimes. Whether she believed Ms. SS's accusations or appellant's admission is of no moment; she established what words came from appellant's mouth.

Finally, this court may not consider the purported prior inconsistent statement on which appellant relies, Def. Ex. DD for identification. (Appellant's Br. 39). That exhibit was never admitted and, under *Holt*, is not eligible for consideration on factual sufficiency review. Accordingly, an impartial review of the evidence shows appellant to be guilty

beyond a reasonable doubt, and this court should affirm the findings and sentence.[9]

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court affirm the findings and sentence.

SAMUEL E. LANDES
CPT, JA
Appellate Government Counsel

DANIEL D. DERNER
MAJ, JA
Branch Chief,
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A.G. COURIE III
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MARK H. SYDENHAM
COL, JA
Chief, Government
Appellate Division

[9] The United States has reviewed the matters submitted personally by appellant under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and submits that they are without merit.

Appendix

UNITED STATES, Appellee v. Sergeant JASON R. CREWS, United States Army, Appellant

ARMY 20130766

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

2016 CCA LEXIS 127

February 29, 2016, Decided

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: [*1] Headquarters, 1st Infantry Division and Fort Riley. Gregory A. Gross, Military Judge, Lieutenant Colonel John A. Hamner, Staff Judge Advocate (pretrial), Colonel Craig E. Merutka, Staff Judge Advocate (post-trial).

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-Testimony provided by two children and a child's mother during a servicemember's trial on a charge alleging that he committed rape of a child, in violation of UCMJ art. 120b, *10 U.S.C.S. § 920b*, that was based on a conversation the mother had with her six-year-old daughter after she viewed a video of the servicemember interacting with the child, was inclusive and not sufficient as a matter of law to sustain the servicemember's conviction for the lesser-included offense of sexual abuse of a child; [2]-The servicemember waived his right to appeal the military judge's decision to instruct the panel that indecent exposure was a lesser-included offense of committing an indecent act, in violation of UCMJ art. 120, *10 U.S.C.S. § 920*, when he did not object to the instruction, and the judge did not commit plain error when he instructed the panel on indecent exposure.

OUTCOME: The court set aside the servicemember's conviction for sexual abuse of a child and dismissed that charge, affirmed the servicemember's conviction for indecent exposure, set aside the servicemember's sentence, and authorized a rehearing to determine a sentence on the servicemember's conviction for indecent exposure.

LexisNexis(R) Headnotes

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

[HN1] The United States Army Court of Criminal Appeals ("ACCA") has the independent duty to review the record to determine whether it is correct in law and fact. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The test for factual sufficiency, on the other hand, involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c) to take into account the fact that the trial court saw and heard the witnesses. In exercising this authority, the ACCA gives no deference to the decisions of the trial court (such as a finding of guilty), but does recognize the trial court's superior ability to see and hear the witnesses. In reviewing for factual sufficiency, the ACCA is limited to the facts introduced at trial and considered by the court-martial. The ACCA may affirm a conviction only if it concludes, as a matter of factual sufficiency, that the evidence proves an appellant's guilt beyond a reasonable doubt.

Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals
Military & Veterans Law > Military Justice > Appeals & Reviews > U.S. Court of Appeals for the Armed Forces
[HN2] The United States Court of Appeals for the Armed Forces ("CAAF") does not share either the United States Army Court of Criminal Appeals' ("ACCA's") factual review authority or responsibility. Nonetheless, ACCA decisions are subject to review by the CAAF.

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN3] The deference given to a trial court's ability to see and hear the witnesses and evidence--or "recognition" as phrased in Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*--reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at a court-martial. A panel hears not only a witness's answer, but may also observe the witness as he or she responds. To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious. In New York State --where the intermediate appellate court conducts a review for factual sufficiency--the intermediate appellate court gives great deference to the fact-finder's opportunity to view the witnesses, hear the testimony, and observe demeanor. However, neither the United States Army Court of Criminal Appeals nor the United States Court of Appeals for the Armed Forces has quite so clearly delineated the amount of deference due a trial court when conducting a factual sufficiency review.

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN4] In United States v. Johnson, the United States Army Court of Military Review distinguished between evidence whose weight depended on the factfinder's assessment of credibility, and evidence where the appellate court was at little or no disadvantage in reviewing the evidence. Similarly, in United States v. Davis, the United States Army Court of Criminal Appeals noted that the degree to which it recognizes or gives deference to a trial court's ability to see and hear the witnesses will often depend upon the degree to which the credibility of the witnesses is at issue.

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN5] In United States v. Johnson, the United States Army Court of Military Review (now the United States Army Court of Criminal Appeals ("ACCA")) stated that Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, cautioned the court to bear in mind that a trial court saw and heard the witnesses, and that in cases where witness credibility played a critical role in the outcome of the trial, it hesitated to second-guess the court's findings. This was inartfully stated as it is the ACCA's duty to "second-guess" a court-martial's findings and the ACCA does not hesitate in that duty. However, the underlying concept--that more deference is due when credibility is key to determining the weight of the evidence--remains sound. The court of military review went on to say in Johnson that when the evidence does not depend on credibility determinations, its independence as a fact-finder should only be constrained by the evidence of record and the logical inferences emanating therefrom.

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN6] The admonition that the United States Army Court of Criminal Appeals recognizes a court-martial panel's ability to see and hear the witnesses applies not only to credibility determinations, but also to weighing the evidence. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*.

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Production of Evidence & Witnesses
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

[HN7] Children sometimes testify with shocking candor, but may also be easily manipulated on the stand. A dry transcript will contain some of these elements, but a trial court is far better positioned to determine the appropriate weight such testimony should be given.

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape
Military & Veterans Law > Military Justice > Sentencing > Maximum Limits
Military & Veterans Law > Military Justice > Sentencing > Confinement
[HN8] The maximum authorized punishment for committing an indecent act in violation of Unif. Code Mil. Justice ("UCMJ") art. 120, *10 U.S.C.S. § 920*, includes up to five years of confinement. Manual Courts-Martial ("MCM") pt. IV, para. 45.f.(6) (2008). The maximum authorized punishment for indecent exposure in violation of art. 120, *10 U.S.C.S. § 920*, includes up to one year of confinement. MCM pt. IV, para. 45.f.(7) (2008). That is, a conviction on indecent exposure reduces the possible confinement that could be adjudged for that offense by 80 percent.

Criminal Law & Procedure > Appeals > Reviewability > Waiver
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN9] Deviation from a legal rule is error unless the rule has been waived. Waiver is the intentional relinquishment or abandonment of a known right. Whether a particular right is waivable, whether a defendant must participate personally in the waiver, whether certain procedures are required for waiver, and whether a defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN10] Under a plain error analysis, an appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant.

Military & Veterans Law > Military Offenses
[HN11] The element of indecent exposure, in violation of Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*, that requires the conduct to occur somewhere other than in front of his own family or household serves as a limitation on what conduct is indecent. That is, being seen naked by your own family--while an "exposure"--is not an indecent exposure.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Burdens of Proof
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN12] When it comes to unpreserved error, the burden is on an appellant to establish prejudice. An appellant bears the burden of proving prejudice because he did not object at trial, and must show that under the totality of the circumstances, the Government's error resulted in material prejudice to his substantial, constitutional right to notice.

Military & Veterans Law > Military Offenses
[HN13] One commits indecent exposure, in violation of Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*, when one intentionally exposes, in an indecent manner, the genitalia. Manual Courts-Martial pt. IV, para. 45.a.(n) (2008).

COUNSEL: For Appellant: Captain Matthew L. Jalandoni, JA (argued); Colonel Kevin Boyle, JA; Major Yolanda McCray Jones, JA; Captain Patrick J. Scudieri, JA (on brief); Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Patrick J. Scudieri, JA (on brief on specified issue).

For Appellee: Captain Timothy C. Donahue, JA (argued); Major Daniel D. Derner, JA; Captain James P. Curtin, JA (on brief); Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Timothy C. Donahue, JA (on brief on specified issue).

JUDGES: Before HAIGHT, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge HAIGHT and Judge PENLAND concur.

OPINION BY: WOLFE

OPINION

MEMORANDUM OPINION

WOLFE, Judge:

A panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of indecent exposure (as a lesser-included offense of indecent acts) and sexual abuse of a child (as a lesser-included offense of rape of a child), in violation of Articles 120 and 120b, Uniform [*2] Code

of Military Justice, *10 U.S.C. §§ 920* and *920b (2006 & Supp. IV; 2012)* [hereinafter UCMJ]. Appellant was arraigned on charges that included one specification of rape of a child (KG) under the age of 12 years, and one specification of indecent acts in the presence of Mrs. SG.[1] The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the grade of E-1.

> 1 A third charge of indecent language was dismissed after arraignment.

Appellant's case is now before this court for review pursuant to *Article 66(c)*, UCMJ. Appellant assigns two errors, both of which merit discussion, and one of which merits relief. Specifically, we find the evidence supporting appellant's conviction for sexual abuse of a child to be factually insufficient.

BACKGROUND

The facts surrounding this case all took place in 2012 in a neighborhood of family housing at Fort Riley, Kansas. While not strictly neighbors, appellant, KG, and Mrs. SG all lived within a few minutes' drive of each other. KG is the five-year-old daughter of an Army specialist who served in the same company as appellant. Appellant, however, did not have any supervisory relationship or [*3] responsibilities over KG's father. Mrs. SG was the wife of an Army soldier. Mrs. SG and KG are not related and lived in separate homes in the neighborhood.

DISCUSSION

A. Factual Sufficiency of Sexual Abuse of a Child

Appellant visited KG's house often. KG's mother testified that appellant stopped by nearly every workday during his lunch break for a brief visit, and often on weekends. During these visits, KG would ask appellant for piggyback rides, and crawl over him while he was on the floor. KG's mother testified that several times appellant volunteered to babysit KG, which she and her husband declined. Appellant was also very gracious with helping around the house, to include changing the brakes and oil on the family car, fixing the dryer, and assisting with an intra-post move to a one-story house necessitated by a back injury to KG's father.

KG had an electronic toy which in addition to playing math and reading games allowed the user to take short 30-second videos. In October of 2012, KG's mother was looking at the toy when she saw a video of appellant and KG that she found disturbing. She asked KG if anyone had ever done anything inappropriate with her. KG answered yes, and indicated [*4] that appellant had touched her genitals. During a subsequent child forensic interview, KG stated that appellant had touched her genitals and penetrated her vagina.

At trial, the government attempted to prove their case that appellant raped KG through the admission of the video and the testimony of KG, KG's mother, and the boy who filmed the video, DH. We will discuss each at length.

1. Facts

a) Testimony of KG's Mother

KG's mother was the government's first witness. She provided background information and the history of interactions between appellant and KG. Most crucially, she also testified to her daughter's statement that appellant had inappropriately touched KG's genitals. Her key testimony was as follows:

> Q [TC]: Has anything between your family and Sergeant Crews changed that relationship?
>
> A: The instant [sic] that happened with our daughter.
>
> Q: Can you tell the panel members a little bit about that?
>
> A: It was one September evening, my friend has just gotten back from her grandmother's funeral. So we had a little barbeque and [appellant] was also over there with us, and we were just -- all the adults were outside and the kids were playing in [KG's] bedroom. And my daughter had one of [*5] those Leap Frogs that records videos and stuff. And I actually didn't notice it until October, but I was watching the video and it was actually recorded with [appellant] sitting on the edge of my daughter's bed with her completely covered underneath the jacket sitting on his lap, and that is when I discovered it. And I went and told my husband about it because he was in the bathroom -- and our daughter was in the living room when I discussed it with him; and I had walked back into the living room to ask her if anybody had done anything that she thought was wrong, and she shook her head yes; and I asked her, "Who?" I never said any name, but she said, "Sergeant Crews," and I asked her, "What did he do?" and she doesn't know the term names

> for her body parts because she is only six, but I asked her can -- I said, "Can you show me where he touched you?" and she proceeded to move the blanket and pointed down to her vaginal area, and that is how I discovered what had happened in her bedroom.

KG's mother further clarified that she discovered the video about a month and a half after it was taken. The defense did not object to KG's mother's testimony as hearsay or otherwise. The record provides [*6] no basis to believe that a plausible hearsay exception would have applied.[2]

> 2 We note of course that as there was no objection, the government did not attempt to lay down a foundation for a hearsay exception. Our review of the record, to include the criminal investigation, *Article 32*, UCMJ, investigation, and other allied papers attached to the record under Rule for Courts-Martial [hereinafter R.C.M.] 1103, does not reveal any indication of an applicable exception, such as an excited utterance.

b) The Video

The video, which was admitted over defense objection, is somewhat grainy.[3] Additionally, the video's camerawork reflects the fact that the video was taken by KG's friend, DH, a six-year-old neighborhood boy.

> 3 Testimony at trial revealed that a technician was unable to digitally copy the video. Instead the copy presented at trial was made by filming the screen of the video player.

At the outset of the 30-second video, appellant is seen sitting on the edge of KG's bed. KG is sitting on appellant's lap and has a large adult jacket wrapped around her midsection and waist. Approximately halfway through the video, KG pulls the jacket over her head while appellant embraces KG by the waist with his left arm, [*7] which remains above the jacket. However, appellant then places his hand beneath the jacket, although his upper arm, elbow, and parts of his forearm remain visible. The angle of his forearm makes it possible that appellant has placed his hand near either KG's stomach or pelvic area. The video ends a few seconds later.

c) Testimony of KG

At trial KG's mother generally testified consistently with her initial statement to investigators and her testimony at the *Article 32*, UCMJ, investigation. KG, however, did not. While KG answered some initial background questions, such as the name of her dog, her answer to every question of substance on direct exam was "I don't know."[4]

> 4 The record does not indicate any request for remote live testimony under R.C.M. 914A, or any other accommodation to assist a six-year-old testifying about a difficult subject. Nor was there any attempt by the trial counsel to declare KG unavailable and admit her testimony at the *Article 32* investigation. *See* Mil. R. Evid. 804(a)(3).

d) Testimony of DH

Finally, the government called DH, the boy who recorded the video. DH's direct testimony, at least when reduced to a written transcript, could generously be described as muddled. It appears that DH, who the government [*8] relied on in authenticating the video, hadn't seen the video at any time between when it was first filmed and when it was played in court. DH at times appears to testify about videos he made which were not admitted into evidence. When recounting a conversation he had with his mother (where he told his mother that KG "got touched in the private") he appears to confuse counsel's questions about where he was when he was talking to his mother, and where he was when KG was touched. DH testified he saw KG get touched, and immediately thereafter said he did not see it. In short, it is not possible to make any sense of DH's testimony one way or the other with respect to the charged misconduct he was called to testify about.

e) The Defense Case

The defense case-in-chief consisted of several witnesses. The first, a child psychologist, testified as an expert witness about child memories. The defense also called several character witnesses who had daughters the same age as KG. After laying the foundation that appellant also spent a lot of time playing with their kids, they testified that they had high opinions of appellant's "character towards children"[5] and that he was helpful.

> 5 The testimony was [*9] admitted without objection and it is not necessary for us to address whether this was testimony about the appellant's *behavior* around children, or whether it was a pertinent character trait and admissible under Mil. R. Evid. 404(a)(1).

2. Law

On appeal, appellant claims that the evidence of child sexual abuse is factually insufficient to support the

conviction. In response, the government argues that KG's hearsay statement to her mother, in light of the video, is sufficient.[6]

> 6 The government's brief argued only that the evidence was legally sufficient. That is, the government argued that "[w]hen viewed in a light most favorable to the government, there was sufficient evidence for a rational fact finder to find beyond a reasonable doubt that appellant sexually abused a child under the age of twelve." At oral argument, the government made clear that the position of the United States was that the evidence was both legally and factually sufficient.

Nonetheless, [HN1] we have the independent duty to review the record to determine whether it is correct in law *and* fact. *UCMJ art. 66(c)*. The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact [*10] could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560, (1979)*; *see also United States v. Phillips, 70 M.J 161, 166 (C.A.A.F. 2011)*. The test for factual sufficiency, on the other hand, "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in *Article 66(c)*, UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. In exercising this authority this court gives no deference to the *decisions* of the trial court (such as a finding of guilty), but does recognize the trial court's superior ability to see and hear the witnesses. *Id.* (A court of criminal appeals gives "no deference to the decision of the trial court" but is required to adhere to the admonition to take into account the fact that the trial court saw and heard the witnesses).

In reviewing for factual sufficiency we are limited to the facts introduced at trial and considered by the court-martial. *United States v. Beatty, 64 M.J. 456 (C.A.A.F. 2007)*. Thus, for example, we do not consider KG's unadmitted pretrial statements, no matter how compelling, in determining whether there was sufficient evidence to support the findings. We may affirm a conviction only if we conclude, as a matter of factual [*11] sufficiency, that the evidence proves appellant's guilt beyond a reasonable doubt. *United States v. Sills, 56 M.J. 239, 240-41 (C.A.A.F. 2002)*; *United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987)*.

[HN2] Our superior court does not share either our factual review authority or responsibility. *Compare Article 66 with Article 67*, UCMJ. Nonetheless, our decisions are subject to review by the United States Court of Appeals for the Armed Forces (C.A.A.F.). *United States v. Nerad, 69 M.J. 138, 140 (C.A.A.F. 2010)* ("[W]hile CCAs have broad authority under *Article 66(c)*, UCMJ, to disapprove a finding, that authority is not unfettered. It must be exercised in the context of legal--not equitable--standards, subject to appellate review.").

3. Analysis

This case, somewhat uniquely, raises the degree to which we recognize the trial court's superior position in seeing and hearing the evidence. Accordingly, and as we find the evidence factually insufficient, we believe it wise to discuss how we arrive at our conclusion in light of these considerations.

[HN3] The deference given to the trial court's ability to see and hear the witnesses and evidence--or "recogni[tion]" as phrased in *Article 66*, UCMJ--reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, [*12] they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial. A panel hears not only a witness's answer, but may also *observe* the witness as he or she responds. For instance, a transcript may state "I am showing the witness prosecution exhibit 13 for identification" but will leave unstated the witness's demeanor--whether surprise, recognition, or dread, when reviewing or confronted with evidence.

To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious. In New York State--the only other jurisdiction we are aware of where the intermediate appellate court conducts a review for factual sufficiency--the intermediate appellate court gives "[g]*reat deference* . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor." *People v. Romero, 7 N.Y.3d 633, 644, 859 N.E.2d 902, 826 N.Y.S.2d 163 (2006)* (emphasis added) (quoting *People v. Bleakley, 69 N.Y.2d 490, 495, 508 N.E.2d 672, 515 N.Y.S.2d 761 (1987))*. However, neither this court, nor our superior court, has quite so clearly delineated the amount of deference due the trial court when conducting a factual sufficiency review.

[HN4] In *United States v. Johnson, 30 M.J. 930, 934 (A.C.M.R. 1990)*, [*13] we distinguished between evidence whose weight depended on the factfinder's assessment of credibility, and evidence where the appellate court was at little or no disadvantage in reviewing the evidence.' Similarly, and more recently, in *United States v. Davis, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015)* (en banc), we noted that "the degree to which we 'recog-

nize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue."

> 7 [HN5] In *Johnson* we stated that *Article 66(c)*, UCMJ, "cautions us to bear in mind that 'the trial court saw and heard the witnesses.' Thus, in cases where witness credibility plays a critical role in the outcome of the trial, we hesitate to second-guess the court's findings." *30 M.J. at 934* (citation omitted). This was inartfully stated as it is our duty to "second-guess" a court-martial's findings and we do not hesitate in this duty. However, the underlying concept--that more deference is due when credibility is key to determining the weight of evidence--remains sound. We went on to say in *Johnson*, for example, that when the evidence does not depend on credibility determinations, "our independence as a fact-finder should only [*14] be constrained by the evidence of record and the logical inferences emanating therefrom." *Id.*

As related above, the government sought to introduce four substantive components of evidence to support the conviction involving KG: First, KG's mother testified that KG had told her that appellant had touched her sexually; second, a video, that while certainly concerning, does not explicitly depict any sexual touching; third, the government's attempt to present testimony by the alleged victim, KG; and fourth, the testimony of DH, who stated both that he saw and didn't see appellant touch KG's "privates."

With regards to the video, our ability to review the evidence and assign it proper weight is nearly identical to that of the panel members.[8] The record of trial contains the same digital copy of the video that was played for the members. It is what it is. While the video was relevant evidence that explains how the allegations came to light, as well as demonstrating opportunity, the video does not explicitly depict a sexual assault.

> 8 We say "nearly identical" for two reasons. First, the panel members had the ability to observe the witness's reaction when the video was played in court. Second, [HN6] the [*15] admonition that we recognize the panel's ability to see and hear the witnesses applies not only to credibility determinations, but also to "weigh[ing] the evidence." *UCMJ art. 66(c)*.

While we give little or no deference to the trial court's weighing of a video, the testimony of the two child witnesses falls on the other side of the spectrum. [HN7] Children sometimes testify with shocking candor, but may also be easily manipulated on the stand. A dry transcript will contain some of these elements, but the trial court is *far* better positioned to determine the appropriate weight such testimony should be given.

Nonetheless, the testimony of the two child eyewitnesses does not support the court-martial's findings. KG's testimony of "I don't know" can be interpreted in two ways: first, as some evidence that the assault did not happen; or second, that she was essentially refusing to answer any questions. Neither interpretation provides evidence of appellant's guilt. Similarly, it is hard to draw any inferences, one way or the other, from DH's internally contradictory testimony. Even applying the "great deference" standard employed by New York intermediate appellate courts, *see, e.g. Romero, 7 N.Y.3d at 644*, the testimony of the [*16] two children in this case does not weigh in favor of appellant's guilt.[9]

> 9 In its brief the government does not rely on either child's testimony in arguing in favor of affirmance.

Accordingly, the only evidence of weight of appellant's guilt is the testimony of KG's mother. As discussed above, KG's mother had no firsthand evidence of the offense. Rather, the inculpatory evidence consisted of repeating KG's statements that appellant had touched her inappropriately. While these unobjected-to hearsay statements were admitted for their truth--and we consider them as such--the lack of an applicable hearsay exception is concerning. Additionally, as recounted at trial, the key statement by KG was in response to a leading question from her mother. After KG indicated that appellant had done something wrong, her mother asked "can you show me where he touched you" which presupposed that an inappropriate touch was the "something wrong."

Having reviewed the entire record, we are not convinced beyond a reasonable doubt that appellant committed the offense of sexual abuse of a child. The evidence in this case did not "exclude every fair and reasonable hypothesis of the evidence except that of guilt." Dep't [*17] of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 8-3 (10 Sept. 2014). Accordingly, we will set aside the finding of guilty in our decretal paragraph.

B. Indecent Exposure

During the course of appellant's friendship with KG's family, he was also introduced to Mrs. SG. Mrs. SG was an adult woman also living in family housing on Fort Riley. Appellant would stop by and talk to Mrs. SG while she was sitting outside on her porch. At trial, however, one instance stood out in her mind.

Mrs. SG stated she was sitting on her porch talking with appellant. She stated it was a perfectly normal con-

versation, until it suddenly wasn't. Specifically, she testified it got awkward when appellant unbuttoned his ACU pants, took out his penis, and began "messing" with himself by stroking his penis. Mrs. SG estimated this went on for twenty minutes while she tried to ignore what appellant was doing and concentrated on her laptop. She stated she discussed this event with her husband that night but decided not to report the incident as it did not happen again.

Prior to instructing the members on findings, the military judge conducted an *Article 39(a)*, UCMJ, session [*18] to discuss instructions. Specifically, the military judge addressed whether indecent exposure was a lesser-included offense of indecent acts:

> MJ: Now regarding Charge II and its Specification as I mentioned in the 802 conference this morning I saw one lesser include [sic] of indecent exposure; does either side want to be heard on that?
>
> DC: No, Your Honor.

At the end of the *Article 39(a)*, UCMJ, session, and again at several more instances during the remainder of the trial, the defense did not object to the military judge's proposed instruction on the lesser-included offense.[10] After being notified of the issue first at a R.C.M. 802 conference, and later at the *Article 39(a)*, UCMJ, session, the defense chose not to object to the instruction on the lesser-included offense.

> 10 [HN8] The maximum authorized punishment for an indecent act includes up to five years of confinement. *See Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*, 2008 ed.] pt. IV, ¶ 45.f.(6). The maximum authorized punishment for indecent exposure includes up to one year of confinement. *MCM*, 2008 ed. at ¶ 45.f.(7). That is, a conviction on indecent exposure reduced the possible confinement that could be adjudged for that offense [*19] by 80%.

We find that this amounted to an affirmative waiver of the matter.

> [HN9] "Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)*. Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Harcrow, 66 M.J. 154, 156 (C.A.A.F. 2008)* (quoting *United States v. Olano, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed.2d 508 (1993)*). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id.* (quoting *Olano, 507 U.S. at 733*).

United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011). In *Girouard*, the court found that waiver was not present, because (unlike this case), the case law governing what constituted a lesser-included offense had changed between trial and appeal. That is, the defense counsel in *Girouard* did not intentionally relinquish a known right, as the right had not yet been clearly identified in *United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010)*. The present case was tried well after *Jones*. Here, the military judge specifically notified the defense that he intended to instruct on the lesser-included offense of indecent exposure, and the defense declined the military judge's invitation to be heard on the matter. Moreover, the defense was provided a copy of the written instructions to [*20] review, and heard the instructions given to the panel. In each instance, the elements of the two offenses in question were laid out one after the other without objection. Under the circumstances of this case, this constituted waiver.

Even assuming that an objection to the instruction on the lesser-included offense of indecent exposure was not affirmatively waived, the failure to object to the instructions forfeited the objection, absent plain error. R.C.M. 920(f); *United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013)*; *see also United States v. Wilkins, 71 M.J. 410, 412 (C.A.A.F. 2012)* (citing *United States v. Arriaga, 70 M.J. 51, 54 (C.A.A.F. 2011)*); *Davis, 75 M.J. 537*.

[HN10] "Under a plain error analysis, [an appellant] 'has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" *Tunstall, 72 M.J. at 193-94* (quoting *Girouard, 70 M.J. at 11*).

Applying the elements test, appellant claims that the military judge committed error as an "indecent act does not require proof of an additional element not found in the instruction for indecent exposure" and that "proof of indecent exposure requires proof that the exposure was intentional and that it was made at a place where the conduct could reasonably be expected to be viewed by

people other than members of the accused's family or household."

We first note that a reasonable panel could [*21] have credited the testimony that appellant pulled out and exposed his penis on Mrs. SG's front porch, but not credited the testimony that he then stroked his penis for twenty minutes while she continued to work on her computer. That is, the panel could have credited the evidence supporting the *exposure*, while not crediting the *act* of masturbation.

We also note that [HN11] the element of indecent exposure that requires the conduct to occur somewhere other than in front of his own family or household serves as a limitation on what conduct is indecent. That is, being seen naked by your own family--while an "exposure"--is not an indecent exposure. Appellant was charged with exposing his penis to Mrs. SG, a person he clearly knew not to be a member of his family. Moreover, as charged, the specification alleged that appellant pulled out his penis and stroked it on the front porch of Mrs. SG. That is, as charged, appellant's exposure of his penis was an intentional act, committed in public; it was not an accidental or negligent exposure or an exposure in front of his family.

[HN12] When it comes to unpreserved error, the burden is on the appellant to establish prejudice. *Wilkins, 71 M.J. at 413*; *United States v. Humphries, 71 M.J. 209, 217 n.10*. "Appellant bears the burden of [*22] proving prejudice because he did not object at trial. Appellant must show 'that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice.'" *Wilkins, 71 M.J. at 413* (alterations in original) (quoting *Humphries, 71 M.J. at 215*) (internal citation omitted).

In *Wilkins* the United States Court of Appeals for the Armed Forces (C.A.A.F.) found that the military judge committed error by instructing the panel on abusive sexual contact as a lesser-included offense of aggravated sexual assault based on how the offense was charged. However, as the appellant had not objected at trial, the C.A.A.F. tested for plain error. The C.A.A.F. found that the appellant was "on notice of all of the elements he had to defend against." *Wilkins, 71 M.J. at 414*. Additionally, the lesser-included offense did not change the defense's strategy at trial. *Id.* Thus while finding error, and finding that it was plain and obvious, the court affirmed the findings as the appellant in *Wilkins* did not carry his burden of demonstrating a material prejudice to a substantial right. *Id. at 413* ("Appellant has not met this burden because he cannot establish prejudice to his ability to defend against [*23] the charge he was convicted of or his right to notice."). *Cf. United States v. Riggins, 75 M.J. 78, 85 (C.A.A.F. 2016)* (preserved constitutional error reviewed for harmlessness beyond a reasonable doubt).

In the present case, appellant does not even attempt to meet his burden. While appellant's brief identifies that plain error is the appropriate test, the brief addresses only the first prong of the plain error test, and does not address whether the error was plain or obvious, and if so, how the error resulted in a material prejudice to a substantial right of appellant. Accordingly, appellant has failed to meet his burden and is not entitled to relief. Even if we were to attempt to meet appellant's burden for him regarding the plain and obvious nature of the error, we find that as in *Wilkins*, the instruction on the lesser-included offense did not deprive appellant of notice regarding what he was defending against or alter his trial strategy. The defense in this case did not hinge on whether appellant's actions were an exposure or an indecent act. Rather, the defense's case claimed that the charged misconduct simply never happened, a theory that applies with equal force to both indecent acts and indecent exposure.

Finally, setting aside whether [*24] appellant waived, forfeited, or met his plain error burden in this case, we find that this issue is controlled by our superior court's decision in *United States v. Rauscher, 71 M.J. 225 (C.A.A.F. 2012)*. In that case, the appellant was charged with assault with intent to commit murder (a violation of *Article 134*), but convicted of the lesser-included offense of aggravated assault with a dangerous weapon or means likely to cause death or grievous bodily harm (a violation of *Article 128*). *Id.* In a per curiam opinion, our superior court never addressed the elements test to determine whether aggravated assault is a lesser-included offense of assault with intent to commit murder. Rather, the C.A.A.F. looked at the words of the specification which alleged that the appellant committed "an assault . . . by stabbing [the victim] in the hand and chest with a knife." *Id. at 226*. *Id.* The court was "convinced that the specification clearly allege[d] every element of [aggravated assault]." *Id.* That is, an elements test is unnecessary if the specification itself alleges the lesser-included offense in question.

In this case, the specification alleged that appellant did "wrongfully commit indecent conduct, to wit: pulling his penis out and openly stroking it with his hand [*25] in the presence of [SG]." [HN13] One commits indecent exposure when one "intentionally exposes, in an indecent manner, the genitalia . . . ." *MCM*, 2008 ed. at ¶ 45.a.(n). As every element of indecent exposure was contained in the specification, appellant was on notice that he was charged with indecent exposure. *Jones, 68 M.J. at 472* ("The charge sheet itself gives content to that general

language, thus providing the required notice of what an accused must defend against.").

CONCLUSION

The finding of guilt to the Specification of Charge I, sexual abuse of a child, is set aside and that charge and its specification are DISMISSED. The finding as to the Specification of Charge II, indecent exposure, is AFFIRMED. The sentence is set aside. In accordance with R.C.M. 810, a sentence rehearing is authorized. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings and sentence set aside by our decision, are ordered restored. *See UCMJ arts. 58b(c)* and *75(a)*.

Senior Judge HAIGHT and Judge PENLAND concur.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original of the foregoing was delivered by hand to this Honorable Court and a copy was served upon Appellate Defense Counsel by hand and on civilian counsel by email on this 28th day of April 2016.

DANIEL L. MANN
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APPENDIX 2

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060-5546

REPLY TO
ATTENTION OF

JALS-GA

October 25, 2016

MEMORANDUM FOR CLERK OF THE COURT, U.S. COURT OF APPEALS FOR THE ARMED FORCES, 450 E STREET, N.W., WASHINGTON, D.C. 20442-0001

SUBJECT: Lieutenant Colonel SEAN M. AHERN, ARMY 20130822, Docket No. 17-0032/AR

1. Pursuant to Rule 21(c)(2)(i), the United States will not submit a formal reply to the supplement to the petition in this case, including those issues raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

2. The United States opposes the granting of a petition for review and relies on its response filed with the Army Court of Criminal Appeals.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov and Ms. Laura Heltzel, on 27 October 2016 and delivered to defense appellate counsel by hand on October 27, 2016.

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