IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40093
	)	
Senior Airman (E-4)	)	USCA Dkt. No. 23-0027/AF
JAMES T. CUNNINGHAM, USAF	)	
Appellant.	)	13 February 2023

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED:

I.

WHETHER THE AIR FORCE COURT PROPERLY APPLIED UNITED STATES V. EDWARDS, 82 M.J. 239 (C.A.A.F. 2022) IN FINDING ERROR—BUT NO PREJUDICE—FOR A VICTIM IMPACT STATEMENT THAT INCLUDED VIDEOS, PERSONAL PICTURES, STOCK IMAGES OF FUTURE EVENTS, AND LYRICAL MUSIC THAT TOUCHED ON THEMES OF DYING, SAYING FAREWELL, AND BECOMING AN ANGEL IN HEAVEN?

II.

WHETHER TRIAL COUNSEL'S SENTENCING ARGUMENT WAS IMPROPER UNDER UNITED STATES V. WARREN, 13 M.J. 278 (C.M.A. 1982) AND UNITED STATES V. NORWOOD, 81 M.J. 12 (C.A.A.F. 2021), RESPECTIVELY, WHEN SHE: (1) ARGUED THAT APPELLANT'S UNCHARGED, FALSE STATEMENTS WERE AGGRAVATING EVIDENCE AFTER SHE HAD PREVIOUSLY

CITED CASE LAW TO THE MILITARY JUDGE THAT SAID FALSE STATEMENTS WERE NOT ADMISSIBLE AS EVIDENCE IN AGGRAVATION; AND (2) TOLD THE MILITARY JUDGE THAT HE HAD SEEN THE MEDIA AND THE WORLD WAS WATCHING, TO JUSTIFY HER SENTENCE RECOMMENDATION?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is correct. Even though Appellant elected to be tried by a panel for findings, he elected to be sentenced by a military judge alone. (JA at 094.)

STATEMENT OF FACTS

Summary

Appellant was convicted of murdering his infant son, Z.C., by striking him in the head and shaking him. (JA at 030.) Z.C. was five months old at the time of his death. (JA at 1347.) Appellant and Z.C.'s mother, C.M., were engaged to be married and, at the time of Z.C.'s murder, lived together in a house with two roommates who lived downstairs. (JA at 003.)

On the morning of 3 March 2020, C.M. woke up, fed, and changed Z.C. and then placed Z.C. in his car seat so Appellant could take Z.C. to daycare. (Id.)

Appellant left around 0700 hours with Z.C. to drop him off at daycare and go to work himself. (Id.) C.M. was scheduled to work from 0800 until 2130 hours that day. (Id.) Z.C.'s daycare provider sent C.M. multiple pictures and messages throughout the morning showing Z.C. happy and acting normally. (Id.) Z.C. was supposed to be at daycare until 1630 hours, but Appellant was released from work early, so Appellant picked Z.C. up from daycare around 1230 hours. (Id.)

Appellant arrived back home with Z.C. around 1300 hours. (Id.) Appellant and Z.C. were upstairs in the house, while a roommate who was home stayed downstairs in her room. (Id.) Around 1400 or 1500 hours, the roommate came upstairs to get food and saw Z.C. in his baby jumper and Appellant playing video games. (Id.) After the roommate went back downstairs, she heard Z.C. being unusually fussy. (Id.) Next, the roommate heard Appellant's footsteps upstairs and then heard a loud noise. (Id.) Z.C.'s crying and the noise upstairs became so significant the roommate sent a text message to her husband complaining about the noise. (Id.)

Appellant's First Lie as the Roommate Calls 911

Shortly after the roommate heard the noises upstairs, Appellant came downstairs to the roommate's room calling the roommate's name. (Id.) The roommate opened her door to find Appellant holding Z.C.'s limp body. (Id.) Appellant told the roommate he did not know what was wrong or happened to Z.C., but that Z.C. made a gurgling noise when Appellant had tried to feed him his

bottle. (Id.) The roommate called 911, and the roommate and Appellant administered CPR based on instructions from the 911 dispatcher until paramedics arrived. (JA at 004.)

Appellant's Second Lie while Paramedics Fight to Save Z.C.'s Life

Both paramedics and police responded to the 911 call. (Id.) Officer S.B. from the Rapid City Police Department was one of the officers who responded to Appellant's house. (Id.) Officer S.B. spoke with Appellant while paramedics tended to Z.C. (Id.) Appellant told Officer S.B. that Z.C. was sleeping, woke up fussy, and when Appellant tried to feed Z.C. a bottle, he started making gurgling noises. (Id., JA 072.) Appellant said that after making the gurgling noise, Z.C. stopped responding to his name, and his eyes closed, so Appellant picked Z.C. up, and Z.C. was limp. (JA at 072-074.)

An ambulance took Z.C. to the emergency room at Monument Hospital in Rapid City, South Dakota. (JA at 004.) When he arrived at the emergency room, Z.C. had slow, shallow breathing and a weak pulse. (Id.) He was pale and limp. (Id.) Z.C.'s forehead was discolored and swollen. (Id.) Medical providers performed chest compressions, secured Z.C.'s airway, and started IVs with medication. (Id.). Then, they performed a CAT scan of Z.C.'s head. (Id.) This initial CAT scan revealed Z.C. had bleeding in his brain, an injury common in traumatically injured patients. (Id.) Providers at the emergency room diagnosed the cause of Z.C.'s condition as non-accidental trauma. (Id.)

Appellant's Third Lie as Doctors Try to Control Z.C.'s Brain Bleed

Later that same day, Officer S.B. left Appellant's house and went to Monument Hospital. (Id.) Doctors informed Officer S.B. that Z.C. had a brain bleed. (Id.) Officer S.B. then met with C.M. and Appellant at the hospital and told them that Z.C. had a brain bleed and would be airlifted to Sanford Children's Hospital in Sioux Falls, South Dakota. (Id.) When informed of this, Appellant started crying and blurted out, "I'm an idiot. I feel so bad. He hit his head, I thought it was nothing." (Id.) Officer S.B. asked both C.M. and Appellant if they were willing to come to the police department and speak with investigators. (Id.) They both agreed. (Id.)

Appellant's Four Different Versions of Events to Investigators as Z.C. Is Airlifted to a Children's Hospital

Investigators S.W. and D.H. from the Rapid City Police Department spoke with Appellant. (JA at 005.) Appellant described the entire morning and picking Z.C. up from daycare early. (Id.) Appellant went on to tell investigators four different stories of how Z.C. was injured before eventually admitting he hit Z.C. in the head. At various points during the interview, investigators explained the importance of knowing what happened to help the doctors save Z.C.'s life:

> **Investigator D.H.:** Just so we can understand, and also it may help the doctors help your son, walk us through what happened.

(JA at 006.)

> **Investigator S.W.:** Like my partner said, it's not just us asking. Anything you can tell us about how this actually happened can help those doctors fix him up too. We need—we need to know the truth.

(Id.)

> **Investigator D.H.:** If they don't know the mechanism of injury, they can't treat the injury as effectively. Does that make sense?

(JA at 007.)

> **Investigator D.H.:** I mean your son's injury is very serious, so any assistance that we can have to treat him is very important.

(Id.)

> **Investigator D.H.:** Help us help the doctors, [Appellant].
>
> **Investigator D.H.:** Help us understand what happened so we can help your son as best we can.

(Id.)

1. The first version (Z.C. hit his head in the baby jumper)

First, Appellant told investigators Z.C. was in his baby jumper when Appellant turned to let the dogs outside and heard a "bang." (Id.) According to Appellant, he looked over at Z.C. in his jumper and Z.C. smiled back at Appellant and then went on playing as normal. (Id.) Appellant then fed Z.C. a bottle and put him down for a nap. (Id.) Appellant explained that when Z.C. woke up from his nap, he was fussy and inconsolably crying. (Id.) Appellant gave Z.C. another bottle and laid him down around 1730 hours, but suddenly heard Z.C. making odd

noises. (Id.) When Appellant went to check on Z.C., Appellant explained, he found Z.C. limp and unresponsive. (Id.)

Investigators asked whether, aside from the jumper incident, there was anything else Appellant could think of that might have caused Z.C.'s injury, and Appellant answered in the negative. (Id.) Investigators told Appellant that Z.C. would not have experienced such a serious injury if he merely bumped his head while in the jumper, as Appellant claimed. (Id.) Investigator S.W. implored, "We know that he did not get this injury from the jumper. Is this a one-time thing where something happened or what—I mean, what happened man?" (JA at 005-006.)

2. The second version (Appellant dropped Z.C. onto the carpet while seated on the living room couch)

After investigators confronted Appellant about the jumper story, Appellant admitted he had dropped Z.C., but withheld that information because he was scared people would think he abused Z.C. (JA at 006.) Appellant next told investigators that he dropped Z.C. from a sitting position while trying to feed him, and Z.C. fell face first onto the carpeted floor in the living room. (Id.)

Again, the investigators questioned Appellant's story with skepticism: "It's time to start giving the truth. We can't keep lying about this stuff. I mean, were you frustrated; couldn't get the kid to stop crying? What was going on?" (Id.)

3. The third version (Appellant dropped Z.C. onto the hardwood floor while standing in the kitchen)

Next, Appellant claimed he sat Z.C. up on the kitchen counter to feed him, but when Appellant turned to get the bottle, Z.C. leaned forward and fell off the counter onto the hardwood floor in the kitchen. (Id.) Once more, unconvinced, investigators responded: "How many times are we going to dance around this?" (Id.) Appellant replied, "Sir, I – I didn't do anything to my child."

4. The fourth version (Appellant punched his 5-month-old son in the face)

Eventually, Appellant admitted that he punched Z.C. "hard" in the forehead while Z.C. was laying down because of the anger and frustration that built up when Z.C. would not stop crying. (JA at 007-008.) Appellant told investigators he lied to them because he was "afraid you guys were going to take my kid from me." (JA at 008.)

Z.C.'s Ongoing Critical Needs while Appellant Lied to Investigators

Appellant's interview with investigators lasted around three and a half hours. (JA at 078.) While Appellant was telling investigators four different stories, doctors continued to try to save Z.C. based on the limited information they had from Appellant. Monument Hospital did not have a pediatric ICU or pediatric neurosurgeon so, because of the nature and extent of Z.C.'s injuries, Z.C. was airlifted to a nearby city and taken via ambulance to a children's hospital. (JA at 004.) An eye exam revealed extensive bilateral retinal hemorrhages, which

suggested abusive or non-accidental head injury. (JA at 009.) A skeletal survey showed Z.C. did not have any broken bones. (Id.)

Doctors also performed a second CAT scan of Z.C.'s head. (Id.) The second CAT scan showed bilateral subdural hemorrhages and severe hypoxic-ischemic injury in Z.C.'s brain. (Id.) Z.C. suffered irreparable damage to his brain so extreme that neurosurgeons advised C.M. his injuries would result in imminent death without machines to help keep Z.C. alive. (Id.) C.M. prayed for a miracle and held out hope that Z.C.'s condition would improve. (Id.)

On the morning of 11 March 2020, nine days after Appellant punched his son, Z.C. stopped showing signs of brain function. (Id.) Doctors confirmed Z.C. brain dead in the early morning hours of 12 March 2020. (Id.) Z.C. was removed from a ventilator, his IVs were taken out, and all care was halted. (Id.) C.M. held Z.C. and sang to him until he died in her arms. (JA at 110-111.)

An autopsy was conducted on Z.C. shortly after his death. (JA at 009.) The autopsy noted a bruise on Z.C.'s right forehead, a second, lighter, smaller bruise on the middle of his forehead, and a bruise a on the outside of his left ear. (Id.) The post-mortem physical examination of Z.C.'s brain reflected the hemorrhages that doctors previously saw on CAT scans taken when Z.C. was alive. (Id.) Z.C.'s brain was swollen due to trauma. (Id.) The injuries to Z.C.'s brain indicated a significant trauma to the outside of Z.C.'s head. (Id.) The autopsy also revealed hemorrhaging around the spinal cord in Z.C.'s neck area — an injury caused by

rapid acceleration and deceleration of the head. (Id.) The autopsy results suggested both "a punch or punches to the head, combined with shaking." (JA at 010.)

SUMMARY OF ARGUMENT

Victim Unsworn Statement

Appellant suffered no prejudice from the admission of C.M.'s unsworn PowerPoint statement especially given the military judge alone forum. Any error was in the mode of C.M.'s unsworn statement and not the substantive content, which was admissible.

The unsworn statement was also cumulative to other evidence properly admitted. C.M. testified under oath during sentencing to the same themes of sorrow expressed in her unsworn statement. Many pictures in C.M.'s unsworn statement were already admitted substantively as prosecution exhibits. C.M.'s mother also testified in sentencing to many of the same topics from her daughter's unsworn statement. Finally, C.M. orally presented an unsworn statement together with the PowerPoint presentation. Taken together, the photographs and music in C.M.'s PowerPoint were not "new ammunition" against Appellant in his sentencing case. United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007).

The military judge affirmed that he would give the PowerPoint statement "the weight that it deserves" and only consider it within the confines of R.C.M. 1001(c). And the military judge is presumed to know, and follow, the law. For

that reason, this Court can be confident Appellant was sentenced based on the evidence alone.

Improper Argument

Appellant waived any objection to trial counsel's sentencing argument. Trial defense counsel did not object to any portion of the argument. Then, after the sentencing argument, the military judge specifically asked if either party objected to the sentencing argument from opposing counsel. (JA at 181.) Trial defense counsel answered, "No, Your Honor." (Id.) Trial defense counsel's affirmative act in response to the military judge's direct question constitutes waiver.

Even if this Court does not apply waiver, trial counsel's arguments did not amount to plain error because the arguments were ultimately grounded in the well-recognized sentencing principles of deterrence, justice, and maintaining good order and discipline in the military.

It was not plain error for trial counsel to argue Appellant's false statements about the cause of Z.C.'s injuries as matters in aggravation because trial counsel properly tied the false statements to Appellant's interest in self-preservation instead of his interest in Z.C.'s prompt medical care.

It was also not plain error for trial counsel to argue that the military judge's sentence would "send a message" through the media to the world. And trial counsel certainly did not go so far as to tell the military judge his community would personally judge him if he did not return a severe sentence. Appellant

premises his argument on interpreting trial counsel's remarks in the most sinister light. But the Supreme Court has long held to "not lightly infer" that a prosecutor's statements were intended to carry their "most damaging meaning" or that one would automatically draw the most damaging meaning from the statements. Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974). Another, more appropriate, interpretation of trial counsel's argument is that she was reflecting on the "seriousness of the offense" and the need for the sentence to "promote adequate deterrence of misconduct." R.C.M. 1002(f) (2019 ed.).

Even if this Court finds plain error, however, Appellant suffered no prejudice. Appellant chose to be sentenced by a military judge. And the military judge is presumed to filter out impermissible argument. The military judge here stated on the record he understood trial counsel's argument were simply her "views" and ultimately rejected trial counsel's sentencing recommendation. Trial counsel argued for "at least 20-25 years of confinement." And the military judge only sentenced Appellant to 18 years confinement for murdering his infant child.

The military judge's acknowledgment shows that even if trial counsel's comments were improper, he did not allow them to infect his deliberations. This Court can be confident that the military judge sentenced Appellant based on the evidence alone, and not trial counsel's argument. This Court should therefore affirm the decision of the Air Force Court of Criminal Appeals.

ARGUMENT

I.

THE VICTIM'S UNSWORN STATEMENT DID NOT SUBSTANTIALLY INFLUENCE THE ADJUDGED SENTENCE, AND NO REMEDY IS WARRANTED.

Additional Facts

Both C.M. and C.M.'s mother testified under oath in the Government's sentencing case. (JA at 100, 095.) C.M.'s mother testified that Z.C. was her only grandchild. (JA at 096.) She spoke to the effect of Z.C.'s death on both her and C.M. Specifically, C.M.'s recounted the "hysterical" phone call she received from C.M. about Z.C.'s medical emergency. (JA at 097.) She immediately flew to her daughter's side and was present at the hospital for the last days of Z.C.'s life. (JA at 097-098.) She told the military judge seeing Z.C. in the hospital was "horrific" and "the worst thing [she] ever had to witness in her entire life." (JA at 098.) The next eight days in the hospital as Z.C. slowly died were "[e]xactly what [she] imagined hell would be." (Id.)

C.M.'s mother was affected by Z.C.'s death, telling the military judge watching her daughter grapple with it "changed [her] entire life" to where there were days when C.M.'s mother could not get out of bed or function. (JA at 099.) She testified that shortly before trial she got medication to help cope with her grief, because she has had days where she wanted to end her life. (Id.) As for the impact

of Z.C.'s death on C.M., her mother testified that it had a tremendous negative effect on C.M.: "Almost every night I get snapchats of my child crying, talking about how she misses her child, she misses being a mommy." (Id.) In short, Z.C.'s death was a "nightmare." (Id.)

C.M. testified under oath about how she wanted to be a mother "more than anything" when she grew up and how excited she was to become a mother to Z.C. (JA at 101-102.) C.M. spoke to the "indescribable" feeling when she found out Z.C. was being rushed to the hospital. (Ja. at 104.) C.M. described the "panic" as she accompanied Z.C. on a life flight to the children's hospital alone without support. (JA at 104-105.) She vividly testified that when the neurosurgeon told her that Z.C. would die, it felt "like somebody took a knife and jabbed it into my heart, and pulled it back out, and stomped on it." (JA at 106.) C.M. talked about the days in the hospital "not sleeping and freaking out," praying over Z.C "constantly." (JA at 106.) C.M. described the agonizing process praying for a miracle every day only to be told that Z.C. was "brain dead." (JA at 110.)

C.M. also testified to the painstaking decision to remove Z.C. from life support. (Id.) Doctors removed Z.C.'s wires and ventilator. (Id.) C.M. held Z.C. in her arms, laid his head on her chest, and sang to her son until he died in her arms. (Id.) C.M. did not want to watch her baby die, so she held him close to her chest. (JA at 111.) Z.C. died before C.M. finished her song. (JA at 111-112.) In that moment, C.M. prayed to God that he would allow C.M. to die with him as

well. (JA at 114.) C.M. told the military judge, "As a mom watching your child lay there and die is the worst thing I could ever imagine." (JA at 111.)

Z.C.'s death profoundly affected C.M. (JA at 114.) On top of her son dying from violent injuries, she mourned the loss of her relationship with Appellant. (Id.) C.M. had suicidal ideations. (Id.) But C.M. could not take her own life because, according to her faith, if she committed suicide she would not "get sent to where [Z.C] is at." (Id.) In sum, Z.C.'s murder changed C.M. "in every way possible." (JA at 1291.)

Following the conclusion of the Government's sentencing case, C.M., who had been appointed as the representative of Z.C. under Article 6b, UCMJ, made an unsworn statement. (JA at 115.) The unsworn statement consisted of C.M. orally addressing the military judge while using a PowerPoint slideshow that consisted of pictures of Z.C., videos of Z.C., music, and stock images. (JA at 122-124; 229.) Unprompted and without questions from trial counsel or anyone, C.M. spoke for almost three pages of the transcript, in her own words, about the impact Appellant's crime had on Z.C. and her life. (JA at 122-124.)

Before the unsworn statement, trial defense counsel objected to the slideshow. (JA at 117.) Trial defense counsel's objection was that the slideshow was not an oral or written statement under R.C.M. 1001, and it failed the M.R.E. 403 balancing test as it was improperly "stoking emotions." (Id.)

The military judge overruled the objection, citing United States v. Hamilton, 77 M.J. 579 (A.F. Ct. Crim. App. 2017), and R.C.M. 1001(c). (JA at 119-121.) In admitting C.M.'s unsworn statement, the Military Judge made clear, "as military judge alone, I'll give it the weight that it deserves, and I will consider it under the rules as I mentioned, 1001(c)." (JA at 121.)

C.M. presented her PowerPoint unsworn statement while also speaking, live, directly to the court-martial. (JA at 122-123.) Near the conclusion of the unsworn statement and playing of the accompanying PowerPoint, C.M. said, "So, all of the slides that I presented here today, videos, pictures, words I've said, words I've written on this presentation they all come from me. . .". (JA at 123.)

Standard of Review

This Court reviews a military judge's decision to admit an unsworn victim statement under R.C.M. 1001(c)[1] for an abuse of discretion. United States v. Edwards, 82 M.J. 239, 243 (C.A.A.F. 2022). A military judge abuses his discretion when his legal findings are erroneous or when he makes a clearly erroneous finding of fact. Id. (citing United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018)).

[1] R.C.M. 1001A has been incorporated into the 2019 edition of the MCM (Appendix 15, Chapter X: *Sentencing*) as R.C.M. 1001(c). At the time of Appellant's sentencing, R.C.M. 1001(c) was the governing rule.

If a military judge abuses his discretion, the Government must establish that the error in admitting the challenged evidence did not substantially influence the adjudged sentence. Edwards, 82 M.J. at 247. This Court uses four factors to evaluate whether the evidence substantially influenced the sentence: (1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. Id. at 247 (quoting Barker, 77 M.J. at 384). Two relevant considerations in determining the materiality and quality of the evidence are the extent to which the evidence contributed to the Government's case and the extent to which the Government referred to the evidence during argument. United States v. Washington, 80 M.J. 106, 111 (C.A.A.F. 2020.)

Law

In Edwards, this Court determined that the military judge abused his discretion under R.C.M. 1001A when he allowed an unsworn victim impact statement that included a video produced by trial counsel that featured trial counsel interviewing the victim's family and a slideshow of photographs set to acoustic background music. 82 M.J. at 244.

The Court concluded the judge abused his discretion for two reasons: (1) a video including music and pictures is neither a written nor oral statement, as required by R.C.M. 1001A(e); and (2) since trial counsel produced the video, the statement belonged to trial counsel rather than the victim. Id. at 241.

As for the first point, CAAF determined that the pictures and music in the video constituted neither oral nor written statements, and so were outside the parameters of R.C.M. 1001A(e). Id. As for the second point, the record established that, while trial counsel received input from the victim's family, trial counsel had produced the video. Id. at 245. This Court also reasoned that the artistic elements went "beyond just the victim impact statements from [the victim's] parents" and were attributable to trial counsel. Id. at 245-46.

The majority in Edwards determined relief was warranted because the Government had not met its burden to show the video did not substantially influence the sentence. Id. at 248. The majority opinion noted, "The Court has also reasoned that an error is more likely to have prejudiced an appellant if the information conveyed as a result of the error was not already obvious from what was presented at trial." Id. at 247 (quoting Harrow, 65 M.J. at 200).

Two judges concurred in part and dissented in part. Id. at 248 (Ohlson, C.J., concurring in part and dissenting in part). The dissenting judges reasoned that the Government had met its burden of proving the video did not substantially influence the sentence because "it was cumulative of the properly admitted victim impact evidence." Id. at 249, 250. The dissent concluded that the Government properly presented evidence that produced an effect substantially the same as that created by the improperly admitted video, thus remedy should not have been awarded. Id. at 250.

Analysis

A. Appellant is not entitled to relief because any improperly admitted portions of the victim's unsworn statement did not substantially influence the adjudged sentence.

C.M. had a right to be reasonably heard in two ways. First, she had a right to be reasonably heard as Z.C.'s lawful representative under Article 6b, UCMJ. (JA at 086.) Second, she had the independent right to be reasonably heard as a crime victim who "suffered direct…emotional…harm" as a result of Appellant killing her son. R.C.M. 1001(c)(2)(A). After testifying under oath in the Government's sentencing case, C.M. exercised both her Article 6b and R.C.M. 1001(c) rights by speaking in person directly to the military judge and using a slide show presentation as a demonstrative aid to help illustrate her words. Although this Court's opinion in Edwards disapproved the use of the photographic and musical components in C.M.'s demonstrative aids, C.M.'s spoken statements themselves were proper and would have conveyed the same basic message. Thus, Appellant suffered no prejudice.

Appellant argues AFCCA failed to analyze this Court's recognition in Edwards that it is harder to apply the Barker prejudice test in sentencing than it is in findings. (App. Br. at 12.) But the appellant in Edwards elected to be tried by a panel. 82 M.J. at 240. Here, Appellant elected to be sentenced by military judge alone. The Air Force Court correctly recognized that any erroneous parts of the victim unsworn statement would unlikely substantially influence a military judge:

"Military judges are presumed to know the law and follow it absent clear evidence to the contrary." (JA at 027.)

Here, the military judge would have known that he must sentence Appellant based on the evidence alone. (Id.) So while it is ordinarily harder for the Government to meet its burden of showing that a sentencing error did not have a substantial influence on a sentence, here, the military judge specifically affirmed he would only give the statement "the weight that it deserves," within the confines of R.C.M. 1001(c). (JA at 121.) Based on the military judge's assertion, the Air Force Court was confident that the PowerPoint presentation "did not substantially influence Appellant's sentence." (JA at 019.) Thus, AFCCA applied the correct standard for prejudice.

Appellant takes a myopic view of Edwards and argues that because his case and Edwards "both involved murder, Article 6b representatives, and impermissible unsworn statements," the prejudice result should follow suit. (App. Br. at 12.) But this Court evaluates prejudice based on "the particular factual circumstances of each case." Washington, 80 M.J. at 111.

Applying the Barker factors to the particular facts of Appellant's case, all four factors favor the Government and against awarding relief.

i. The Government's case was strong.

First, the Government's case was exceptionally strong. The evidence showed Appellant, the victim's own father, punched his helpless 5-month-old baby

in the head after being provoked by merely the child's cries. Despite multiple avenues, in the form of Z.C.'s mother or his roommate, from which to seek relief once his anger and frustration at Z.C. built, the evidence showed Appellant struck and shook his child with immense force.

C.M. provided testimony under oath about how badly she wanted Z.C., and how much she loved him and being a mom. She testified in findings about the shock of getting the phone call telling her Z.C. was unresponsive and being rushed to the hospital. She spoke about the whirlwind of emotions she felt and what the experience was like at the hospital and on the life flight as she watched Z.C. struggle to hang on to life, clinging to the hope that Z.C. would recover. C.M. also testified about the heart wrenching process of watching her baby slowly die and having to make the agonizing decision to remove Z.C. from life support. C.M. detailed the last moments of Z.C.'s life, describing how she held Z.C. on her chest and sweetly sang to him until he died, and she handed his body over to the doctors. C.M. also testified about the difficulty of moving on after Z.C. died, and wanting to die herself just so she could be with Z.C.

C.M's mother testified to the devastating impact Z.C.'s murder had on both her and C.M. She testified about the emotional pain of losing Z.C. and watching C.M. struggle through losing her child. Like C.M., her mother said the pain was so consuming there were days C.M.'s mother also did not want to be alive anymore.

The Government's sentencing case consisted of compelling, properly admitted evidence in aggravation and victim impact, leading the first factor to favor the Government.

ii. The defense's case was weak.

By contrast, the defense case was weak. The defense called several witnesses, some of whom had testified before in findings, to speak to Appellant's rehabilitative potential. (JA at 125-134.) The defense also introduced some pre-recorded witness interviews that included questions or prompts from defense counsel, potentially creating the perception of a contrived presentation instead of a genuine statement from witnesses. (JA at 142-166.) Most of the witnesses who spoke in the pre-recorded interviews were Appellant's family members, who had an evident bias even without cross-examination.

Finally, Appellant submitted a verbal unsworn statement in a question-and-answer format. (JA at 167.) The portion of his unsworn that addressed Z.C.'s death focused on Appellant's own pain in that Appellant did not get the chance to say goodbye to Z.C., attend his funeral, or grieve the way he wanted. (JA at 171.) Appellant focused his statement on what he personally lost without once acknowledging the lasting pain he caused C.M. or C.M.'s family. The defense's sentencing case, therefore, was not that compelling, and the second Barker factor favors the Government.

iii. The evidence was not material.

The third factor, the materiality of the evidence, also weighs in favor of the Government.

a) *The content of C.M.'s PowerPoint presentation was cumulative with what had been properly admitted.*

Prejudice is less likely when the information conveyed because of the error was not already obvious from what was presented at trial. Edwards, 82 M.J. at 247. The content presented in the victim unsworn statement was cumulative of what had been properly admitted through other sources.

Appellant attempts to rigidly apply Edwards as a per se rule requiring a finding of prejudice and suggesting a mathematical approach for determining prejudice. For instance, Appellant argues: "In terms of quantity, C.M.'s unsworn statement had 52 photos, while the one in Edwards only had 30." (App. Br. at 16.) As to length, Appellant argues: "the Edwards' unsworn statement was seven minutes long, while…C.M.'s total PowerPoint production is approximately ten minutes, exceeding the time in Edwards." (App. Br. at 116.) But Edwards did not announce a bright line rule to determining cumulativeness.

Here, the "information conveyed" from the music, video, and photos in the PowerPoint accompanying C.M.'s unsworn statement centered on themes of motherly love, the sorrow surrounding losing a child, and C.M.'s faith that she would see her baby again in heaven. Edwards, 82 M.J. at 247. These themes were

evident from C.M. and her mothers' sworn testimony already before the military judge. The themes were also evident from the oral statement C.M. gave which was properly presented.

The Government introduced six individual photographs of Z.C. as a happy, healthy baby as prosecution exhibits. (JA at 187-193.) The Government also introduced as a prosecution exhibit a photo collage of 60 separate photographs of Z.C. in varies settings throughout his short life. (JA at 210.) The Government also introduced 18 photographs of Z.C. intubated at the hospital after the incident. (JA at 194-212.) Thus, all the same themes C.M. captured in her PowerPoint—Z.C. as a happy baby over the first five months of his life and Z.C. in the hospital dying—were already in evidence through other sources.

Like C.M.'s sworn testimony, the music C.M. chose to include in her PowerPoint touched on themes of dying, saying farewell, and becoming an angel in heaven. Under oath, C.M. described the pain of watching Z.C. die in her arms, the pain of saying farewell, and the pain of not being able to commit suicide because then she could not join Z.C. in heaven.

Like C.M.'s oral unsworn statement, the stock photos in C.M.'s PowerPoint touch on the sadness that Z.C. will never get to experience major milestones. Orally, C.M. described how Z.C. would never get to play T-ball or graduate or get married. (JA at 123.) But one of the elements of the offense of murder was that

Z.C. had died, so it was already evident to the military judge that Z.C. would miss out on major life milestones because Appellant murdered him.

The victim's oral unsworn statement also focused on the pain C.M. experienced, as well as what she would miss out on witnessing during Z.C.'s life. Again, the fact that C.M. would not witness Z.C.'s life was already established by the evidence of his untimely passing. The properly admitted testimony from C.M. and her mother also had presented evidence of the unimaginable pain and devastating impact the crime had on C.M. While there were photos in the unsworn statement that were not otherwise admitted at trial, many were stock photos that did not depict Z.C., C.M., or anyone else associated with the case. The stock nature of the photos diminishes their value and potential to substantially influence the sentence – especially in front of a military judge.

b) *The Government did not refer to C.M.'s PowerPoint during argument.*

Moreover, in this case, trial counsel did not play or explicitly referred to any part of the victim's PowerPoint presentation during sentencing argument. As already noted, the unsworn statement contributed little to the Government's case that was not already evident through properly admitted evidence.

While Appellant concedes trial counsel never explicitly referred to the unsworn statement, he argues that trial counsel *implicitly* referred to C.M.'s unsworn statement in two ways. (App. Br. at 21.) First, trial counsel argued that C.M. would be unable to experience certain milestones in Z.C.'s life, like taking

six-month photos, saying his first words, or watching him graduate. (Id.) Appellant dubs this a "clear reference" to the portion of the unsworn statement were C.M. used stock images and animation to crumple up the stock images like trash. (Id.) But trial counsel never said, "As you heard from C.M." or "as you can see Court Exhibit A." Nor did trial counsel argue the same milestones C.M. mentioned in her unsworn statement. For instance, trial counsel did not mention Z.C.'s "first day of school" (JA at 229, page 6.) She did not argue Z.C.'s "first tee ball game." (Id., page 7.) She did not talk about "marriage." (Id., page 9.) The only overlap to the stock images is trial counsel's fleeting reference to C.M. "never going to get to watch him graduate." (JA at 180.) But C.M. already expressed the graduation theme during her oral unsworn when she said, "I'll never be able to…applaud as he walks across the stage on graduation day." (JA at 123.)

Next, Appellant argues that trial counsel implicitly referenced C.M.'s unsworn statement when she argued there is "no word" in the English language for a mother who has lost her child. (App. Br. at 22.) Appellant contends this argument "aligns with the emotion the PowerPoint production was intended to evoke." (Id.) But this argument equally aligns with the emotion C.M.'s sworn testimony was intended to evoke as she testified "being a mom…was everything I had ever dreamed of." (JA at 102.) It also aligns with the emotion C.M.'s oral unsworn statement was intended to evoke when she orally relayed: "They say having children is like watching your heart walk around on the outside your body.

I wake up every day wondering how I'm supposed to go on living without my heart." (JA at 123.)

The non-materiality of the unsworn statement, particularly in the judge alone forum, weighs against remedy and pushes the third Barker factor in favor of the Government.

iv. The quality of the evidence was not high.

The fourth Barker factor, the quality of the evidence, also weighs in favor of the Government.

Again citing Edwards, Appellant contends the "artistic expressions" in C.M.'s PowerPoint created a "similar effect as if Trial Counsel would have been involved in its production" which, in turn, "dramatically increased the quality of the unsworn." (App. Br. at 20.) But this Court in Edwards did not hold that a victim may not artistically express themselves during an unsworn statement. Rather, this Court focused on how *trial counsel*, in producing the video, "made creative and organizational decisions that lead us to believe that the video incorporated [trial counsel's] own personal artistic expression." 82 M.J. at 246. Here, the Government did not seek to "supplement its sentencing argument by putting its own statements—oral, written, artistic, or otherwise—into the victim's mouth." Id. On the contrary, C.M. made clear that everything she presented came solely from her. (JA at 123.) So this case is different from Edwards in that the statement was solely C.M.'s statement, not trial counsel.

Unlike the unsworn statement presented in Edwards, which was created by trial counsel, who were trained and experienced in advocacy and persuasive communication, the unsworn statement here was created by C.M. She noted repeatedly during the unsworn statement she was not a trained public speaker, and that the content, including the photos and videos, were her creation. (JA at 122-124.) Rather than a presentation prepared by trained advocates with a duty to further the Government's cause, the presentation here was one built by a novice with a duty only to the victim. The overall quality of the evidence and its presentation, therefore, weighs in favor of the Government.

Next, Appellant argues that the last slide of the victim's PowerPoint presentation, depicting a photograph of Z.C. wrapped in Appellant's uniform, resembles the video of the father in Edwards crying into his son's uniform. (App. Br. at 18.) The Court in Edwards analyzed the uniform moment as "heart-wrenching" in terms of its "potential to influence the sentencing decision of the *panel*." 82 M.J. at 247-48 (emphasis added). But here, the photograph was before the military judge as part of the photo collage admitted as a prosecution exhibit. (JA at 210.)[2]

[2] Appellant contends the copy of Prosecution Exhibit 36 in the Joint Appendix is "too small and blurry to confirm," but the Government contends the picture at issue is depicted in the far-right column of the photo collage. (App. Br. at 7, n.1.)

Here, a judge, while human, "is generally less apt to be emotionally swayed by the facts of the crime" than a panel. Lynch v. Fla. Dep't of Corr., 776 F.3d 1209, 1230 n.17 (11th Cir. 2015). In the Mil. R. Evid. 403 context, this Court has made clear "the potential for unfair prejudice [is] substantially less than it would be in a trial with members." United States v. Manns, 54 M.J. 164, 167 (C.A.A.F. 2000). So, the "strong emotional response" Appellant complains of is lessened when sentenced by military judge alone. (App. Br. at 17.) This is especially so when the military judge is presumed to know, and follow, the law that dictates he should fashion his sentence not "upon blind outrage and visceral anguish," but upon "cool, calm consideration of the evidence and commonly accepted principles of sentencing." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000).

Appellant likens the music in the victim's unsworn statement to the "emotional displays" this Court warned about in United States v. Pearson, 17 M.J. 149, 153 (C.M.A. 1984). (App. Br. at 19.) But Pearson was also a case involving panel members. In Pearson, the victim's father testified to dissatisfaction with the panel's conviction of negligent homicide rather than murder. 17 M.J. at 151. An officer from the victim's unit testified that "the whole squadron has been waiting to find out the verdict of this court, and to see how his killer was going to be treated." Id. Because the military judge did not instruct the members on these "[e]motional displays" in the courtroom, and the appellant was sentenced to "the literal maximum punishment" possible, the Court found prejudice. Id. at 149.

The same cannot be said in Appellant's case. Here, even if the victim's PowerPoint was considered an improper "emotional display," the military judge stated he would give it "the weight it deserves." (JA at 121.) The degree of C.M.'s loss was apparent from the facts of the case, her sworn testimony, her oral unsworn statement, and her mother's sworn testimony. The sentimental music C.M. chose to play would not have provided "new ammunition" that would have properly swayed the military judge. Harrow, 65 M.J. at 200.

Any error in allowing C.M.'s unsworn PowerPoint demonstration did not substantially influence the adjudged sentence. The somber and sorrowful themes expressed in the PowerPoint were already apparent from other evidence properly admitted, including sworn testimony, prosecution exhibits, and C.M.'s oral unsworn statements accompanying the PowerPoint. Moreover, because Appellant was sentenced by a military judge who affirmatively declared he would only give the PowerPoint the "weight it deserve[d]," this Court can be satisfied the judge was not unduly swayed by the emotional content of the PowerPoint presentation. Appellant suffered no prejudice and is not entitled to relief.

II.

APPELLANT WAIVED ANY CLAIM OF IMPROPER ARGUMENT. BUT EVEN IF THIS COURT DOES NOT APPLY WAIVER, TRIAL COUNSEL'S SENTENCING ARGUMENT DID NOT AMOUNT TO PLAIN ERROR, AND APPELLANT HAS NOT ESTABLISHED PREJUDICE.

Additional Facts

Appellant elected to be tried by a panel of officer and enlisted members, but to be sentenced by a military judge alone. (JA at 030.) Trial counsel's sentencing argument lasted about 30 minutes and spanned less than 4 pages of the transcript. (JA at 670, 689, 691, 704.) Trial defense counsel never objected. At the end of trial counsel's argument, the military judge said, "Thank you for your *views*, trial counsel." (JA at 180) (emphasis added.)

During her sentencing argument, trial counsel argued Appellant's false statements about the source of his son's injuries were aggravating because they showed a lack of remorse and jeopardized his son's prompt treatment:

> But what does he not do, he doesn't tell the truth about what just happened? In that split second [Appellant] goes from beating his son into self-preservation mode. He is more interested in protecting himself, keeping himself out of trouble then [sic] getting his son the help that he so desperately needs. He tells [his roommate], I don't know what happened. A couple of minutes later, the first responders show up, he has a little bit more time, and he tells them well, I'm not sure what happened, [Z.C.] was feeding and ma[de] some choking noise. But I just don't know what happened.

> He gets to the hospital, and the doctors say, your kid has a bruise on his head. So then [Appellant] says, oh well it was the taco – or the bouncy thing, the jumper. And then when he goes to law enforcement, while his son is fighting for his life, [Appellant] tells lie, after lie, after lie, after lie, until we finally get a piece of truth. [Appellant] finally admits, yes, I punched my son.
>
> …
>
> [Appellant]'s repeated lies were designed to keep him out of trouble and were in complete disregard to the well-being and safety of his baby. These are aggravating circumstances surrounding the [Appellant]'s crimes.

(JA at 177.)

Trial counsel also argued Appellant's sentence should send a message:

> You have seen the media, and you see the people in the courtroom, and you have heard witness testimony talking about the media interest in this case, the world is watching. The world wants to know what price tag you're going to put on this accused for murdering his son. Send a message that promotes respect for the law. Send a message that deters others from ever thinking of doing what the accused did. And send a message to promote justice in this case.

(Id.)

The defense ended its sentencing argument by responding to trial counsel's theme about sending a message:

> I agree with trial counsel, I agree that you have the opportunity, the unique opportunity to send a message. There are a lot of people here before you, a lot of people will read about your ruling, will understand that you have the unenviable task of handing down a sentence in this case, but I propose, Your Honor, that you send a different message. Not about what a human life is worth. Send a message that each of us is more than the worst thing that

we have done.

(JA at 185.)

The defense had the last word in sentencing. (JA at 751-52.) At the close of the defense's sentencing argument, the military judge asked, "Do counsel object to opposing counsel's argument or have any additional requests of this Court? Other than rebuttal argument?[3]" (JA at 185.) Trial counsel responded, "No, Your Honor." (Id.) Trial defense counsel likewise responded, "No, Your Honor." (Id.)

Standard of Review

"Whether an appellant has waived an issue is a legal question that this Court reviews *de novo*. Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation and internal quotation marks omitted).

An affirmative statement that an accused at trial has "no objection" generally "constitutes an affirmative waiver of the right or admission at issue." United States v. Swift, 76 M.J. 210, 217 (C.A.A.F. 2017) (citation omitted). And a valid waiver leaves no error for this Court to correct on appeal. United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

[3] The military judge previously allowed "one argument per side." (R. at 1346.)

This Court reviews forfeited issues for plain error. Id. To establish plain error, the appellant bears the burden of demonstrating: (1) there was error; (2) such error was plain, obvious, or "clear under current law"; and (3) the error resulted in material prejudice to a substantial right. Id. at 88-89; United States v. Olano, 507 U.S. 725, 734 (1993).

In determining whether prejudice exists, military courts balance three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). In United States v. Halpin, this Court extended this test to improper sentencing arguments. 71 M.J. 477, 480 (C.A.A.F. 2013). Reversal for an improper sentencing argument is appropriate only if "trial counsel's comments, taken as a whole, 'were so damaging that [the Court] cannot be confident that [the appellant] was sentenced on the basis of the evidence alone.'" United States v. Frey, 73 M.J. 245, 259 (C.A.A.F. 2014) (quoting Halpin, 71 M.J. at 480).

Law

Over seventy-five years ago, the Supreme Court admonished prosecutors to "refrain from improper methods calculated to produce a wrongful conviction . . . ." Berger v. United States, 295 U.S. 78, 88 (1935). The line separating zealous advocacy from prosecutorial misconduct is not always bright. Our adversarial system allows a prosecutor to "prosecute with earnestness and vigor." Id.

Trial counsel is "charged with being as zealous an advocate for the Government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 266 (C.M.A. 1986). In this regard, it is appropriate for trial counsel "to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." Baer, 53 M.J. at 237.

This often-fine distinction may be blurred by the emotionally charged atmosphere inherent at trial. As Learned Hand observed: "It is impossible to expect that a criminal trial shall be conducted without some showing of feeling; the stakes are high, and the participants are inevitably charged with emotion." United States v. Wexler, 79 F.2d 526, 529-530 (2d Cir. 1935), *cert. denied*, 297 U.S. 703 (1936).

Perhaps the most fertile ground for emotion in the courtroom lies within the realm of sentencing arguments. The law has long recognized that summation is not a "detached exposition," Wexler, 79 F.2d at 530, with every word "carefully constructed . . . before the event," DeChristoforo, 416 U.S. at 646-47. Because closing and sentencing arguments often require "improvisation," courts will "not lightly infer" that every statement is intended to carry "its most dangerous meaning." Id. It is appropriate for trial counsel—who is charged with being a zealous advocate for the Government—to be "emphatic, forceful, blunt and passionate in addressing the legitimate concerns and objectives of sentencing."

United States v. Baer, NMCM 97 02044, 1999 CCA LEXIS 180, at *6 (N-M Ct. Crim. App. 30 June 1999) (unpub. op.), *aff'd*, 53 M.J. 235 (C.A.A.F. 2000).

The Government has a right to offer evidence in aggravation at sentence under R.C.M. 1001(b)(4) to show any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. R.C.M. 1001(b)(4).

While the "experienced and professional military lawyers who find themselves appointed as trial judges" are assumed to be able to appropriately consider only relevant material in assessing sentencing, the same cannot be said for members. United States v. McNutt, 62 M.J. 16, 26 (C.A.A.F. 2005) (quoting United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)).

Analysis

A. Appellant waived his claim of improper argument.

Although the Courts of Criminal Appeals have plenary authority to review cases despite an appellant's affirmative waiver, this Court does not. United States v. Chin, 75 M.J. 220, 222-23 (C.A.A.F. 2016).

Trial defense counsel did not object to any portion of the Government's sentencing argument as trial counsel delivered it. The Government acknowledges that failure to object during argument normally constitutes forfeiture, and the appropriate standard of review would be plain error. However, at the end of the sentencing argument from both parties, the military judge specifically asked if

either party objected to the sentencing argument from opposing counsel. (JA at 181.) Trial defense counsel answered in the negative. (Id.) Trial defense counsel's affirmative act in response to the military judge's question that the Defense did not object to trial counsel's sentencing argument constitutes waiver.

At the time of the military judge's question, trial defense counsel had time to consider the Government's sentencing argument in full, make his own sentencing argument, and then determine, with the benefit of time and reflection, if he had any objection. He did not. Thus, the affirmative action of telling the military judge that the defense did not object to the Government's sentencing argument when asked was a deliberate decision that constitutes waiver. Since any objection to trial counsel's argument was affirmatively waived, there is nothing for this Court to correct on appeal. Davis, 79 M.J. at 331.

Appellant argues that because this Court decided Norwood six days *after* trial counsel's argument, Appellant should benefit from the change in law and find this issue forfeited and not waived. (App. Br. at 47-48.) But "changes in the law" did not spring from Norwood. United States v. Tovarchavez, 78 M.J. 458, 462 (C.A.A.F. 2019) ("An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal.") On the contrary, this Court in Norwood reiterated that it "had *repeatedly* held that 'a court-martial must reach a decision based only on the facts in evidence.'" 81 M.J. at 21 (additional citations omitted) (emphasis added.) This Court then cited the operative language from United States

v. Wood, 18 C.M.A. 291 (C.M.A. 1969): "Trial counsel may properly ask for a severe sentence, but [they] cannot threaten the court members with the specter of contempt or ostracism if they reject [their] request." Norwood, 81 M.J. at 21.

For that reason, even though Norwood had not yet been decided of Appellant's court-martial, Wood had been good law for 52 years. So had all the cases "repeatedly" holding that "a court-martial must reach a decision based only on the facts in evidence." 62 M.J. at 83 (citing United States v. Bouie, 9 C.M.A. 228, 233 (1958)). Thus, trial defense counsel was on notice that he could object to improper argument if he perceived trial counsel's arguments as threatening the military judge with the specter of contempt or ostracism. Since trial defense counsel affirmatively declined to do so, this Court should find the matter waived.

B. Trial counsel did not plainly err by arguing Appellant's lies about what happened to Z.C. because it was aggravating that Appellant was more motivated to avoid culpability than he was to help his son.

Appellant argues, for the first time on appeal, that trial counsel improperly argued Appellant's lies as matters in aggravation. This argument was not error, less plain error.

All of Appellant's lies to his roommate, first responders, and law enforcement were admitted into evidence during findings without objection. At six junctures, law enforcement explained the importance of Appellant truthfully telling them what happened with Z.C. so that the doctors could better treat his injuries. A medical provider testified, without objection, that understanding the mechanism of

an injury is "important" because it provides a "more clear picture" of how to treat the patient. (R. at 344.)

Despite no objection at trial, Appellant now argues if the Government had chosen to charge him with his false statements, he "could have fully challenged whether or not those statements were actually false." (App. Br. at 39.) But Appellant disregards the fact that every individual to whom Appellant made a false statement testified at trial. (JA at 058, 060, 067, 071, 077.) Despite trial defense counsel having cross-examined them all, Appellant did not take the opportunity to challenge these statements at trial. (Id.) Moreover, the Government could not have charged Appellant's false statements to civilians as false official statements under Article 107, UCMJ, as they were not "official statements" within the definition of the statute. MCM, Part IV, ¶ 41c.(1)(b).

Trial counsel's sentencing argument properly focused on the impact Appellant's lies had on Z.C.'s medical care as aggravation under R.C.M. 1001(b)(4). It is aggravating that at the same time doctors were trying to preserve Z.C.'s life, Appellant was weaving four versions of what happened to law enforcement to preserve his liberty. It was not error to argue that Appellant's lies, aimed at protecting himself rather than his son, were aggravating.

Appellant contends trial counsel's argument was plain error under Warren. (App. Br. at 3.) But Warren is distinguishable. In Warren, the appellant testified under oath in his own defense in findings. 13 M.J. at 279. After the appellant was

convicted, in sentencing, trial counsel argued to punish the appellant more harshly for his lies:

> And it also needs to be demonstrated to this individual that lying about it is going to subject him to severe punishment.
>
> …
>
> Maybe that will teach him the importance of telling the truth
> …
>
> This man needs a severe punishment…because we have seen in the case in chief what kind of individual this man is. He is capable of getting up there and lying on the witness stand.

Id. at 279-280.

The Warren Court held, "in sentencing, a military judge may properly consider that the accused's false testimony in his own defense tends to refute claims of his repentance and readiness for rehabilitation." Id. at 284. That said, the Warren holding did not restrict the ability to argue an accused's lies to others as aggravation if properly tied to the evidence.

Here, Appellant did not testify in his own defense. The focus of trial counsel's argument was how Appellant's lies were focused on self-preservation and the critical needs of his infant child. As the Air Force Court correctly found, "[t]rial counsel properly connected the false statements to the negative impact on ZC's medical care, which he was only receiving as a direct result of Appellant's crimes." (JA at 027.)

At bottom, trial counsel did not invite the military judge to sentence Appellant for perjury or "mete out" more punishment for lies. Warren, 13 M.J. at 285-86. Instead, she properly asked the military judge to consider Appellant's lies as "aggravating circumstances surround [Appellant's] crimes." (JA at 177.) Appellant also incorrectly suggests that it was improper for trial counsel to say that the aggravating circumstances "deserve at least 20-25 years confinement." (App. Br. at 33-34.) But R.C.M. 1001(a)(1)(A)(iv) makes clear that "evidence of aggravation" may "aid the court-martial in determining an appropriate sentence." Here, the aggravating circumstances of Appellant's crime provided justification for trial counsel's recommended sentence.

Appellant argues this case is "unique because Trial Counsel had actual knowledge of the case law that prohibited her from arguing [Appellant]'s uncharged, false statements as a matter in aggravation." (App. Br. at 31.) But the exchange between the military judge and trial counsel to which Appellant refers was more nuanced than Appellant suggests.

Trial counsel informed the military judge she intended to call witnesses in sentencing to testify that Appellant told them, "He was either forced to confess" to police or "he doesn't remember confessing." (JA at 089.) Trial counsel argued the evidence was admissible to show Appellant's "lack of remorse" and "ability to be rehabilitated." (Id.) In this context, the military judge asked trial counsel for a case that supported her position in admitting Appellant's lies to show a lack of

remorse and lack of rehabilitation. (JA at 092.) Trial counsel responded with case law that "false statements about…an offense made sometime after the offense are not admissible as evidence in aggravation." (Id.) The defense counsel clarified if trial counsel's position was that "false statements were not admissible as evidence in aggravation?" to which trial counsel responded, "False statements *about* an offense, yes." (JA at 093) (emphasis added.) The military judge never ruled on this issue because trial counsel withdrew her request to offer that type of evidence. (Id.)

Trial counsel's acknowledgment of the case law that prohibited false statements about an offense was in the context of substantively admitting evidence in sentencing that Appellant lied to witnesses about his confession to police. This is different than how trial counsel argued Appellant's unobjected-to lies to his roommate, first responders, and investigators that were admitted in findings. In general, lying to someone about committing an offense is not admissible simply to show someone is a bad person and deserves more punishment. But here, Appellant's lies had been admitted and they were directly related to the offense of which Appellant was found guilty.

Because the lies Appellant told directly related to his indifference about Z.C. receiving proper treatment for his injuries and Z.C. ultimately died, trial counsel did not err, no less plainly err, by arguing these as aggravating "medical impact" on Z.C. under R.C.M. 1001(b)(4).

C. Trial counsel did not plainly err by arguing Appellant's sentence should send a message to the watching world because it was a plea for general deterrence.

Trial counsel never impermissibly invited the military judge to sentence Appellant based on community or media expectations. Nor did she state the Air Force was expecting or demanding a particular sentence. Instead, trial counsel sought to persuade the military judge to return a sentence that properly accounted for the need for general deterrence and preservation of good order and discipline when she referred to the media and spectators watching the public proceedings. Furthermore, when trial counsel argued an idiom, "The world wants to know what price tag you're going to put on this accused for murdering his son," she was merely asking the military judge to consider the need for the sentence to reflect the seriousness of the offense.

Appellant concedes trial counsel "did not explicitly say the community would ask the Military Judge about his decision." (App. Br. at 45.) However, Appellant argues "the upshot was clear: The world was watching him, and the world would judge him for his sentence." (Id.) But Appellant defies the Supreme Court's direction not to "lightly infer" that trial counsel's statements were intended to carry their "most damaging meaning. Donnelly, 416 U.S. at 647.

i. *Trial counsel properly argued general deterrence, the seriousness of the offense, and the need to uphold good order and discipline.*

Appellant argues it was plain error for trial counsel to say the sentence would send a message to "the world." (App. Br. at 24.) But the very nature and purpose of military law is to "assist in maintaining good order and discipline in the armed forces." MCM, Preamble, Pt. I, ¶ 3. R.C.M. 1002(f) (2019 ed.) reflects proper considerations in sentencing, and it echoes the sentiment of the Preamble that the sentence needs "to promote justice and to maintain good order and discipline in the armed forces," and, among other things:

(A) Reflect the seriousness of the offense;

(B) Promote respect for the law;

(C) Provide just punishment for the offense;

(D) Promote adequate deterrence of misconduct; and

(E) Protect others from further crimes by the accused.

R.C.M. 1002(f).

Trial counsel's arguments strongly tied into the court-martial's need to impose a sentence that upheld good order and discipline. By its sentence, a court-martial necessarily sends a message to those who know of Appellant's crime and his sentence and deters them from committing the same or similar offenses. The effect of the sentence on good order and discipline must be carefully weighed: "In a large city, or large federal judicial division, an unusually light or harsh sentence may not even be noticed. The same cannot be said of a military unit." Captain

Denise K. Vowell, To Determine an Appropriate Sentence: Sentencing in the Military Justice System, 114 Mil. L. Rev. 87, 180 n. 481 (1986). A sentence sends a message and, in turn, upholds good order and discipline in the armed forces as it deters others in the close-knit military community from committing crimes. For these reasons, when trial counsel noted "the media interest," "the people in the courtroom," and hyperbolically stated, "the world is watching," she properly tied these concepts to sentencing principles when she continued her argument: "Send a message that promotes respect for the law. Send a message to deter others from ever thinking of doing what the accused did. And send a message to promote justice in this case, Your Honor." (JA at 177.)

Appellant argues trial counsel did not properly invoke general deterrence because she never mentioned the sentencing principle by name during argument and never explained what it meant. (App. Br. at 51-52.) But there are not magic words an advocate must use to invoke general deterrence as a sentencing principle. This is especially the case in a military judge alone forum, where the military judge is acutely aware of what general deterrence means. The overall tenor of trial counsel's arguments implicated general deterrence by speaking to the need for the sentence to deter those who know of Appellant's crime ("spectators" and "the world") from committing the same or similar offenses. R.C.M. 1002(f)(3)(D).

ii. *The lack of binding precedent addressing the complained-of arguments tends to show there was no plain error.*

Appellant cites no precedent from any court holding that the same arguments made here are improper. "The absence of any controlling precedent strongly undermines Appellant's argument that the military judge committed plain or obvious error by [not interrupting trial counsel's sentencing argument.]" United States v. Bench, 82 M.J. 388, 394 (C.A.A.F. 2022) (citing United States v. Lange, 862 F.3d 1290, 1296 (11th Cir. 2017) ("there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it" (internal quotation marks omitted) (citation omitted)); *see also* United States v. Akbar, 74 M.J. 364, 398-99 (C.A.A.F. 2015) (explaining that absence of case law "is not dispositive" for plain-error analysis but "does tend to show that" there was no plain or obvious error).

Appellant relies on a civil Fifth Circuit case in which the Court found error with a plaintiff's argument that referenced, among other things, "what price [the victim]'s son might want to put on a daddy." (App. Br. at 43.) But the Court in that case did not address the "price" argument individually. Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 285-86 (5th Cir. 1975). In the context of a jury trial, the Fifth Circuit found collective error in the plaintiff's closing argument for arguing facts not in evidence, playing on personal associations with the deceased,

evoking the image of the deceased's children crying at the graveside, and urging the jury to exact retribution on the defendants. Id.

Appellant next cites two civil jury cases from the Court of Appeals of Iowa to argue trial counsel plainly erred by referencing "the world is watching." (App. Br. at 44.) In Conn v. Alfstad, the defense counsel told the jury in closing argument, "the world is watching them and everyone around the state is watching them" as they decide on a verdict. No. 10-1171, 2011 Iowa App. LEXIS 1090, at *5 (Ct. App. Apr. 27, 2011). The Iowa Court held that argument suggested that "the amount of damages awarded by the jury would be critiqued by the public and might expose the jurors to criticism." Id.

In Kipp v. Stanford, the plaintiff's counsel urged the jury to "to be a hero" for the plaintiff, to "tell a story to the community," and hold the defendant accountable for his "betrayal." 949 N.W.2d 249 (Iowa Ct. App. 2020). The Court found error with "pervasive arguments by Plaintiff's counsel urging the jury to use their power to set a standard for the community" which included telling personal anecdotes and asking the members vivid hypothetical about returning to their communities after the trial and being asked about their verdict. Id. Counsel's improper comments in Kipp occurred during both closing and rebuttal argument and were the "theme" of the plaintiff's case. Id.

Both Conn and Kipp are distinguishable. First, they are both civil cases. "Private civil litigants present a very different case from criminal defendants."

United States v. De Gross, 960 F.2d 1433, 1445 (9th Cir. 1992). Civil litigants seek to vindicate personal and private rights and interests. In contrast, the Government is a party to a criminal case and seeks to enforce the public's right to enforcement of criminal law and the rights of individual defendants. Moreover, Conn and Kipp involved juries while Appellant's case here was a bench trial.

Trial counsel's argument that the sentence would "send a message" is like arguing that the sentence will "make a statement," which the Sixth Circuit endorsed in Irick v. Bell:

> With your verdict, you make a statement…You will make a statement about the value of [the victim]'s life. You will make a statement about what this man did and your willingness to tolerate it. You will make a statement to everybody else out there what is going to happen to people who do this sort of thing.

565 F.3d 315, 324-25 (6th Cir. 2009).

The Sixth Circuit concluded the similar "make a statement" argument was proper because appeals to general deterrence are permissible in sentencing arguments. Id. at 325. Here, trial counsel was asking the military judge to adjudge a sentence that would not only deter others but would also maintain good order and discipline by sending the message that the military will not tolerate crimes like Appellant's.

iii. *Trial counsel did not pressure or threaten the military judge with the specter of contempt or ostracism if he rejected her sentence recommendation.*

Appellant contends that trial counsel's words "were enough of an implicit threat to make clear to the Military Judge that he would be accountable to the world and fellow service members for his sentence." (App. Br. at 47.) To that end, Appellant argues trial counsel exerted "medial and social pressure" on the military judge in order "to coerce a tough sentence." (Id.)

But the O-6 military judge was significantly senior in rank and position to the O-4 trial counsel arguing before him. He was also not stationed at Ellsworth Air Force Base where the trial occurred. Thus, he would not have been easily coerced by a junior counsel's personal "views" on sentencing. (JA at 180.) He was also not part of the same community where the crime occurred, or the media coverage ensued. Because of the military judge's rank, routine interaction with trial counsel, and independent position, there did not exist the same pressure present in Norwood when trial counsel asked "the members to consider how their fellow service-members would judge them." Id. at 21. There likewise did not exist the same risk as Norwood that the military judge would "return to [his] normal duties" and a colleague, no less a fellow judge, would ask him, "Wow, what did [Appellant] get for that?" 81 M.J. at 19.

Next, Appellant contends the way that counsel and the military judge guarded against media pressure preceding sentencing supports a finding of plain

and obvious error. (App. Br. at 48.) Appellant broadly cites a myriad of state and federal cases discussing the limitations of media at trial and, from them, argue that mentioning the media to a military judge during sentencing argument is plain error. But every case Appellant cites involves juries. The only case that refers, in passing, to the impact media may have on judges is Estes v. Texas, 381 U.S. 532 (1965). Appellant relies on the following quote from Estes: "Our judges are high-minded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them directly and through the shaping of public opinion." (App. Br. at 42.) From that, Appellant concludes the Supreme Court warned against "the danger publicity posed to a jury and judges." (Id.) But the quote Appellant cites is incomplete. The very next sentence reads: "Moreover, when one judge in a district or even in a State permits telecasting, the requirement that the others do the same is almost mandatory. Especially is this true where the judge is selected at the ballot box." Estes, 381 U.S. at 549.

Unlike Estes, here, Appellant's case was not broadcasted live. And the military judge was not an elected official subject to the same public or political pressures inherent in a judiciary selected by the popular vote at the ballot box. Thus, the Supreme Court's holding in Estes, warning that "telecasting is particularly bad where the judge is elected," has limited application to a case with no telecasting and a non-elected judge. Id. at 548.

Under a plain-error standard, trial counsel's arguments were grounded in recognized and accepted sentencing principles and did not cross the "exceedingly fine line which distinguishes permissible advocacy from permissible excess," especially considering the dearth of case law proscribing the specific arguments trial counsel made. Fletcher, 62 M.J. at 183.

D. There was no prejudice because the military judge is presumed to filter out improper argument and not rely on it in fashioning a sentence.

Even if some of trial counsel's statements were error, Appellant cannot show prejudice. "When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle." United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000). This is because the "military judge is presumed to know the law and apply it correctly, is presumed to capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence." Id. This presumption applies equally to improper argument in a military judge alone forum: "In a military judge alone case we would normally presume that the military judge would disregard any improper comments by counsel during argument and such comments would have no effect on determining an appropriate sentence." United States v. Waldrup, 30 M.J. 1126, 1132 (N-M.C.M.R. 1989). As a result, "plain error before a military judge sitting alone is rare indeed." Robbins, 52 M.J. at 457.

Arguments by counsel are not evidence. United States v. Clifton, 15 M.J. 26, 29 (C.M.A. 1983). And the military judge demonstrated his understanding of this when he thanked each side for their "views." In balancing the three Fletcher factors, any error was harmless.

i. *The severity of any misconduct was low.*

In analyzing the first Fletcher factor, assuming some of trial counsel's arguments amounted to plain error, the severity of the misconduct must have been low as Appellant made no effort to object to any of trial counsel's comments either during, or after argument.

Appellant's trial defense counsel showed the minimal impact trial counsel's argument had on the case when he chose to not object. Failure to object to trial counsel's argument is "some measure of the minimal impact of [the] prosecutor's improper argument." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001). After all, trial defense counsel "was in the best position to determine the prejudicial effect of the argument." United States v. Scamahorn, No. NMCCA 200201583, 2006 CCA LEXIS 71, at *42 (N-M Ct. Crim. App. 27 March 2006) (unpub. op.). Appellant's counsel should not be able to sit silently through multiple possible objections during sentencing argument – making no attempt to cure the alleged errors – and then claim on appeal that the argument was so prejudicial that it requires set aside of the sentence.

The lack of objection was a "tactical decision." *See* Darden v. Wainwright, 477 U.S. 168, 182 (1986) (finding no prejudice from prosecutorial misconduct where a defense counsel made "tactical decision[s]" in case strategy.) After allowing trial counsel's arguments to proceed, without interruption, defense counsel aptly re-framed the debate: "I agree with trial counsel, I agree that you have the opportunity, the unique opportunity to send a message. There are a lot of people here before you, a lot of people will read about your ruling… but I propose, Your Honor, that you send a different message. Not about what a human life is worth. Send a message that each of us is more than the worst thing that we have done." (JA at 705.)

Defense counsel's own argument explains why he allowed trial counsel's argument—he did not think the argument was effective. The improper comments were thus neutralized by trial defense counsel's argument. Thus, Appellant's tactical decision to counter, rather than object to trial counsel's earlier argument should not be held against the United States. *See* Norwood, 81 M.J. at 24 (Sparks, J., dissenting) ("Defense counsel in this case was best situated to determine which parts of trial counsel's argument were worth objecting to and which were not.") Rather than object, trial defense counsel chose to rebut the themes brought up by trial counsel in his own sentencing argument. This proved successful, as Appellant avoided the maximum possible punishment and trial counsel's plea for 20-25 years confinement. *See* United States v. Gulley, NMCM 94 00626, 1995 CCA LEXIS

495, at *5 (N-M Ct. Crim. App. 27 September 1995) (unpub. op.) (rather than objecting, trial defense counsel echoed trial counsel's "send a message" argument theme by arguing the appropriate message was already sent by the fact that the appellant was tried by a public court-martial); *See* United States v. Palacios Cueto, 82 M.J. 323, 335 (C.A.A.F. 2022) ("Civilian defense counsel also effectively responded to most of what trial counsel said, especially with respect to the suggestion that justice required a finding of guilt."). Instead, Appellant received 18 years confinement, which was far less than the maximum punishment of life without parole.

The defense had also the last word. This was a curative measure. United States v. Phillips, 914 F.2d 835, 845 (7th Cir. 1990) (citing Darden, 477 U.S. at 182-83) ("The defense's opportunity to rebut the prosecutor's improper remark is a factor militating against a finding of prosecutorial misconduct."). Here, the last word the military judge heard was trial defense counsel's plea that the judge, "Send a message that each of us is more than the worst thing that we have done." (R. at 1359.) Trial defense counsel aptly rebutting trial counsel's comments in argument and thus dissipated the effect of any improper argument.

Finally, trial counsel's comments did not "permeate" the entire argument. Fletcher, 62 M.J. at 184-85. Evaluating any error against the entire record, any misconduct was cabined to a small portion of trial counsel's argument on the ninth, and final, day of trial. In this regard, any misconduct was not "pronounced and

persistent." Berger, 295 U.S. at 89. Trial counsel's comments reflect a small portion of an otherwise fair and lengthy proceeding.

ii. *The military judge's presumptive knowledge of the law and defense counsel's argument were enough to cure any allegedly improper insinuations by trial counsel.*

Turning to the second Fletcher factor, Appellant argues that the military did not "take any curative measures." (App. Br. at 55.) But without any objection from defense, the military judge is presumed to know, and follow, the law. This presumption includes the military judge knowing that trial counsel's arguments were merely her individual views and the presumption that "the military judge is able to filter out improper argument in the absence of evidence to the contrary." United States v. McCall, No. ACM 39548, 2020 CCA LEXIS 97, at *20 (A.F. Ct. Crim. App. 26 March 2020) (unpub. op.) This is not an instance in which the military judge endorsed the erroneous aspects of trial counsel's argument or demonstrated his passions were inflamed after trial counsel's argument.

In Waldrup, the trial counsel improperly argued, among other things, that Appellant was "a despicable and disgusting man," he "should be ashamed for what he did," and then argued the military judge should sentence the appellant not just for his charged offenses, but also the way he conducted his uncharged "private interpersonal relationships." 30 M.J. at 1132. After trial counsel's sentencing argument, the military judge declared on the record that he agreed "wholeheartedly with the comments of trial counsel concerning the despicable nature of

[appellant]'s conduct in this case." Id. The Navy-Marine Corps Court recognized that it would "normally presume that the military judge would disregard any improper comments by counsel during argument," but given "the specific statement by the trial judge which adopted the trial counsel's comments," the Court could not make such a presumption.

Here, unlike Waldrup, the military judge's comment thanking trial counsel for her "views" was enough to neutralize Appellant's complaint that the military judge perceived an expectation to return a specific sentence based on demands of society or because of Appellant's lies.

iii. *The overwhelming weight of the evidence supporting the sentence adjudged heavily weighs in the Government's favor.*

Though Fletcher recommended a balancing of all three factors, it did not assign a particular value to each or comment whether these factors should be weighed equally. In Halpin, this Court found that the third Fletcher factor weighed "so heavily in favor of the Government" that it could be fully confident the appellant was sentenced based on the evidence alone. 71 M.J. at 480. The Court should likewise find the third Fletcher factor so heavily weighs in the Government's favor as to deny relief.

As in Halpin, the weight of evidence supporting the sentence adjudged was strong. Trial counsel's half-hour sentencing argument paled in comparison to

Z.C.'s mother testifying under oath to her anguish at her infant son's death and the autopsy photos admitted into evidence.

Trial counsel's argument could not possibly have inflamed the military judge's passions "more than did the facts of the crime." Payne v. Tennessee, 501 U.S. 808, 832 (1991). Trial counsel's comments were "bland and pale" in comparison to the evidence of Z.C. slowly dying over nine days and were of "minimal impact" given the judge alone forum. United States v. Hutchinson, 15 M.J. 1056, 1066-67 (N-M.C.M.R. 1983), *vacated on other grounds*, 18 M.J. 281 (C.M.A. 1984).

Any error from trial counsel's sentencing argument was not "particularly egregious" such that it warrants another rehearing or disapproval of the sentence. Young, 470 U.S. 1, 15 (1985). The plain-error doctrine should be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." Id. This is not such a circumstance. The circumstance of Z.C.'s murder was horrific. And this Court can be confident that Appellant was appropriately sentenced because of his heinous crime and not because of any overreach during trial counsel's arguments. Thus, even if Appellant did not waive this issue, he has not established an entitlement to relief under a plain error standard.

CONCLUSION

WHEREFORE the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of the Air Force Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 13 February 2023.

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/s/_____

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Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 13 February 2023

APPENDIX

Cited Unpublished Opinions

User Name: Morgan CHRISTIE
Date and Time: Monday, February 13, 2023 9:43:00AM CST
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Document (1)

1. *United States v. Baer, 1999 CCA LEXIS 180*

Client/Matter: -None-
Search Terms: 1999 CCA LEXIS 180
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Court: Federal > Military Justice

United States v. Baer

United States Navy-Marine Corps Court of Criminal Appeals

June 30, 1999, Decided

NMCM 97 02044

Reporter
1999 CCA LEXIS 180 *; 1999 WL 447327

UNITED STATES v. William J. BAER, 172 58 0140
Lance Corporal (E-3), U.S. Marine Corps

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: Sentence adjudged 18 January 1997. Military Judge: W.P. Hollerich. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base Hawaii, Kaneohe Bay, HI.

Disposition: Specification 2 under Charge I, and Charge IV and its sole specification are dismissed. The remaining findings and sentence are affirmed.

Core Terms

sentence, military, trial counsel, offenses, photographs, assigned error, murder, stipulation of facts, co-conspirators, multiplicious, specification, aggravating, prejudicial, sit, aggravated assault, inelastic, tape, unpremeditated murder, appropriate sentence, challenge for cause, premeditated murder, contradicted, conspiracy, convicted, responses, uncharged, assault, robbery, admit, bias

Case Summary

Procedural Posture
Defendant challenged the judgment of the General Court-Martial convened by the Commanding General, Marine Corps Base Hawaii, Kaneohe Bay, which convicted defendant of various charges, which included unpremeditated murder, robbery, and assault and sentenced him to a period of confinement.

Overview
Defendant, a lance corporal in the United States Marines, was convicted of various crimes, which included unpremeditated murder, robbery, and aggravated assault. The panel of officer members sentenced appellant to a term of confinement. On appeal, defendant contended that the trial judge erred when it overruled his objection to the prosecution's closing argument on sentencing. Defendant also contended that it was error for the trial court to deny his challenge for cause during the member selection process and for failing to dismiss offenses that were multiplicious for sentencing. Defendant also challenged the trial court's admission of his confession because it contradicted a stipulation of fact and the propriety of admitting certain photographs. The court found that the prosecution's closing argument was permissible since it did not ask panel members to put themselves in the victim's place. While, the panel member did not harbor an inelastic opinion, the trial court should have dismissed the multiplicious specification. As to the admission of the confession and photographs, the court found no abuse of discretion in the trial court's decision to admit.

Outcome
The court dismissed a certain specification against defendant because it was multiplicious of another specification, but affirmed the trial court's judgment and sentence as to the remaining charges and specifications against defendant.

LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

HN1[] **Closing Arguments, Inflammatory Statements**

The critical bottom line in any criminal prosecution

where guilt has been established is the sentence to be awarded to the accused. In arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul, blows.

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

HN2 Closing Arguments, Fair Comment & Fair Response

The trial counsel's argument may forcefully comment on the evidence presented at trial, but it should not seek to improperly incite the passions of the sentencing authority. Clearly, it is appropriate for trial counsel, who is charged with being a zealous advocate for the Government, to argue the evidence of record as well as all reasonable inferences fairly derived from such evidence. Propriety in this regard does not mandate bland or anemic argument; trial counsel may be emphatic, forceful, blunt, and passionate in addressing the legitimate concerns and objectives of sentencing.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

HN3 Imposition of Sentence, Evidence

Arguments aimed at inflaming the passions or prejudices of the court members are clearly improper.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

HN4 Imposition of Sentence, Evidence

It has been unequivocally established that arguments that ask the court members to place themselves in the position of the victim, or a near relative of the victim, are little more than improper invitations for the members to cast aside the objective impartiality demanded of them as court members and to judge the issue of sentencing from the perspective of personal interest.

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Military & Veterans Law > Military Justice > General Overview

HN5 Appellate Review, Standards of Review

A military judge's decision to deny a challenge for cause is not overturned absent a clear abuse of discretion in applying the "liberal-grant" mandate. Under the "liberal-grant" approach to challenges for cause in the military, a member should normally be excused if there is substantial doubt as to the legality, fairness, or impartiality of having that person sit as a member, pursuant to R.C.M. 912(f)(1)(N). In deciding the propriety of a trial judge's denial of a challenge for cause, the court gives due deference to the trial judge who personally saw the member, heard his answers, and judged his demeanor.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence

Military & Veterans Law > Military Justice > General Overview

HN6 Particular Instructions, Use of Particular Evidence

Harboring an inelastic opinion concerning an appropriate sentence would almost always be an appropriate ground for challenging a member. The test for an inelastic opinion toward sentence is that the member's bias will not yield to the evidence presented and the judge's instructions. Inelastic attitude toward sentencing involves an actual bias on the part of the member.

Criminal Law & Procedure > ... > Defective Joinder & Severance > Multiplicity > Challenges & Waivers

Criminal Law & Procedure > ... > Defective Joinder & Severance > Multiplicity > General Overview

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Tests for Double Jeopardy Protection

HN7[] Multiplicity, Challenges & Waivers

Where the offenses are multiplicious, they are multiplicious for all purposes.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Military & Veterans Law > Military Justice > General Overview

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN8[] Imposition of Sentence, Evidence

Under R.C.M. 1001(b)(4), in a sentencing hearing, the trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. The determination of whether evidence directly resulted from an offense is within the sound discretion of the military judge, and his judgment is not lightly overturned.

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > Military Justice > General Overview

HN9[] Sentences, Presentencing Proceedings

R.C.M. 1001(b)(4) evidence must be properly considered for admission on its own terms, not those subscribed within a stipulation of fact.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

HN10[] Imposition of Sentence, Factors

The test for prejudice seeks to discern whether an appellant's sentence was greater than that which would have been imposed if the prejudicial error had not been committed.

Counsel: LT JOHN D. HOLDEN, JAGC, USNR, Appellate Defense Counsel.

Maj MARK K. JAMISON, USMC, Appellate Government Counsel.

Judges: BEFORE CHARLES Wm. DORMAN, R.H. TROIDL, JOHN W. ROLPH. Senior Judges DORMAN and TROIDL concur.

Opinion by: JOHN W. ROLPH

Opinion

ROLPH, Judge:

A military judge sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of three specifications of conspiracy, unpremeditated murder, robbery, aggravated assault, and kidnapping in violation of Articles 81, 118, 122, 128 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 881*, *918*, *922*, *928* and *934 (1994)*. A panel of officer members sentenced the appellant to 25 years confinement, total forfeiture of all pay and allowances, reduction to E-1, and a dishonorable **[*2]** discharge. The convening authority approved the sentence as adjudged.

We have carefully reviewed the record of trial, the appellant's five assignments of error, and the Government's response. Except as noted below, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant and his three Marine co-conspirators entered into an agreement to lure their victim, LCpl Juan Guerrero, USMC, into one of their homes where they planned to assault and rob him. Under the pretext of promised repayment of an overdue loan, LCpl Guerrero was invited to the home of LCpl Michael Pereira, USMC, which was located on the Marine Corps Base, Hawaii. LCpl Guerrero drove to LCpl Pereira's home alone in his car, expecting to pick up his money and then return to his barracks. Almost immediately after entering LCpl Pereira's home, he was simultaneously attacked by each of the co-conspirators, including the appellant. Using their fists, shod feet, a baseball bat, and a "stun-gun," they ultimately assaulted LCpl Guerrero to the point of complete **[*3]** unconsciousness. They then bound their victim's mouth, hands, arms and legs with heavy duct tape, wrapped his body in a canvas car cover, and loaded him into the back of a co-conspirator's Chevy Blazer. The appellant then removed stereo equipment and other items from LCpl Guerrero's car. Upon completion of this larceny, all four conspirators transported LCpl Guerrero to a remote site on the island of Oahu, where LCpl Darryl Antle summarily executed him with a single pistol shot to the head. LCpl Guerrero's body was then dumped over a railing and into a deep ravine. Almost a month passed before the badly decomposed remains of LCpl Guerrero were discovered. Within days of the discovery of LCpl Guerrero's body, the appellant and his co-actors were identified as possible perpetrators, and two of them (including the appellant) ultimately confessed their involvement in this heinous crime. Various items of LCpl Guerrero's stereo equipment were later recovered from the appellant's home.

Trial Counsel's Sentencing Argument

In his first assignment of error, the appellant contends that the military judge abused his discretion when he overruled a defense objection to the Government's **[*4]** closing argument on sentencing, in which the trial counsel ostensibly asked the members to put themselves in the place of the victim as he was being beaten, tortured, and murdered. Appellant's Brief of 30 Sep 1998 at 2.

Specifically, appellant complains of the following two instances during the trial counsel's sentencing argument where he believes prejudicial error occurred:

> ATC: Imagine [LCpl Guerrero] entering the house. Imagine him entering the house, and what happens next? A savage beating at the hands of people [who] he knows, fellow Marines, to which the accused was a willing participant. He's grabbed, he's choked, he's beaten, he's kicked, he's hit with a bat, small baseball bat. ***Imagine being Lance Corporal Guerrero sitting there as these people are beating him***.
> CC: Excuse me, I'm very sorry to interrupt. That's improper argument.
> MJ: I disagree.
> CC: To invite the jury to imagine themselves being in the same situation.
>
> MJ: I disagree. What the trial counsel is trying to do is describe the particular situation in which the victim was in, and that's an appropriate consideration for the members to consider in determining an appropriate **[*5]** sentence.

Record at 550-551(emphasis added).

Three paragraphs and 240 words later, trial counsel again made an argument that appellant claims was objectionable:

> ATC: Imagine. Just imagine the pain and the agony. Imagine the helplessness and the terror, I mean the sheer terror of being taped and bound, ***you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding.*** Maybe they started at the ankles, and the knees, and they went up. Imagine, if you will, what it was like before that piece of tape went across Lance Corporal Guerrero's eyes. Then imagine that tape going across his eyes. The brutal darkness and terror. Maybe he was unconscious, but maybe he wasn't. What were his thoughts? Sheer terror. We don't know and we'll never know. Why? Because the accused stood by while Lance Corporal Antle put a bullet in Lance Corporal Guerrero's brain. Stood 25 feet away and did nothing.

Record at 551-52 (emphasis added).

HN1[] The critical bottom line in any criminal prosecution where guilt has been established is the sentence to be awarded to the accused. In arguing for what is perceived to be an appropriate sentence, **[*6]** the trial counsel is at liberty to strike hard, but not foul, blows. Berger v. United States, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629 (1935); United States v. Edwards, 35 M.J. 351 (C.M.A. 1992); United States v. Waldrup, 30 M.J. 1126 (N.M.C.M.R. 1989). HN2[] The trial counsel's argument may forcefully comment on the evidence presented at trial, but should not seek to improperly incite the passions of the sentencing authority. Waldrup, 30 M.J. at 1132. Clearly, it is appropriate for trial counsel -- who is charged with being a zealous advocate for the Government -- to argue the evidence of record as well as all reasonable inferences fairly derived from such evidence. United States v. Nelson, 1 M.J. 235 (C.M.A. 1975); United States v. Edmonds, 36 M.J. 791, 792 (A.C.M.R. 1993). Propriety in this regard does not mandate "bland or anemic" argument; trial counsel may be emphatic, forceful, blunt and passionate in addressing the legitimate concerns and objectives of sentencing. Edmonds, 36 M.J. at 792.

However, HN3[] arguments aimed at inflaming the passions or prejudices of the court members are clearly improper. United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983); ABA Standards for Criminal **[*7]** Justice, The Prosecution Function PP 5.8(c) and (d) (1986). [1] This dimension of advocacy improperly encourages the members to fashion their sentence not upon cool, calm consideration of the evidence and commonly accepted principles of sentencing, but upon blind outrage and visceral anguish. HN4[] It has been unequivocally established that arguments that ask the court members to place themselves in the position of the victim, or a near relative of the victim, are little more than improper invitations for the members "to cast aside the objective impartiality demanded of [them] as [court members] and judge the issue [of sentencing] from the perspective of personal interest." United States v. Shamberger, 1 M.J. 377, 379 (C.M.A. 1976)(trial counsel asked members to place themselves in the position of rape victim's husband, who was restrained and watched as his wife was repeatedly raped) *quoting* United States v. Wood, 18 U.S.C.M.A. 291, 296, 40 C.M.R. 3, 8 (1969)(trial counsel asked members to sentence accused from the perspective that their own sons had been the victims of indecent liberties by the accused). We are asked to decide whether the above referenced argument in this case **[*8]** falls into this unacceptable category of advocacy. We hold that it does not.

In our opinion, the argument made in this case is most analogous to that addressed in United States v. Edmonds, supra. In *Edmonds,* the accused and his co-conspirators assaulted and robbed a taxicab driver in his taxi. The taxicab driver was held down in the front seat of the car by Specialist Edmonds, while the other conspirators seized his wallet and ran. The evidence established that the driver was in fear for his life. During sentencing, trial counsel asked the members to:

> "Imagine [the taxi-cab **[*9]** driver's] fear as he hears another group of individuals coming up to the car to do who knows what to him. Punish the accused also, not only for the fear that [the victim] felt that night, but also for the force that must have been used to hold that frightened man down."

Edmonds, 36 M.J. at 792.

In ruling that this argument was permissible, the then Army Court of Military Review concluded that asking the members to imagine the victim's fear was substantially different from asking them to put themselves in the victim's place. Id. at 793. The Army Court reasoned that this brand of argument simply asks the members to consider victim impact evidence, which is clearly permissible. United States v. Holt, 33 M.J. 400, 408-09 (C.M.A. 1991); RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). [2] We agree, and similarly conclude that the argument by trial counsel in this case simply asked the members to imagine the fear, pain, and suffering that LCpl Guerrero went through on the night of his murder -- that is, to consider the impact that the actions of the appellant and his co-conspirators had on their victim. Such argument is permissible. **[*10]**

We evaluate trial counsel's argument in this case not in piecemeal fashion, but as a whole. In doing this, we can

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[1] These Standards state that "the prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury," and "the prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."

[2] In the Discussion to R.C.M. 1001(b)(4), it states, "Evidence in aggravation may include evidence of financial, social, ***psychological***, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused . . . ." (Emphasis added).

clearly discern the overall direction, tone, and theme of his approach. We are fully satisfied that the trial counsel's argument was not calculated to inflame the members' passions or possible prejudices. While he struck hard blows on occasion, trial counsel was unquestionably fair. We can discern no error, no abuse of discretion by the military judge, and no material prejudice to the substantial rights of the accused resulting from this argument. Art. 59(a), UCMJ. This assignment of error is without merit.

Denial of Challenge for Cause

In his second assignment of error, the appellant asserts that the military **[*11]** judge erred during the member selection process when he denied the appellant's challenge for cause against Major C. Appellant's Brief of 30 Sep 1998 at 5. Appellant alleges that Major C's responses to questions posed to him during voir dire clearly indicated that he harbored an "inelastic attitude towards sentencing" in this case. We disagree.

During voir dire, Major C made a number of comments concerning the appellant's offenses in which he expressed a "fundamental problem" he had with "Marines doing that to Marines." Record at 206. Major C also revealed a conversation he had with his wife after first learning of LCpl Guerrero's murder through media sources. In this conversation he expressed his general disbelief that "Marines would do this to Marines," and stated that, "if they did it they deserve similar [punishment]." *Id*. In explaining to the military judge what he meant by "similar punishment," Major C indicated he was referring to the death sentence or life in prison. Record at 208. The appellant contends that these statements reflected Major C's "inelastic attitude" in regard to fashioning an appropriate sentence in this case, and that the military judge should have **[*12]** granted the appellant's challenge for cause against this member.

HN5[] A military judge's decision to deny a challenge for cause will not be overturned absent a clear abuse of discretion in applying the "liberal-grant" mandate. United States v. Giles, 48 M.J. 60 (1998); United States v. McLaren, 38 M.J. 112, 118 (C.M.A. 1993); United States v. White, 36 M.J. 284, 287 (C.M.A. 1993). Under the "liberal-grant" approach to challenges for cause in the military, a member should normally be excused if there is substantial doubt as to the legality, fairness, or impartiality of having that person sit as a member. R.C.M. 912(f)(1)(N). In deciding the propriety of a trial judge's denial of a challenge for cause, we give due deference to the trial judge who personally saw the member, heard his answers, and judged his demeanor.

HN6[] Harboring an inelastic opinion concerning an appropriate sentence would almost always be an appropriate grounds for challenging a member. R.C.M. 912(f)(1)(N), Discussion. As our Superior Court stated in United States v. Davenport, 17 M.J. 242, 244 (C.M.A. 1984):

> What we have sought to guard against is a member who harbors such bias toward the crime **[*13]** that he, based upon the facts as they develop and the law as it is given by the military judge, cannot put his personal prejudices aside in order to arrive at a fair sentence for the accused.

However, a member who simply possesses an "unfavorable inclination toward an offense" is not automatically disqualified. Giles, 48 M.J. at 63. The test for an inelastic opinion toward sentence is that the member's bias will "not yield to the evidence presented and the judge's instructions." McLaren, 38 M.J. at 118; *Reynolds* (quoting United States v. McGowan, 7 M.J. 205, 206 (C.M.A. 1979)). Inelastic attitude toward sentencing involves an actual bias on the part of the member. United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987); Giles, 48 M.J. at 63 (Sullivan, J., dissenting); United States v. Bannwarth, 36 M.J. 265, 268 (C.M.A. 1993); Davenport, 17 M.J. at 245.

We believe the following colloquy between the military judge and Major C belies the appellant's assertion that Major C harbored an inelastic opinion concerning an appropriate sentence in this case:

> MJ: Now with regard to this one comment that you may have made to your wife about Marines who **[*14]** would do this deserving similar punishment, I take that to be a reference to the death penalty.
> MBR: Well, either that or prison term, long -- life prison term.
> MJ: The main point I want you to understand, of course, is that in this case the penalty of death may not be imposed.
> MBR: Yes, sir.
> MJ: That will not be an authorized punishment in this case.
> MBR: Yes, sir.
> MJ: Does that cause you any personal difficulty with sitting as a member in this case?

MBR: No, sir.
MJ: Do you feel that simply because a penalty of death may not be imposed in this case, that therefore it would automatically be appropriate to instead substitute perhaps a lengthy period of confinement without regard to what the evidence in the case might actually show.

MBR: ***It obviously couldn't be without regard after our discussion just a few minutes ago. It would have to be in regard to all the facts.***
MJ: I'm sorry?
MBR: It would have to be in regard with all the facts.

MJ: Do you feel as you sit here now that you have some opinion about the type or amount of punishment that should be imposed in this case that would be so inflexible that you would **[*15]** not be able to listen to the evidence fairly and base your decision on the evidence in this case?
MBR: No sir.
. . . .
MJ: Will you be able to reserve your judgment as to what type or amount of punishment ought to be imposed in this case until after you've heard all the evidence?

MBR: ***Yes, sir.***
MJ: Now at the end of this case, after you go back to your deliberations, if the other members of the court feel that perhaps an especially severe punishment ought to be imposed, and you were of the view, after hearing all of the evidence, that perhaps a much more lenient punishment out [sic] to be imposed, would you be able to cast your vote on the basis of what you believe to be appropriate and not be influenced by the opinions of the others members?

MBR: ***I'm sure during the discussion and as the facts are exposed I would be able to provide my opinion, yes sir, even in spite of the fact that someone else may think more of a stringent punishment and mine is a lenient position. I could do that.***

MJ: Let me ask you this question. Suppose after the members close for deliberations and they come back and they adjudge a sentence, and then after **[*16]** you go back to your work section the sense you get is that other people consider that to be too lenient. Is that something you would fear in this case?

MBR: ***That would be their opinion. They hadn't sat through the facts. That wouldn't phase me at all.***
MJ: Do you feel, as you sit here now, any pressure from any source to impose any particular type of punishment, an especially lenient punishment or, for that matter, an especially severe punishment?

MBR: ***Feel pressured sir***
MJ: Yes.

MBR: ***No. sir.***
Record at 208-09, 218 (emphasis added).

We must decide this issue of alleged actual bias by examining all of the members' responses to the voir dire questions posed -- not isolated answers taken out of context. Doing so in this case convinces us that Major C was in no way predisposed towards any particular disposition in this case. His responses clearly indicated that, although he had strong feelings about "Marines doing that to Marines," he would conscientiously listen to all the evidence, follow the military judge's instructions, and fashion a sentence appropriate for the accused. We disagree with appellant's assertion **[*17]** that Major C was simply "parroting" responses to leading questions asked by the military judge. Indeed, we found his responses honest, thoughtful and reflective. We cannot discern from those responses, or from the entire record, any actual or implied bias on the part of this member. This assignment of error is without merit.

Multiplicity

In his third assignment of error, the appellant asserts that the military judge erred in failing to dismiss offenses that he found "multiplicious for sentencing." Appellant's brief of 30 Sep 1998 at 11. We agree.

The military judge ruled that specification 2 under Charge I (conspiracy to commit aggravated assault) was multiplicious with specification 1 of Charge I (conspiracy to commit robbery), and that the sole specification under Charge IV (aggravated assault) was multiplicious with the sole specification under Charge III (robbery). Record at 122. In this case, the military judge reasoned that the aggravated assault upon LCpl Guerrerro was the means by which the appellant and his co-conspirators ultimately robbed him of his automobile and its contents, and, therefore, the aggravated assault was a lesser included offense of the robbery. **[*18]** Record at 117-122; *see* MANUAL FOR COURTS-MARTIAL, UNITED

STATES (1998 ed.), Part IV, P 47d(4) and (5)(aggravated assault, a violation of Article 128, UCMJ, is a listed lesser included offense of robbery, a violation of Article 122, UCMJ); *United States v. Foster, 40 M.J. 140 (C.M.A. 1994)*.

Whether we agree with these determinations or not, the judge's ruling had a sound basis in law and became the "law of the case" absent plain error. *United States v. McKinley, 27 M.J. 78, 80 (C.M.A. 1988)*. We find no plain error.

Having made these determinations, the judge should have dismissed the multiplicious charge and specifications. ***HN7***[↑] Where the offenses are multiplicious, they are multiplicious for all purposes. *United States v. Oatney, 41 M.J. 619, 630 (N.M.Ct.Crim. App. 1994)* (en banc). Simply treating these offenses as "multiplicious for sentencing" is inadequate relief where the separate convictions clearly offend the Double Jeopardy principle outlined in *Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932)*; *Ball v. United States, 470 U.S. 856, 861-62, 84 L. Ed. 2d 740, 105 S. Ct. 1668 (1985)*; *United States v. Savage 50 M.J. 244 (1999)*(unauthorized conviction has potential adverse collateral consequences **[*19]** that may not be ignored, and constitutes unauthorized punishment in and of itself)(citing *Ball v. United States, supra*); *United States v. Earle, 46 M.J. 823, 825 (A.F.Ct.Crim.App. 1997)*. We will grant relief in our decretal paragraph.

Admission of Appellant's Confession

The appellant's fourth assignment of error alleges that the military judge erred in admitting the appellant's confession to the Naval Criminal Investigative Service (NCIS) because its contents contradicted the stipulation of fact, Prosecution Exhibit 2, entered into between the Government and the appellant, referenced uncharged misconduct, and undermined the terms of the appellant's pretrial agreement. Appellant's Brief of 30 Sep 1998 at 13. We find this assertion completely without merit.

The fulcrum of the appellant's argument on this issue is the assertion that once the Government enters into a stipulation of fact, they are bound by that stipulation and may not present any evidence that contradicts it (i.e., evidence indicating that the appellant's role in the events at issue was greater than depicted in the stipulation). At issue specifically is that portion of appellant's confession that indicates **[*20]** he had prior knowledge of the fact that his co-conspirators were going to shoot LCpl Guerrero and dispose of the body. Appellant's Brief of 30 Sep 1998 at 14. [3] This information, he argues, would indicate prior knowledge of the murder, suggesting the appellant committed the greater offense of premeditated murder. He claims that putting this statement before the members injected "uncharged misconduct" (i.e., "premeditation") into the proceeding, effectively nullified the provision of his pretrial agreement that allowed him to plead guilty to unpremeditated murder vice premeditated murder, [4] and contradicted the stipulation of fact wherein he and the Government agreed that the offense he committed was unpremeditated murder. [5] We disagree.

[*21] ***HN8***[↑]

In a sentencing hearing, the trial counsel may present evidence as to any "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). The determination of whether evidence directly resulted from an offense is within the sound discretion of the military judge and his judgment will not be lightly overturned. *United States v. Wilson, 47 M.J. 152, 155 (1997)*.

The military judge correctly ruled that the information contained in Prosecution Exhibit 10, including the particular statement complained of, directly related to the offenses to which appellant was found guilty. Record

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[3] The specific language complained of in Prosecution Exhibit 10 is the appellant's statement that, "I was not supposed to be along when they disposed of the body or when they shot him, but ***I had knowledge they were going to do this***." Prosecution Exhibit 10 at 11, P 2 (emphasis added).

[4] *See* Appellate Exhibit 3, PP 11 and 13.

[5] The following provisions of Prosecution Exhibit 2 are germane:

> I agreed to help beat up LCpl Guerrerro and to steal his car stereo equipment. I did nothing to dissuade Pereira, Antle, or Soto from beating up LCpl Guerrerro. Also on the evening of 6 May 1996, Pereira, Antle, Soto and I discussed luring Guerrerro over to Pereira's house and beating him up while he was there.
>
> . . . .
>
> I believed that we would assault Guerrerro that night if he showed up at Pereiria's house, even to the extent that he would suffer great bodily harm, and that after the assault we would steal Guerrerro's car stereo equipment.

at 319. Appellant's statement that he had knowledge of the fact that his co-conspirators were planning to murder LCpl Guerrero did not establish premeditation, but was instead reasonably and directly related to the unpremeditated murder charge to which he pled guilty. R.C.M. 1001(b)(4). It highlighted the fact that appellant had knowledge of the murder plan. Moreover, the statement at issue did not establish "conspiracy to commit premeditated murder" on the part of appellant, or any similar misconduct. It did, however, show that **[*22]** the appellant was "less innocent" than he wanted the members to believe. If the appellant had knowledge of the planned murder the day prior to its occurrence, it certainly made his crime of unpremeditated murder more aggravated since he could have notified authorities and prevented the crime from happening. Even if it had been evidence of "uncharged misconduct," it would still have been admissible as it directly related to the offense of which the appellant was found guilty. *United States v. Wingart, 27 M.J. 128 (C.M.A. 1988)*. [6] Thus, appellant's self-created image of being an uninformed actor in LCpl Guerrero's grisly murder was squarely countered by his own admission. This was classic evidence in aggravation directly relating to the offenses of which the appellant was convicted.

[*23] A stipulation of fact sets the stage upon which a criminal trial is thereafter conducted, but it does not necessarily write the final act. We reject the appellant's contention that the Government's evidence in aggravation "contradicted" a binding stipulation of fact in violation of R.C.M. 811(e)(stipulation of fact is binding on the court-martial and may not be contradicted by the parties thereto). To adopt such a literal interpretation of R.C.M. 811(e) would produce absurd results. For example, the Government would never be able to go forward to prove a greater offense than that stipulated to by an accused. Additionally, a stipulation of fact could be used as a sword to sever from consideration by the sentencing authority clearly admissible aggravating circumstances surrounding an offense. This was clearly not the intent of the provision. ***HN9***[⬆] R.C.M. 1001(b)(4) evidence must be properly considered for admission on its own terms, not those subscribed within a stipulation of fact.

[6] Military Rule of Evidence 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), would, of course, still apply in this situation, and the military judge would be obliged to provide proper limiting instructions to the members for how such evidence could be considered by the members (e.g., as evidence of "rehabilitative potential").

The appellant's reliance on *Wingart, supra*, and *United States v. Gordon, 31 M.J. 30 (C.M.A. 1990)* is misplaced. Appellant's Brief of 30 Sep 1998 at 14-15. In *Wingart*, trial counsel offered photographic **[*24]** slides that contained evidence of an **unrelated** sexual assault on an underage girl, where Wingart had already pled guilty to indecent assault. Likewise, in *Gordon*, our Superior Court found that since Gordon was only convicted of negligent homicide, the Brigade Commander's opinion that Gordon's crime had an adverse impact on his soldiers' confidence in one another, was **not related** to the offense of which appellant was convicted. *Gordon, 31 M.J. at 36*. The remaining two cases on which appellant relies both dealt with offenses that were unrelated to the offenses of which each accused was found guilty. Appellant's Brief of 30 Sep 1998 at 15; *United States v. Cole, 29 M.J. 873, 876 (A.F.C.M.R. 1989)*(prejudicial error to elicit evidence of uncharged sodomy offense that had been dismissed pursuant to a pretrial agreement); *United States v. Kinman, 25 M.J. 99, 102 (C.M.A. 1987)*(prejudicial error to admit evidence of other uncharged sexual offenses). Hence, the cases on which appellant relies are clearly distinguishable from the facts in this case, which demonstrate that the evidence was directly related to the appellant's offenses. We find no abuse of discretion **[*25]** in the military judge's admission of this evidence.

Assuming *arguendo* that it was error to admit the disputed statement, we are fully convinced such error did not materially prejudice the substantial rights of appellant. Art. 59(a), UCMJ. ***HN10***[⬆] The test for prejudice in this situation seeks to discern whether the appellant's sentence was "greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki, 20 M.J. 248, 249 (C.M.A. 1985)*. Premeditated murder carries a mandatory minimum of life imprisonment. MCM, Part IV, P 43e(1). The mandatory minimum for conspiracy to commit premeditated murder is life imprisonment. *Id.* P5e. The maximum punishment appellant faced for his offenses included, *inter alia,* confinement for life, and trial counsel vigorously argued for that sentence. Record at 553 and 567. The members awarded appellant only 25 years of confinement. Record at 583. We are convinced that, if error occurred, it was harmless beyond a reasonable doubt. Art. 59(a), UCMJ. This assignment of error is without merit.

Admission of Photos

The appellant's final assignment of error challenges the propriety **[*26]** of the military judge's admission of three admittedly disturbing color photographs of LCpl Guerrero's badly decomposed corpse. Appellant's Brief of 30 Sep 1998 at 16-17; Prosecution Exhibits 11-13. He claims that it was an abuse of discretion for the military judge to admit these photographs as they were unduly prejudicial under Mil. R. Evid. 403. We disagree.

The three photographs in this case were clearly relevant evidence that the members could properly consider in aggravation. R.C.M. 1004(b)(4); *United States v. Burks, 36 M.J. 447, 453 (C.M.A. 1993)*. Each was offered for a specific and legitimate purpose. One photograph clearly depicts the manner in which LCpl Guerrero was extensively bound in duct tape prior to his murder. Prosecution Exhibit 11. The other two photographs show the entry and exit wounds of the bullet that killed LCpl Guerrero. Prosecution Exhibits 12 and 13. All three photos were taken during LCpl Guerrero's autopsy, and depict his body in as benign a manner as possible under the circumstances. They demonstrate better than words ever could the serious aggravating circumstances surrounding the appellant's offenses. While they do show the body in an advanced **[*27]** state of decomposition, and ravaged by significant predation, that fact alone does not render the photographs inadmissible. [7] *United States v. White, 23 M.J. 84, 88 (C.M.A. 1986)*.

We do not find these photographs unduly prejudicial **[*28]** to the appellant, and conclude that the military judge did not abuse his discretion in admitting them over defense objection. The judge conducted careful Mil. R. Evid. 403 balancing in deciding whether or not to admit these photographs. Record at 326-27. He specifically concluded that the photographs were relevant, not cumulative, and that their probative value was not outweighed by the danger of unfair prejudice to the appellant. *Id*. We find his logic extremely persuasive. This assignment of error is without merit.

Conclusion

Accordingly, Specification 2 under Charge I, and Charge IV and its sole specification are dismissed. No relief on sentence is warranted as the dismissed charges did not affect the maximum possible punishment, and were treated as "multiplicious for sentencing" by the military judge. The remaining findings and sentence as approved on review below are affirmed.

JOHN W. ROLPH

Senior Judges DORMAN and TROIDL concur.

CHARLES Wm. DORMAN

R.H. TROIDL

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[7] The military judge astutely noted in this regard that:

> While I appreciate the fact that the photographs show the condition of the body after it had reached an advanced stage of decomposition, surely when the body was thrown over the rail in that particular remote area, it was obvious to all parties, including the accused, that that is exactly the condition the body would be in in no small amount of time given the climate here in Hawaii and given the location in which [the] body was being disposed of. So under the circumstances, it seems to me that the willingness of the parties to dispose of the body in that manner itself is evidence of a certain heartlessness that the members may find relevant in fashioning an appropriate sentence in this case.

Record at 326.

User Name: Morgan CHRISTIE
Date and Time: Monday, February 13, 2023 9:44:00AM CST
Job Number: 190195636

Document (1)

1. *United States v. Gulley, 1995 CCA LEXIS 495*

Client/Matter: -None-
Search Terms: 1995 CCA LEXIS 495
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Court: Federal > Military Justice

United States v. Gulley

United States Navy-Marine Corps Court of Criminal Appeals

September 27, 1995, Decided

NMCM 94 00626

Reporter
1995 CCA LEXIS 495 *; 1995 WL 935043

UNITED STATES v. Kenny R. GULLEY, 430-47-0200 Mess Management Specialist Third Class (E-4), U.S. Navy

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: Sentence adjudged 13 July 1993. Military Judge: D.P. Holcombe. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Japan, FPO AP 96349-0051.

Disposition: Findings of guilty and the sentence approved on review below affirmed, except for the finding of guilty of Charge IV and its specification. Charge IV and its specification dismissed.

Core Terms

sentence, military, instructions, messages, assigned error, waived, argument of counsel, defense counsel, send a message, plain error, German, sexual

Case Summary

Procedural Posture
Appellant, a member of the United States Navy, challenged a judgment from a general court-martial, convened by the Commander, U.S. Naval Forces, Japan, that convicted him on a four-count indictment for having sexual relations with a 13-year old female and for indecent acts with a person under the age of 16.

Overview
The court rejected appellant's claim that the military judge erred by not giving a curative instruction to the court members regarding trial counsel's argument at sentencing that referred to the importance of "sending a clear message" to the civilian community that appellant's conduct was "wrong." The court ruled that, by not objecting at trial, appellant waived the issue on appeal and that, even if the error was not waived, when trial counsel's argument was considered in its entirety, the comment was minor and peripheral. The court then rejected appellant's claim that he was improperly denied the ability to present evidence of the victim's appearance and mature conduct, ruling that the record established that appellant had the opportunity to present such evidence. There was no error in not permitting appellant to introduce evidence that the girl dated sailors and regularly smoked and drank alcohol. The court agreed with the government that the military judge erred by not dismissing appellant's conviction of indecent acts with a person under 16 because such a charge was a lesser-included offense of carnal knowledge, under Part IV, Para. 45d(2)(a), Manual for Courts-Martial (1984).

Outcome
The court affirmed the findings of guilty and the sentence imposed on appellant's convictions, except for the finding of guilty of indecent acts with a person under 16 and its specification. The court dismissed that charge and its specification.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Trial Procedures > Instructions > Objections

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN1 **Standards of Review, Plain Error**

Failure to object to error in sentencing argument before the military judge begins to instruct the members on sentencing will waive the error unless it amounts to plain error.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Criminal Law & Procedure > Trials > Jury Instructions > Curative Instructions

Criminal Law & Procedure > Trials > Jury Instructions > Requests to Charge

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Trial Procedures > Instructions > General Overview

Military & Veterans Law > ... > Trial Procedures > Instructions > Curative Instructions

Military & Veterans Law > ... > Trial Procedures > Instructions > Objections

Military & Veterans Law > ... > Trial Procedures > Instructions > Requests for Instructions

HN2 **Sentences, Deliberations, Instructions & Voting**

In the absence of plain error trial defense counsel's broadside oral request for "an instruction regarding the proper argument of messages being sent by a sentence," made after the military judge finished his instructions, is not the functional equivalent of an objection during or after the trial counsel's argument. Thus, where there was no timely objection to the trial counsel's argument, any error concerning the argument was waived and a curative instruction was not required.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Military & Veterans Law > ... > Courts Martial > Motions > Appropriate Relief

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

Military & Veterans Law > Military Justice > General Overview

Military & Veterans Law > ... > Trial Procedures > Instructions > Requests for Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 **Standards of Review, Abuse of Discretion**

While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give. The test to determine if denial of a requested instruction constitutes error is whether: (1) the charge is correct; (2) it is not substantially covered in the main charge; and (3) it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation. The United States Nay-Marine Corps Court of Criminal Appeals reviews the military judge's refusal to give a defense-requested instruction under an abuse-of-discretion standard of review.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Military & Veterans Law > Military Justice > General Overview

Criminal Law & Procedure > Sentencing > Appeals > General Overview

HN4 **Postconviction Proceedings, Clemency**

The distinction between a review of sentence appropriateness and consideration of clemency matters is significant: Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy -- treating an accused with less rigor than he deserves. Congress has assigned the United States Nay-Marine Corps Court of Criminal Appeals only the task of determining sentence appropriateness. It has placed the responsibility for clemency in other hands (e.g., the convening authority's). Generally, sentence appropriateness should be judged by individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Jury Instructions

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Military & Veterans Law > Military Offenses > Lesser Included Offenses

Military & Veterans Law > Military Justice > General Overview

HN5 **Harmless & Invited Error, Jury Instructions**

The crime of indecent acts with a person under 16 is a lesser-included offense of carnal knowledge. Part IV, Para. 45d(2)(a), Manual for Courts-Martial (1984).

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > Juries & Jurors > General Overview

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

HN6 **Plain Error, Definition of Plain Error**

The absence of one of the eight assigned members of the court-martial is error, but not plain error. The failure to raise an objection at trial waives the issue on appeal.

Counsel: LCDR ERIC C. PRICE, JAGC, USN, Appellate Defense Counsel.

LT JOHN R. LIVINGSTON Jr., JAGC, USN, Appellate Government Counsel.

Judges: BEFORE DAVID C. LARSON, EDWIN W. WELCH, J.E. DOMBROSKI. Chief Judge LARSON and Judge DOMBROSKI concur.

Opinion by: EDWIN W. WELCH

Opinion

WELCH, Senior Judge:

Based on our examination of the record of trial, the appellant's assignments of error, [1] and the

[1] I. THE MILITARY JUDGE ERRED BY FAILING TO PROVIDE A CURATIVE INSTRUCTION TO THE COURT-MARTIAL MEMBERS ON THE PORTION OF TRIAL COUNSEL'S SENTENCING ARGUMENT REFERRING TO THE IMPORTANCE OF SENDING A CLEAR MESSAGE TO THE LOCAL CIVILIAN COMMUNITY. II. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY PROHIBITING THE INTRODUCTION OF EVIDENCE RELATED TO MISS [P]'S PUBLIC CONDUCT,

Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights was committed. We comment briefly on the assignments of error.

[*2] Assignment of Error I

We base our conclusion that this assignment of error is without merit on alternative grounds.

We conclude that the appellant waived any error relating to the trial counsel's argument by failing to make a timely objection. ***HN1***[⬆] "Failure to object to error in sentencing argument before the military judge begins to instruct the members on sentencing will waive the error unless it amounts to plain error." *United States v. Turner, 30 M.J. 1183, 1188 (A.F.C.M.R. 1990)*(citing *United States v. McPhaul, 22 M.J. 808* (A.C.M.R.), *pet. denied 23 M.J. 266 (C.M.A. 1986)*; Rule for Courts-Martial [R.C.M.] 1001(g)). *See also United States v. Commander, 39 M.J. 972, 978 (A.F.C.M.R. 1994)*. In the appellant's case, no objection was voiced by the trial defense counsel prior to instructions on sentencing. Indeed, prior to the instructions, the trial defense counsel chose to end his presentencing argument by focusing attention on the "send a message" theme by arguing that "there are a lot of messages you need to consider, but perhaps the most important is the message to Petty Officer Gulley, and how much a message is necessary?" Record at 177. Stated otherwise, **[*3]** ***HN2***[⬆] in the absence of plain error -- and there is no plain error in this case -- we do not consider the trial defense counsel's broadside oral request for "an instruction regarding the proper argument of messages being sent by a sentence," made after the military judge finished his instructions, Record at 182, to be the functional equivalent of an objection during or after the trial counsel's argument. Thus, because there was no timely objection to the trial counsel's argument, any error concerning the argument was waived and a curative instruction was not required.

THUS DEPRIVING APPELLANT OF SIGNIFICANT EVIDENCE IN EXTENUATION AND MITIGATION. III. A SENTENCE INCLUDING ONE YEAR CONFINEMENT, TOTAL FORFEITURES AND AN UNSUSPENDED BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE IN LIGHT OF APPELLANT'S PLEAS OF GUILTY, THE CIRCUMSTANCES SURROUNDING APPELLANT'S OFFENSES, AND APPELLANT'S PRIOR SERVICE.IV. THE COURT-MARTIAL LACKED JURISDICTION TO TRY APPELLANT IN VIEW OF THE UNEXPLAINED ABSENCE OF A PANEL MEMBER.

Alternatively, assuming *arguendo* that the alleged error was not waived, we find that the military judge did not abuse his discretion when he denied the trial defense counsel's request for an instruction "regarding the proper argument of messages being sent by a sentence." Record at 182. *United States v. Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993)*, provides applicable guidance:

> ***HN3***[⬆] While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give. *United States v. Smith, 34 M.J. 200 (C.M.A. 1992)*; R.C.M. 920(c), Discussion. **[*4]** The test to determine if denial of a requested instruction constitutes error is whether (1) the charge is correct; (2) "it is not substantially covered in the main charge"; and (3) "it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation." *United States v. Winborn*, 14 [C.M.A.] 277, 282, *34 C.M.R. 57, 62 (1963)*. [In this case, we] review the military judge's refusal to give the defense-requested instruction on prior inconsistent statements under an abuse-of-discretion standard of review. *United States v. Dennis, 625 F.2d 782 (8th Cir.1980)*; *United States v. Rogers, 549 F.2d 490 (8th Cir.1976)*.

37 M.J. at 478. *See also United States v. Givens, 11 M.J. 694, 696 (N.M.C.M.R. 1981)*("We are satisfied that the judge's refusal to expand his instructions was no abuse of discretion.").

Before concluding that the military judge did not abuse his discretion, we evaluated the argument of each counsel, the military judge's instructions concerning sentencing, the trial defense counsel's request for an instruction, and the evidence considered by the court-martial members. We **[*5]** note below pertinent observations concerning each of these components of the record.

First, we have considered the totality of the trial counsel's lengthy argument, noting that it mainly hammers home the undisputed facts (i.e., that the appellant was a petty officer who engaged in sexual intercourse with a 13-year old girl and that the activity occurred in a BEQ which is also a temporary home for families) and the general deterrence theory of punishment. Only a brief part of the argument -- running 1 1/2 inches down the record -- asserts that the sentence adjudged should send a message "to our host

nationals, that sex with a 13-year old is [not] okay." Record at 175. Second, in response, rather than objecting to the "send a message" argument, the defense counsel echoed the "send a message" theme by arguing that the appropriate message was already conveyed by the fact that the appellant was already conveyed by the fact that the appellant was tried by a court-martial ("Look where he's sitting now."). Record at 176. Third, the military judge's instructions listed the five general reasons for sentencing, including "the deterrence of the wrongdoer and those who know of his crime and **[*6]** his sentence . . . ." Record at 180. Fourth, the evidence considered by the court-members was illuminating. They heard and observed the victim; they reviewed 1990 and 1991 reports of psychological evaluations of the victim, Defense Exs. A and B; they heard that the victim was "smoking, and . . . drinking," Record at 107; they learned from a physician that the victim was a 5 on the 1-to-5 Tanner Stages of sexual maturity; they heard the appellant testify under oath and they listened to his unsworn statement (e.g., "Maybe alcohol played a part in my misjudgment." Record at 172), and; they received considerable evidence indicating that the appellant had a relatively good record of performance.

Focusing on sections of the record mentioned above and the *Damatta-Olivera* test, we make three significant observations: (1) The appellant offered no specific curative instruction and failed to articulate with precision what he meant by "an instruction regarding the proper argument of messages being sent by a sentence," which means we *cannot conclude that he offered a correct instruction*; (2) The military judge's instructions were *exhaustive, thorough, and accurate*, and correctly stated **[*7]** the five principle reasons for sentencing offenders; in our opinion, his listing of the five reasons usually given for sentencing offenders -- and no more -- also conveyed *subsilentio* the message that other argued theories of punishment were not germane, and; (3) The trial defense counsel's request for instructions was clearly not a request for an instruction *vitally important to the appellant's defense* and the failure to instruct as requested *did not seriously impair an effective presentation by the appellant*.

In making the third observation stated above, we are cognizant of the patent factual differences between the appellant's case and *United States v. Sherman, 32 M.J. 449 (C.M.A. 1991)*. In *Sherman*, Germany was the situs of the robbery and aggravated assault trial, the thrice-stabbed victim was a German taxi driver, and the German newspapers devoted considerable attention to the incident involved. In the appellant's case, the record presents absolutely nothing indicating that even one Japanese national had the slightest interest in the case. Thus, factually, *Sherman* presents a more persuasive case for appellate relief than the appellant's. However, after **[*8]** concluding that the appellant in *Sherman* had waived his right to object to the trial counsel's argument urging the members to "send a message" to the German community, the Court stated:

> Even if trial defense counsel preserved this issue for review, it is doubtful that this legal error substantially affected appellant's sentence. . . . The appeal to appeasement of the German community *was a peripheral and minor portion of the prosecution's argument which defense counsel ably rebutted in his own closing argument*.

32 M.J. at 452 (emphasis added). In our opinion, based on the entire record, the phrase "peripheral and minor portion of the prosecution's argument" aptly describes the portions of the trial counsel's argument that are the basis of the appellant's first assignment of error. Thus, the military judge did not abuse his discretion by failing to provide additional instruction "regarding the proper argument of messages being sent by a sentence."

Assignment of Error II

The appellant's assertion that he was deprived of significant evidence in extenuation and mitigation because he was "deprived of independent evidence of Ms. P's appearance and actions **[*9]** outside the courtroom which could mislead appellant into believing she was older than 16 years of age and of evidence of the lack of impact of the sexual activity upon Ms. P," simply turns a blind eye to considerable evidence in the record indicating that the appellant was in no way deprived of the opportunity to present evidence concerning Ms. P's appearance and actions during the relevant time period. For example, the record clearly demonstrates that Mess Management Specialist Seaman [MMSN] C was a witness who observed Ms. P on the night of 13 February 1993, that MMSN C was questioned about his discussion that night with Ms. P about her age and that he replied that he "seen her smoking, and . . . drinking, [and] thought she was in the Navy," Record at 107. Could MMSN C have been asked at that point to describe Mr. P's physical appearance? Her dress? Her height? Her weight? Could he have been asked for an opinion concerning her age? Obviously, such questions would not have been

prevented by the granting of the motion *in limine*. Thus, the appellant *had the opportunity* to ask such questions. Furthermore, the physician who testified said Ms. P was a "fully developed female," **[*10]** Record at 117, the appellant testified that Ms. P looked at least 17 or 18 years of age, Record at 128, Hospital Corpsman Second Class J and Hospitalman C testified by stipulation that on 14 February 1993 they observed that Ms. P was calm and had a matter of fact attitude while waiting to be examined by a physician, App. Exs. XIV and XV, and the members observed Ms. P's appearance at the court-martial. Stated otherwise, we find that the record does not support a claim that the appellant was prejudiced by the military judge's ruling on the motion in limine.

We also find that the military judge did not abuse his discretion by granting the motion in limine and thereby preventing the appellant from presenting at the sentencing stage of the trial evidence that Ms. P "has gone out with other sailors . . . [and] regularly smokes and drinks and holds herself out as somewhat older than she is." Appellate Ex. II. *See* United States v. Fox, 24 M.J. 110 (C.M.A. 1987)(holding in indecent assault case that the accused did not demonstrate how evidence of the victim's past sexual conduct would be relevant during the sentencing stage of the trial to an issue before the court); United States **[*11]** v. Vega, 27 M.J. 744 (A.C.M.R. 1988)(holding in carnal knowledge case that evidence of victim's prior sexual experience was not relevant under the circumstances presented and was properly excluded from the sentencing stage of the trial).

Assignment of Error III

HN4[↑] The distinction between a review of sentence appropriateness and consideration of clemency matters is significant: "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy -- treating an accused with less rigor than he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988).

Congress has assigned this Court only the task of determining sentence appropriateness. It has placed the responsibility for clemency in other hands (e.g., the convening authority's). Id. at 395-96.

"Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)(citation omitted).

Under the circumstances of **[*12]** this case, we conclude that the sentence approved below is not inappropriate.

Although not assigned as error, the Government invites our attention to the fact that the military judge erred by not dismissing the appellant's conviction ***HN5***[↑] of indecent acts with a person under 16 because such a charge is a lesser-included offense of carnal knowledge. Manual for Courts-Martial, United States, 1984, Part IV, P 45d(2)(a); United States v. Foster, 40 M.J. 140 (C.M.A. 1994). We agree with the Government that the error was harmless because the military judge instructed the members that the offenses were multiplicious for sentencing purposes. Record at 177. As suggested by the Government, we will correct the error by dismissing the indecent acts charge in our decretal paragraph.

Supplemental Assignment of Error

We hold that ***HN6***[↑] the absence of one of the eight assigned members of the court-martial was error, but not plain error. Thus, the failure to raise an objection at trial waived the issue. *See* United States v. Bouknight, 35 M.J. 671, 672 (A.C.M.R. 1992)(absence of three of eleven members was not plain error).

Accordingly, the findings of guilty and the sentence approved on review **[*13]** below are affirmed, except for the finding of guilty of Charge IV and its specification. Charge IV and its specification are dismissed for reasons stated above.

EDWIN W. WELCH

Chief Judge LARSON and Judge DOMBROSKI concur.

ABSENT FOR SIGNATURE

DAVID C. LARSON

ABSENT FOR SIGNATURE

J.E. DOMBROSKI

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1. *United States v. McCall, 2020 CCA LEXIS 97*

Client/Matter: -None-
Search Terms: 2020 CCA LEXIS 97
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Court: Federal > Military Justice

United States v. McCall

United States Air Force Court of Criminal Appeals

March 26, 2020, Decided

No. ACM 39548

Reporter
2020 CCA LEXIS 97 *

UNITED STATES, Appellee v. Charles M. MCCALL, Airman First Class (E-3), U.S. Air Force, Appellant

Subsequent History: Review denied by *United States v. McCall, 2020 CAAF LEXIS 377 (C.A.A.F., July 15, 2020)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Jefferson B. Brown. Approved sentence: Dishonorable discharge, confinement for 15 months, and reduction to E-1. Sentence adjudged 18 April 2018 by GCM convened at Joint Base San Antonio-Lackland, Texas.

Core Terms

military, communications, sentencing, trial counsel, sexual, child molestation, messages, contends, senior, improper argument, conversations, ineffective, absence of mistake, trial defense counsel, sexually explicit, modus operandi, post-trial, threshold, comments, letters, danger of unfair prejudice, reasonable probability, charged offense, entrapment, propensity, Exhibits, punitive, factors, dishonorable discharge, admit evidence

Case Summary

Overview
HOLDINGS: [1]-Appellant, who was convicted of one specification of attempted sexual abuse of a child, raised seven issues on appeal; issues (4), (6), and (7) did not require further discussion or warrant relief. As to the remaining issues, no error was found that materially prejudiced his substantial rights; [2]-The military judge did not abuse his discretion when he admitted appellant's communications with "queen (H)" and "k" pursuant to Mil. R. Evid. 414, Manual Courts-Martial; [3]-The court further found no material prejudice to appellant's substantial rights with regard to Mil. R. Evid. 404(b); [4]-Among other matters, if the processing of appellant's case was less than excellent, the delay was not so egregious as to adversely affect the perceived fairness and integrity of the military justice system; [5]-The approved findings and sentence were correct in law and fact.

Outcome
The findings and sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Evidence, Evidentiary Rulings**

The standard of review for a military judge's decision to admit evidence is abuse of discretion. A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable. The question of whether the admitted testimony constitutes evidence that the accused committed another offense of child molestation under Mil. R Evid. 414, Manual Courts-Martial, is one of law, reviewed de novo.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Character, Custom & Habit Evidence

HN2[] Admissibility of Evidence, Character, Custom & Habit Evidence

Mil. R. Evid. 404(b), Manual Courts-Martial, provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, inter alia, proving intent, knowledge, or absence of mistake. Mil. R. Evid. 404(b)(2), Manual Courts-Martial. The list of potential purposes in Mil. R. Evid. 404(b)(2) is illustrative, not exhaustive. The court applies a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b): 1. Does the evidence reasonably support a finding by the court members that the appellant committed prior crimes, wrongs or acts? 2. What "fact. of consequence" is made "more" or "less probable" by the existence of this evidence? 3. Is the "probative value. substantially outweighed by the danger of unfair prejudice"?

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Character, Custom & Habit Evidence

HN3[] Admissibility of Evidence, Character, Custom & Habit Evidence

Mil. R. Evid. 414, Manual Courts-Martial, provides an exception to Mil. R. Evid. 404(b), Manual Courts-Martial's general prohibition on propensity evidence in cases in which the accused is charged with a qualifying "act of child molestation." Mil. R. Evid. 414(a). Mil. R. Evid. 414(d) defines "child molestation" to include, inter alia, any conduct prohibited by Unif. Code Mil. Justice art. 120b, *10 U.S.C.S. § 920b*, or any attempt to engage in such conduct. If evidence is admitted under Mil. R. Evid. 414, it may be considered on any matter to which it is relevant, including propensity. Mil. R. Evid. 414(a).

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN4[] Admissibility of Evidence, Sex Offenses

Admission of evidence under Mil. R. Evid. 414, Manual Courts-Martial, requires a two-step process. In the first step, the military judge must make three threshold findings: (1) whether the accused is charged with an act of child molestation as defined by Mil. R. Evid. 414(a); (2) whether the proffered evidence is evidence of his commission of another offense of child molestation as defined by the rule; and (3) whether the evidence is relevant under Mil. R. Evid. 401, Manual Courts-Martial, and Mil. R. Evid. 402, Manual Courts-Martial.

Military & Veterans
Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN5[] Relevance, Confusion, Prejudice & Waste of Time

Second, if the three threshold factors are met, the military judge must then apply a balancing test under Mil. R. Evid. 403, Manual Courts-Martial, to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. Although not exhaustive or exclusive, the U.S. Court of Appeals for the Armed Forces has identified a list of factors to consider under this balancing test: Strength of proof of prior act--conviction versus gossip; probative weight of evidence; potential for less prejudicial evidence; distraction of factfinder. time needed for proof of prior conduct. temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN6[] Admissibility of Evidence, Sex Offenses

Inherent in Mil. R. Evid. 414, Manual Courts-Martial, is a general presumption in favor of admission.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN7 **Admissibility of Evidence, Sex Offenses**

Mil. R. Evid. 414, Manual Courts-Martial, recognizes that similar incidents of child molestation are relevant to whether an accused has a propensity to engage in incidents of child molestation.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN8 **Relevance, Confusion, Prejudice & Waste of Time**

Where a military judge conducts a proper Mil. R. Evid. 403, Manual Court-Martial, balancing test and articulates his analysis on the record, the ruling will not be overturned unless there is a clear abuse of discretion.

Military & Veterans Law > Military Justice > Courts Martial > Judges

HN9 **Courts Martial, Judges**

Military judges are presumed to know the law and follow it absent clear evidence to the contrary.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Character, Custom & Habit Evidence

HN10 **Admissibility of Evidence, Character, Custom & Habit Evidence**

The court considers the military judge's ruling in light of the three-part Reynolds test for admissibility of Mil. R. Evid. 404(b), Manual Courts-Martial, evidence.

Military & Veterans Law > ... > Courts Martial > Evidence > Admissibility of Evidence

Military & Veterans Law > Military Offenses > Attempts

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN11 **Evidence, Admissibility of Evidence**

Relevance is a "low threshold." The Government was required to prove (here) that appellant attempted--that is, acted with specific intent--to commit the offense of sexual abuse of a child by intentionally communicating indecent language to (child); refer to Unif. Code Mil. Justice art. 80, *10 U.S.C.S. § 880*; Unif. Code Mil. Justice art. 120b, *10 U.S.C.S. § 920b*.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Character, Custom & Habit Evidence

HN12 **Admissibility of Evidence, Character, Custom & Habit Evidence**

Where identity of the perpetrator is not in issue, the Mil. R. Evid. 404(b), Manual Courts-Martial, evidence is not relevant to demonstrate modus operandi. If identity is not in doubt and the only issue is whether the criminal act was committed, modus operandi is not relevant.

Criminal Law & Procedure > Trials > Closing Arguments

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Evidence > Burdens of Proof > Allocation

HN13 **Trials, Closing Arguments**

Improper argument is a question of law that the court reviews de novo. If there is no objection at trial, on appeal the appellant bears the burden to demonstrate plain error. When reviewing an allegedly improper argument for plain error, the appellate court must determine: (1) whether trial counsel's arguments amounted to clear, obvious error; and (2) if so, whether there was 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Legal Ethics > Prosecutorial Conduct

HN14[] **Appeals, Prosecutorial Misconduct**

Trial prosecutorial misconduct is behavior by the prosecuting attorney that oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. Prosecutorial misconduct can be generally defined as 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 canon.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Tests for Prosecutorial Misconduct

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN15[] **Prosecutorial Misconduct, Tests for Prosecutorial Misconduct**

A prosecutorial comment must be examined in light of its context within the entire court-martial. Prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that the court cannot be confident that the appellant was convicted and sentenced on the basis of the evidence alone. In assessing prejudice from improper argument, the court balances three factors: (1) the severity of the misconduct; (2) the measures, if any, adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction or sentence.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN16[] **Judicial Review, Standards of Review**

In order to obtain relief on appeal (under plain error review) the defense bears the burden to demonstrate a reasonable probability of a different result had the asserted error not occurred. As the United States Court of Appeals for the Armed Forces (CAAF) has explained: When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence. As a result, plain error before a military judge sitting alone is rare indeed. Similarly, the court presumes the military judge is able to filter out improper argument in the absence of evidence to the contrary.

Military & Veterans Law > ... > Courts Martial > Evidence > Admissibility of Evidence

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN17[] **Evidence, Admissibility of Evidence**

Mil. R. Evid. 404(b), Manual Courts-Martial, does not provide a basis for admission of evidence during sentencing that is not otherwise admissible under R.C.M. 1001(b)(4), Manual Courts-Martial. R.C.M. 1001(b)(4) permits the Government to present in sentencing aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN18[] **Criminal Process, Assistance of Counsel**

The *Sixth Amendment* guarantees an accused the right to effective assistance of counsel. In assessing the effectiveness of counsel, the court applies the standard set forth in Strickland, and begins with the presumption of competence announced in Cronic. Accordingly, the court will not second-guess the strategic or tactical decisions made at trial by defense counsel. The court reviews allegations of ineffective assistance de novo.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN19[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

The court utilizes the following three-part test to determine whether the presumption of competence has been overcome: 1. Are appellant's allegations true; if so, is there a reasonable explanation for counsel's actions? 2. If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? 3. If defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result?

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

HN20[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

Appellant bears the burden to demonstrate prejudice as well as deficient performance. If appellant cannot demonstrate prejudice, the court need not determine whether counsel's performance was constitutionally deficient under Strickland.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Hearsay Rule Components

HN21[] Hearsay Rule & Exceptions, Hearsay Rule Components

According to Mil. R. Evid. 801(c), "hearsay" is an out-of-court statement a party offers in evidence to prove the truth of the matter asserted").

Criminal Law & Procedure > Trials > Closing Arguments

Military & Veterans Law > ... > Courts Martial > Evidence > Admissibility of Evidence

Military & Veterans Law > Military Justice > Courts Martial > Judges

HN22[] Trials, Closing Arguments

The military judge is presumed to know the law and to filter out improper evidence and arguments.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Judicial Review

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

HN23[] Procedural Due Process, Scope of Protection

The court reviews de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

HN24[] Procedural Due Process, Scope of Protection

Where the period exceeds the 120-day threshold for a presumptively unreasonable post-trial delay that the U.S. Court of Appeals for the Armed Forces (CAAF) established in Moreno, the court considers the four factors the CAAF identified in Moreno to assess whether Appellant's due process right to timely post-trial and appellate review has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. However, where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system.

Counsel: For Appellant: Captain M. Dedra Campbell, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Major Michael T. Bunnell, USAF; Major Mary Ellen Payne, USAF; Justin A. Miller (civilian intern).[1].

Judges: Before J. JOHNSON, POSCH, and KEY, Appellate Military Judges. Chief Judge J. JOHNSON delivered the opinion of the court, in which Judge POSCH and Judge KEY joined.

Opinion by: J. JOHNSON

Opinion

J. JOHNSON, Chief Judge:

A general court-martial composed of a military judge alone convicted Appellant, contrary to his pleas, of one specification of attempted sexual abuse of a child in violation of *Article 80*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 880*.[2] The military judge sentenced Appellant to a dishonorable discharge, confinement for 15 months, and reduction to the grade of E-1. The convening authority approved the adjudged sentence, but pursuant to *Article 58b(b), 10 U.S.C. § 858b(b)*, waived $258.00 per month of mandatory forfeitures of pay for the benefit of **[*2]** Appellant's dependent child.

Appellant raises seven issues on appeal: (1) whether the military judge abused his discretion by failing to limit the scope of evidence admitted pursuant to Mil. R. Evid. 414 and by admitting irrelevant evidence pursuant to Mil. R. Evid. 404(b); (2) whether trial counsel made improper arguments; (3) whether civilian trial defense counsel was ineffective with respect to his sentencing argument, the defense sentencing evidence, and failure to object to certain prosecution exhibits and arguments; (4) whether the addendum to the staff judge advocate's recommendation (SJAR) failed to address a legal error the Defense raised to the convening authority; (5) whether Appellant is entitled to relief for post-trial delay; (6) whether the military judge abused his discretion by denying the Defense's request for access to devices used by law enforcement to investigate the charged offense; and (7) whether trial defense counsel were ineffective in failing to timely request and compel certain discovery and in failing to speak to sentencing witnesses before trial.[3] With respect to issues (4), (6), and (7), we have carefully considered Appellant's contentions and find they **[*3]** do not require further discussion or warrant relief. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*. With respect to the remaining issues, we do not find error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

I. Background

Appellant joined the Air Force in December 2015 when he was 25 years old. In late March 2016, Appellant was living on Joint Base San Antonio (JBSA)-Lackland, Texas, where he had been undergoing training.

On 28 March 2016, Appellant responded to a post on "Whisper," an Internet application that permits users to post photos and messages and to send responses anonymously. The post Appellant responded to featured a photo of a 14-year-old girl with the caption, "Anyone on lackland base? Hmu" [sic]. In an exchange of messages over several days, Appellant identified himself as a 25-year-old Airman temporarily assigned to JBSA-Lackland for training. The anonymous poster identified themselves as "Helen," the 14-year-old daughter of an active duty Air Force member stationed at JBSA-Lackland.[4] In reality, "Helen" was a fictitious persona created by Special Agent (SA) JH, an agent of the Air Force Office of Special Investigations (AFOSI).

From 28 March 2016 until 5 April **[*4]** 2016, Appellant and "Helen" exchanged a series of messages, first on Whisper and later by cell phone text message. In the course of their correspondence, Appellant provided several photographs of himself, and "Helen" provided two additional photographs of herself, none of them featuring nudity or sexually explicit conduct.[5] However, Appellant did make a number of sexually explicit

[1] Mr. Miller was a legal intern with the Air Force Legal Operations Agency and was at all times supervised by attorneys admitted to practice before this court.

[2] All references in this opinion to the Uniform Code of Military Justice (UCMJ) and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.).

[3] Appellant raises Issues (6) and (7) pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1992)*.

[4] "Helen" stated her age on three separate occasions over the course of her correspondence with Appellant.

[5] The photographs of "Helen" were pictures of a female AFOSI agent taken when she was 13 and 14 years old.

comments to "Helen" on such topics as masturbation, having an erection, oral sex, desiring to meet to engage in sexual activity, and fantasizing about digitally penetrating "Helen's" vagina in a movie theater. "Helen" did not initiate any of the sexual comments.

SA JH was able to identify Appellant based on Appellant's reported age, his presence as a trainee on JBSA-Lackland, and photographs of servicemembers in the Defense Enrollment Eligibility Reporting System database. The message exchange ended when on 6 April 2016 the AFOSI brought Appellant to their office for an interview, on the pretense that "Helen's" father had discovered the messages and contacted their office. Appellant agreed to speak to the agents after they advised him of his rights. Appellant made a number of incriminating admissions during **[*5]** the videorecorded interview, including that he had in fact written the messages to "Helen."

Ultimately, Appellant was tried and convicted for a single specification of attempted sexual abuse of a minor by "intentionally communicating indecent language by sending sexually explicit language to 'Helen' and describing potential sexual encounters . . . ," in violation of *Article 80*, UCMJ.

II. Discussion

A. Mil. R. Evid. 414 and Mil. R. Evid. 404(b)

1. Additional Background

At the conclusion of the AFOSI interview, Appellant consented to have the AFOSI agents review his cell phone. The agents sent Appellant's phone to the Cyber Forensics Laboratory (CFL) at the Defense Cyber Crime Center for further analysis. The CFL produced an extraction report that reproduced not only Appellant's Whisper and text communications with "Helen," but also numerous other exchanges Appellant engaged in on Whisper. Among these exchanges were several with individuals who purported to be under the age of 16 years. Other than Appellant himself, the AFOSI did not ascertain the identity of any individual involved in these additional communications.

Before trial, the Government identified 11 of these additional communications on Whisper—each a series of messages **[*6]** between Appellant and another individual occurring between 28 March 2016 and 2 April 2016—that it intended to introduce at trial. Two of the communications, with individuals identified as "queen [H]" and "k," involved sexual comments or references by Appellant; the remaining nine did not have explicit sexual content. The Government contended that these communications were admissible under Mil. R. Evid. 414[6] as evidence of crimes of child molestation similar to the charged offense, and also were relevant and admissible under Mil. R. Evid. 404(b) to show Appellant's absence of mistake, intent, plan, and motive, as well as to rebut a possible defense of entrapment. The Defense moved in limine to exclude such evidence. The military judge conducted a hearing on the Defense's motion at which he received evidence and argument from counsel.

In a written ruling, the military judge granted the defense motion in limine in part and denied it in part. The military judge found Appellant's communications with "queen [H]" and "k" were admissible under Mil. R. Evid. 414. However, he found the nine communications that did not include sexual references were not admissible under Mil. R. Evid. 414, because court members could not find by a preponderance of evidence that these **[*7]** messages were instances of "child molestation." The military judge further found these nine non-explicit communications were nevertheless relevant under Mil. R. Evid. 404(b) to demonstrate "intent, absence of mistake or accident, modus operandi, and to rebut—if raised—the defense of entrapment." However, the military judge further found the volume of these other messages presented some danger of unfair prejudice; therefore, he held the Government could "choose two sample conversations in addition to the [Mil. R. Evid.] 414 evidenc[e], and may generally summarize the remaining seven conversations."

At trial, the Government introduced Appellant's communications with "queen [H]" and "k," as well as two other communications (with "BleachBud-die14" and "[J]"), in accordance with the military judge's ruling.

2. Law

[6] The Government initially provided notice it intended to offer this evidence under Mil. R. Evid. 413 rather than Mil. R. Evid. 414, but corrected its position at the motion hearing. The military judge found the Government's notice under Mil. R. Evid. 414 to be timely.

a. Standard of Review

HN1[] "The standard of review for a military judge's decision to admit evidence is abuse of discretion." United States v. Fetrow, 76 M.J. 181, 185 (C.A.A.F. 2017) (citing United States v. Yammine, 69 M.J. 70, 73 (C.A.A.F. 2010)). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." **[*8]** United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (citation omitted). "The question of whether the admitted testimony constitutes evidence that the accused committed another offense of child molestation under M.R.E. 414 is one of law, reviewed de novo." Fetrow, 76 M.J. at 185 (citing Yammine, 69 M.J. at 73).

b. Mil. R. Evid. 404(b)

HN2[] Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, *inter alia*, proving intent, knowledge, or absence of mistake. Mil. R. Evid. 404(b)(2). The list of potential purposes in Mil. R. Evid. 404(b)(2) "is illustrative, not exhaustive." United States v. Ferguson, 28 M.J. 104, 108 (C.M.A. 1989). We apply a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b):

> 1. Does the evidence reasonably support a finding by the court members that [the] appellant committed prior crimes, wrongs or acts?
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

United States v. Staton, 69 M.J. 228, 230 (C.A.A.F. 2010) (alterations in original) (quoting United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989)).

c. Mil. R. Evid. 414

HN3[] Mil. R. Evid. 414 provides an exception to Mil. R. Evid. 404(b)'s general prohibition on propensity evidence in cases in which the accused is charged **[*9]** with a qualifying "act of child molestation." Mil. R. Evid. 414(a). Mil. R. Evid. 414(d) defines "child molestation" to include, *inter alia*, any conduct prohibited by Article 120b, UCMJ, or any attempt to engage in such conduct. If evidence is admitted under Mil. R. Evid. 414, it "may be considered on any matter to which it is relevant," including propensity. Mil. R. Evid. 414(a); United States v. James, 63 M.J. 217, 220 (C.A.A.F. 2006).

HN4[] Admission of evidence under Mil. R. Evid. 414 requires a two-step process. In the first step,

> [T]he military judge must make three threshold findings: (1) whether the accused is charged with an act of child molestation as defined by [Mil. R. Evid.] 414(a); (2) whether the proffered evidence is evidence of his commission of another offense of child molestation as defined by the rule; and (3) whether the evidence is relevant under [Mil. R. Evid.] 401 and [Mil. R. Evid.] 402.

United States v. Ediger, 68 M.J. 243, 248 (C.A.A.F. 2010) (citing United States v. Bare, 65 M.J. 35, 36 (C.A.A.F. 2007)).

HN5[] Second, if the three threshold factors are met, the military judge must then apply a balancing test under Mil. R. Evid. 403 to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. *Id.*; *see* United States v. Wright, 53 M.J. 476, 482-83 (C.A.A.F. 2000). Although not exhaustive or exclusive, our superior court has identified a list of factors to consider under this balancing **[*10]** test: "Strength of proof of prior act—conviction versus gossip; probative weight of evidence; potential for less prejudicial evidence; distraction of factfinder; . . . time needed for proof of prior conduct[;] . . . temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties." Wright, 53 M.J. at 482 (citations omitted); *see* United States v. Dewrell, 55 M.J. 131, 138 (C.A.A.F. 2001).

HN6[] "Inherent in [Mil. R. Evid.] 414 is a general presumption in favor of admission." Yammine, 69 M.J. at 74 n.4 (citing Ediger, 68 M.J. at 248).

3. Analysis

On appeal, Appellant contends the military judge abused his discretion with respect to admitting evidence under both Mil. R. Evid. 414 and Mil. R. Evid. 404(b). We address each type of evidence in turn.

a. Mil. R. Evid. 414 Evidence

We find the military judge did not abuse his discretion when he admitted Appellant's communications with "queen [H]" and "k" pursuant to Mil. R. Evid. 414. He clearly explained his reasoning as he applied the correct legal framework, beginning with the three threshold criteria set forth in *Ediger, 68 M.J. at 248*. First, he correctly found Appellant was charged with an offense of child molestation, specifically an attempt to commit the offense of sexual abuse of a minor, a violation of *Article 120b*, UCMJ. *See* Mil. R. Evid. 414(d)(2)(G).

Second, the military judge reasonably concluded court members could find by a preponderance **[*11]** of evidence that the record of Appellant's communications with "queen [H]" and "k" constituted other offenses of child molestation. *See* Mil. R. Evid. 414(a). Indeed, these other communications were very similar to the charged offense, in that they also involved communicating sexually explicit language on Whisper to recipients who purported to be under 16 years old.

Third, the military judge properly concluded these "other" communications were relevant to the charged offense. He explained, "[t]hese two discussions provide some evidence of [Appellant's] intent to gratify his sexual desire when he used similar language in the charged specification and is relevant to whether there was an absence of mistake as to whether 'Helen' was a minor." In addition, the military judge noted ***HN7***[⬆] Mil. R. Evid. 414 "recognize[s] that . . . similar incidents of child molestation are relevant to whether an accused has a propensity to engage in incident[s] of child molestation." *See United States v. Dewrell, 52 M.J. 601, 608 (A.F. Ct. Crim. App. 1999)* ("[I]n view of the language Congress used in [Mil. R. Evid.] 413 and 414, relevancy is all but mandated.") (citations omitted).

Having properly found these communications met the three threshold criteria, the military judge also reasonably applied the Mil. R. Evid. 403 balancing test and found the probative **[*12]** value of the Mil. R. Evid. 414 evidence was not substantially outweighed by the danger of unfair prejudice or other countervailing factors. He individually assessed each of the *Wright* factors in his written ruling, and concluded that most of them favored admission, none favored exclusion, and two (potential for less prejudicial evidence and frequency of the acts) were essentially neutral. ***HN8***[⬆] Where a military judge conducts a proper Mil. R. Evid. 403 balancing test and articulates his analysis on the record, "the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)* (quoting *United States v. Ruppel, 49 M.J. 247, 250 (C.A.A.F. 1998)*). We agree with the military judge that the balancing in this case favored admission, and we find no clear abuse of discretion.

On appeal, Appellant does not contend that his communications with "queen [H]" and "k" failed to meet the threshold test for Mil. R. Evid. 414 evidence. Instead, he faults the military judge for failing to "properly limit the scope of the admissible propensity evidence to protect against the danger of unfair prejudice." Appellant notes the military judge admitted 51 pages of Mil. R. Evid. 414 text conversations, permitted trial counsel to have the Government's expert read through substantial portions of Appellant's explicit conversation **[*13]** with "k" line by line, and permitted the Government to refer in argument to "queen [H]" and "k" as if they were actual minors despite the fact their identities had never been established. Appellant contends this "unfettered" use of the evidence was unfairly prejudicial, and implies the military judge either should have intervened to limit the Government's use of the evidence, or excluded it under Mil. R. Evid. 403.

We are not persuaded. Essentially, Appellant does not fault the military judge's preliminary ruling allowing the evidence under Mil. R. Evid. 414 which, as discussed above, was appropriate. To the extent Appellant complains the Government exaggerated or misused this evidence, ***HN9***[⬆] "[m]ilitary judges are presumed to know the law and follow it absent clear evidence to the contrary." *United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007)* (citing *United States v. Mason, 45 M.J. 483, 485 (C.A.A.F. 1997)*). In light of the military judge's proper and clearly-articulated analysis of the admissibility and relevance of this evidence, we are confident he considered it appropriately in its proper context.

b. Mil. R. Evid. 404(b) Evidence

We further find no material prejudice to Appellant's

substantial rights with regard to Mil. R. Evid. 404(b). Although the military judge's written analysis of this rule is less explicit and more abbreviated than his application of Mil. R. Evid. 414, he did **[*14]** explain his reasoning in his ruling, and therefore we review for a clear abuse of discretion. *See* Manns, 54 M.J. at 166 (citation omitted). ***HN10***[↑] We consider the military judge's ruling in light of the three-part *Reynolds* test for admissibility of Mil. R. Evid. 404(b) evidence. *See* Ediger, 68 M.J. at 248.

First, the communications in question with "BleachBuddie14" and "[J]" were of a similar nature to the evidence of Appellant's communications with "Helen"—the subject of the charged offense—as well as those with "queen [H]" and "k," and would support a finding by a preponderance of the evidence that Appellant in fact engaged in such communications.

Second, the military judge found this evidence was relevant for multiple purposes—specifically to demonstrate intent, absence of mistake or accident, and modus operandi, and to rebut a possible defense of entrapment. We find no abuse of discretion in the military judge's ruling with respect to intent, mistake or accident, and entrapment; and to the extent the evidence was not relevant to modus operandi, we find the military judge's ruling harmless.

With regard to entrapment, Appellant notes the Defense did not ultimately raise that defense. However, it was not error for the military judge to rule the evidence **[*15]** would be admissible for this purpose.

With regard to intent, Appellant contends this evidence of non-criminal communication with purported minors had no tendency to demonstrate an intent to engage in acts of child sexual abuse through indecent language with "Helen." However, ***HN11***[↑] relevance is a "low threshold." United States v. Roberts, 69 M.J. 23, 27 (C.A.A.F. 2010). The Government was required to prove Appellant attempted—that is, acted with specific intent—to commit the offense of sexual abuse of a child by intentionally communicating indecent language to "Helen." *See* Article 80, UCMJ; Article 120b, UCMJ, 10 U.S.C. § 920b. We agree with the military judge that Appellant's willingness to engage on Whisper with multiple individuals who held themselves out to be under the age of 16 years in non-sexually explicit conversations, in the same time frame that he engaged in three other communications that were sexually explicit, has some tendency to demonstrate his indecent communications to "Helen" were intentional. *See* Mil. R. Evid. 401(a). For example, Appellant's awareness of multiple other individuals purporting to be children while communicating on Whisper has some tendency to increase the likelihood he believed "Helen" was also actually under 16 years old.

With regard to absence of mistake, Appellant **[*16]** contends the non-explicit communications with "BleachBuddie14" and "[J]" were cumulative with other evidence that Appellant was aware that individuals under 16 years of age used Whisper, and in any event admitting the entirety of the conversations was unnecessary. However, these arguments do not impugn the *relevance* of these communications, i.e., that they have some tendency to indicate Appellant did not overlook or make a mistake as to "Helen's" age.

With regard to modus operandi, Appellant properly cites prior decisions of this court for the proposition that, ***HN12***[↑] where identity of the perpetrator is not in issue, the Mil. R. Evid. 404(b) evidence is not relevant to demonstrate modus operandi. *See* United States v. Rollins, 23 M.J. 729, 735 (A.F.C.M.R. 1986) ("If identity is not in doubt and the only issue is whether the criminal act was committed, modus operandi is not relevant."); United States v. McIntyre, Misc. Dkt. No. 2013-24, 2014 CCA LEXIS 19, at *17-18 (A.F. Ct. Crim. App. 16 Jan. 2014) (relying on *Rollins*). In this case, the identity of the perpetrator was not in issue. However, as the Government observes, the military judge properly found the evidence relevant for other purposes and did not improperly consider it for propensity. We note again Appellant was tried by a military judge; thus, notwithstanding that the Mil. R. Evid. 404(b) material may not **[*17]** have been relevant to Appellant's identity, we are confident the military judge considered the evidence for relevant purposes, and not as evidence of propensity or for any other improper purpose. *See* Erickson, 65 M.J. at 225.

Third, for similar reasons, and as with the Mil. R. Evid. 414 evidence, we find the probative value of these communications was not substantially outweighed by the danger of unfair prejudice. The military judge is presumed to know the law, and his rulings and rationale indicate he did not intend to use this evidence for an improper purpose. *See id.* Moreover, we find the other dangers that Mil. R. Evid. 403 guards against, such as confusion, delay, and cumulativeness, to be of minimal concern—particularly in light of the military judge's decision to admit the text of only two of the nine non-explicit conversations.

B. Improper Argument

1. Law

HN13[] Improper argument is a question of law that we review de novo. *United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014)* (citation omitted). If there is no objection at trial, on appeal the appellant bears the burden to demonstrate plain error. *United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019)* (citations omitted). When reviewing an allegedly improper argument for plain error, the appellate court "must determine: (1) whether trial counsel's arguments amounted to clear, obvious error; and **[*18]** (2) if so, whether there was 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" *Id.* (quoting *United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017))* (additional citations omitted).

HN14[] "Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005)* (quoting *Berger v. United States, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314 (1935))*. "Prosecutorial misconduct can be generally defined as 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 canon." *United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)* (citing *Berger, 295 U.S. at 88*) (additional citation omitted).

HN15[] "A prosecutorial comment must be examined in light of its context within the entire court-martial." *United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005)* (citation omitted). "[P]rosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident" that the appellant was convicted and sentenced on the basis of the evidence alone. *Fletcher, 62 M.J. at 184*; *see United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013)* (regarding sentencing arguments). In assessing prejudice from improper argument, we balance three factors: (1) the **[*19]** severity of the misconduct; (2) the measures, if any, adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction or sentence. *See Halpin, 71 M.J. at 480*; *Fletcher, 62 M.J. at 184*.

2. Analysis

Appellant argues that the trial counsels' arguments were improper in three respects. Specifically, Appellant contends senior trial counsel and assistant trial counsel misused the evidence admitted pursuant to Mil. R. Evid. 404(b) during their findings and sentencing arguments, respectively; senior trial counsel improperly commented on Appellant's constitutional right to remain silent; and senior trial counsel improperly referred to victim impact during her rebuttal findings argument.

However, trial defense counsel did not object to any of these arguments, and ***HN16***[] in order to obtain relief on appeal the Defense bears the burden to demonstrate a reasonable probability of a different result had the asserted error not occurred. *See Voorhees, 79 M.J. at 9* (citation omitted). In this regard, it is significant that Appellant was tried by a military judge alone. As the United States Court of Appeals for the Armed Forces (CAAF) has explained:

> When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle. A military judge **[*20]** is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence. . . . As a result, "plain error before a military judge sitting alone is rare indeed."

United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000) (citations omitted). Similarly, we presume the military judge is able to filter out improper argument in the absence of evidence to the contrary. With this in mind, we turn to the specifics of Appellant's case.

As an initial matter, we note the Government's case for findings was very strong. *See Fletcher, 62 M.J. at 184*. The Government introduced the record of Appellant's sexually explicit communications with "Helen," which extended over several days and in the course of which "Helen" repeatedly informed him she was 14 years old. The Government also introduced Appellant's recorded AFOSI interview in which he admitted writing the messages. Any suggestion that Appellant might have overlooked "Helen's" age was undercut by the evidence that during the same time frame he willingly engaged in other conversations on Whisper with individuals purporting to be girls under the age of 16 years, two of which were also sexually explicit. **[*21]**

a. Use of Mil. R. Evid. 404(b) Evidence

Turning to Appellant's assertions of improper argument, Appellant's non-explicit communications with "BleachBuddie14" and "[J]" were admitted pursuant to Mil. R. Evid. 404(b) as evidence of, *inter alia*, intent and absence of mistake. During argument on findings, senior trial counsel referred to Appellant's apparent interest in pictures of these two individuals, and Appellant's questioning "BleachBuddie14's" assertion that he was too old for her. We find senior trial counsel's remarks were fair comments consistent with purposes for which this evidence was admitted, and Appellant has not demonstrated "clear, obvious error." *Voorhees, 79 M.J. at 9* (citation omitted).

Assistant trial counsel's use of the "BleachBuddie14" and "[J]" evidence during sentencing argument, which the Government does not squarely address, was potentially more problematic. After describing Appellant's explicit comments to "queen [H]" and "k," admitted as prior acts of child molestation pursuant to Mil. R. Evid. 414, assistant trial counsel then stated:

> And, finally, we know [Appellant] talked to ["[J]"] who indicated she was 11 [years old], and he did turn the conversation, right. He asked for pictures. And all the evidence in this case shows you that he **[*22]** had only one purpose for asking for pictures. And so when he asked Beach Bunny [sic] "what's your upper limit of guys you go out with?" We certainly can tell from ["[J]"] that, well, [Appellant's] limit is something as low as 11.

The military judge admitted evidence of Appellant's communications with "BleachBuddie14" and "[J]" specifically as evidence of intent, absence of mistake or accident, modus operandi, and to rebut entrapment relevant to proving the charged offense, none of which were at issue at this stage of the proceedings. ***HN17***[↑] Mil. R. Evid. 404(b) "does not provide a basis for admission of evidence during sentencing that is not otherwise admissible under R.C.M. 1001(b)(4)." *United States v. Tanner, 63 M.J. 445, 448 (C.A.A.F. 2006)* (citing *United States v. Wingart, 27 M.J. 128, 135-36 (C.M.A. 1988)*). R.C.M. 1001(b)(4) permits the Government to present in sentencing "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."

However, we need not definitively decide whether assistant trial counsel's use of this evidence in sentencing was clear error, or whether there was a proper use for such evidence in aggravation or as rebuttal to the Defense's evidence of rehabilitation potential. Because the Defense did not object to this argument at trial, Appellant bears the burden to demonstrate **[*23]** a reasonable probability of a different result. In light of our presumption that the military judge knows the law and filters out impermissible evidence and argument, Appellant cannot meet that burden here.

b. Comment on Appellant Not Making a Written Statement

During her rebuttal argument on findings, senior trial counsel stated with regard to Appellant's AFOSI interview:

> And finally at the end of the video they offer him the opportunity to write a statement; perfect opportunity to explain yourself if OSI has shut you down and there is valid information that you want to put forward that they need to know about and you want to explain the why. But what does he say when they offer him that chance? He says "I can't make sense of what I would say right now." There's no explanation, sir, other than that he's guilty.

To be perfectly clear, this was a blatant and inappropriate invitation for the finder of fact to hold against Appellant his constitutional right to decline to make a statement. Before a panel of members, this argument might have inflicted irreparable harm to the fairness of the proceedings. However, the military judge recognized the impropriety of the argument. At the conclusion **[*24]** of senior trial counsel's rebuttal, the military judge stated he "will not consider [Appellant's] decision to refrain from providing a written statement," which he deemed as Appellant "invoking his right to remain silent, and as such the court will not consider that as any substantive evidence in this case or consider it [sic] any inferences as argued by the trial counsel regarding that election." The military judge could and arguably should have condemned senior trial counsel's argument more strongly. *See Voorhees, 79 M.J. at 14-15*. However, we are left in no doubt that this improper argument did not play a role in the military judge's findings.

c. Comment on Victim Impact in Argument on Findings

Finally, Appellant cites another portion of the rebuttal findings argument as improper. Senior trial counsel argued:

> [T]his operation that OSI was undertaking is highly valuable to the Air Force and society as a whole. Talking like this to minors thrusts them way too early into an adult world. It makes them sexualize prematurely, and the negative consequences of that not only to the child but to society as a whole, the ripple effect, it's huge.

At this point, the military judge interrupted to ask, "[i]s that a sentencing **[*25]** argument rather than a findings argument?" The senior trial counsel responded that she was "just coming to a conclusion," and she quickly concluded without returning to the subject of victim impact. Although the military judge did not expressly state that he would not consider this quoted portion of the argument, his interruption and question indicated he recognized this argument about the impact of the charged offense was essentially irrelevant. Coupled with the general presumption that the military judge knows and properly applies the law, we are very confident this asserted error did not influence the findings.

C. Ineffective Assistance of Counsel

1. Law

HN18[↑] The *Sixth Amendment* guarantees an accused the right to effective assistance of counsel. *United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001)*. In assessing the effectiveness of counsel, we apply the standard set forth in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and begin with the presumption of competence announced in *United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)*. *See Gilley, 56 M.J. at 124* (citing *United States v. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000))*. Accordingly, we "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009)* (quoting *United States v. Anderson, 55 M.J. 198, 202 (C.A.A.F. 2001))*. We review allegations of ineffective assistance de novo. *United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011)* (citing *Mazza, 67 M.J. at 474*).

HN19[↑] We utilize the following three-part test to determine whether the presumption of competence has been overcome:

> 1. Are **[*26]** appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Gooch, 69 M.J. at 362 (alteration in original) (quoting *United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991))*. The burden is on the appellant to demonstrate both deficient performance and prejudice. *United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012)* (citation omitted).

2. Analysis

Appellant contends his trial defense counsel, Mr. DC and Maj SH, were ineffective in multiple respects. At the Government's request, this court ordered and received from Mr. DC and Maj SH declarations responsive to Appellant's claims of ineffective assistance. Because their declarations do not raise any substantive factual disputes, we find no post-trial evidentiary hearing is required to resolve this assignment of error. *See United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997)*; *United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411, 413 (C.M.A. 1967)*. We consider Appellant's arguments in turn and conclude the alleged errors warrant no relief.

a. Sentencing Argument

During Mr. DC's sentencing argument, he paused and stated: "I meant to ask this before I stood up, but **[*27]** maybe I'm confused. The DD [dishonorable discharge] is statutorily required, is that correct?" The military judge took a moment to consult his materials before informing Mr. DC that the offense of attempted sexual abuse of a child did not carry a mandatory minimum sentence. Trial counsel concurred. Mr. DC then continued with his argument. Although Mr. DC conceded reduction in rank and some period of confinement was appropriate, he did not concede that a punitive discharge was appropriate. Rather, Mr. DC asked the military judge to "spare" Appellant a punitive discharge, and opined that "a punitive discharge is not what we see in this case."

Appellant now contends Mr. DC's question to the

military judge indicated he was unprepared, and that there is no reasonable explanation for Mr. DC not to have familiarized himself with the applicable minimum and maximum sentences. Appellant further argues Mr. DC's apparent assumption that a minimum dishonorable discharge applied effectively conceded such a punishment was appropriate, and left him "unable to present a competent or persuasive sentencing argument, especially in regards to a punitive discharge."

In response, Mr. DC explains that during **[*28]** the assistant trial counsel's sentencing argument he realized the parties had not discussed the applicable maximum and minimum punishments with the military judge. Mr. DC states:

> I understood there was not a mandatory punitive discharge and based on trial counsel's sentence recommendation I wanted to clarify on the record the court's understanding of both the maximum and minimum punishment. I recognize that both the timing of the question and the manner in which I phrased my question to the military judge may have been confusing and inartful. Although an inopportune moment, my intent was to gain clarity for myself and the record.

We agree with Mr. DC that his question was inartful at best, posed in such a way as to suggest he incorrectly believed a dishonorable discharge was mandatory. However, ***HN20***[⬆] Appellant bears the burden to demonstrate prejudice as well as deficient performance. If Appellant cannot demonstrate prejudice, we need not determine whether Mr. DC's performance was constitutionally deficient under *Strickland*. *See* *United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007)* (quoting *United States v. Saintaude, 61 M.J. 175, 183 (C.A.A.F. 2005))*. In this case, Appellant cannot demonstrate prejudice. The military judge was clearly aware a dishonorable discharge was not mandatory. Mr. DC did not concede **[*29]** a punitive discharge, and argued against such a punishment. We are not persuaded a reasonable probability exists that, absent Mr. DC's question, the military judge would have imposed a more favorable sentence for Appellant.

b. Failure to Present Character Letters at Sentencing

Appellant asserts that a few days before trial, his defense team lost approximately six character letters prepared for sentencing proceedings. Mr. DC and Maj SH do not deny that certain character letters were lost due to what Mr. DC describes as a "computer failure" at the Area Defense Counsel's office. As a result, the Defense worked to rebuild its sentencing evidence. According to Mr. DC, he explained to Appellant that the Defense could request a delay in order to obtain any letters he felt were missing. However, Appellant stated he was satisfied with the sentencing evidence and did not want a delay. Ultimately, in sentencing the Defense introduced favorable live testimony from Appellant's spouse and three military witnesses, three character letters, a letter of appreciation, two civilian awards, and a number of photos in addition to Appellant's oral and written unsworn statements.

The details and causes of the **[*30]** loss of the original character letters is unclear. However, once again we need not determine whether trial defense counsel's performance was deficient because Appellant cannot demonstrate prejudice. *See* *Tippit, 65 M.J. at 76* (citation omitted). Appellant has made no showing of the content of the missing character letters; therefore, he cannot show how they would have differed from or materially enhanced the Defense's sentencing case. *Cf.* *United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997)* ("[A]ppellant has not even established a foundation for his claim [of ineffective assistance of counsel] by demonstrating that specific individuals would have provided the court with specific testimony.") Accordingly, he has failed to demonstrate a reasonable probability of a more favorable result.

c. Failure to Object to Prosecution Exhibits

Appellant next contends trial defense counsel were ineffective by failing to object to Prosecution Exhibits 10 through 13, which were printed records of his communications with "queen [H]," "k," "BleachBuddie14," and "[J]," admitted as Mil. R. Evid. 414 and Mil. R. Evid. 404(b) evidence as described above. We are not persuaded. It is true that trial defense counsel declined to object when the Government offered these exhibits without laying a foundation or authenticating **[*31]** the exhibits. However, as Mr. DC indicates, there is no reason to believe the Government could not have laid such a foundation if required, and the military judge had already ruled the substance of the Mil. R. Evid. 414 and Mil. R. Evid. 404(b) evidence was admissible.

Appellant contends the Defense could have also objected to the statements these unknown individuals made to Appellant on hearsay grounds. Again, we

disagree. The significance of these statements was not the truth of the matter asserted; it was the effect on the recipient, Appellant. *See* HN21[] Mil. R. Evid. 801(c) ("hearsay" is an out-of-court statement "a party offers in evidence to prove the truth of the matter asserted"). We find Appellant has failed to demonstrate either deficient performance or prejudice with respect to Prosecution Exhibits 10 through 13.

d. Failure to Object to Improper Argument

Finally, Appellant argues trial defense counsel were deficient in failing to object to the various allegedly improper trial counsel arguments, as described above. Mr. DC responds that based on the draft instructions the military judge prepared, he "believed the judge understood how the evidence was to be considered and therefore did not require additional objections from defense counsel." **[*32]** As we have explained above, HN22[] the military judge is presumed to know the law and to filter out improper evidence and arguments. *See Robbins, 52 M.J. at 457*. Because we have already determined Appellant was not prejudiced by these arguments in this judge-alone trial, it follows that he was also not prejudiced by trial defense counsel's failure to object.

D. Post-Trial Delay

HN23[] "We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *Id.* (citing *United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004)*; *United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003))*.

Appellant's court-martial concluded on 18 April 2018. However, the convening authority did not take action until 11 September 2018. HN24[] This 146-day period exceeded by 26 days the 120-day threshold for a presumptively unreasonable post-trial delay that the CAAF established in *United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006)*. Accordingly, we have considered the four factors the CAAF identified in *Moreno* to assess whether Appellant's due process right to timely post-trial and appellate review has been violated: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Id. at 135* (citing *United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005)*, *United States v. Toohey, 60 M.J. 100, 102 (C.A.A.F. 2004))*. However, where there is no qualifying prejudice from the delay, there is no due process **[*33]** violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*.

Appellant does not claim he suffered any particular prejudice from the delay. Based on the court reporter's chronology, it appears the primary reason for the delay was the court reporter's workload. Appellant's record of trial was substantial, but not unusually large, amounting to six total volumes including 492 pages of transcript. After recording Appellant's trial, the court reporter transcribed and recorded other proceedings such that more than two months had elapsed before he could dedicate more than one day to transcribing Appellant's trial. It appears the Government sought to mitigate this delay to some extent by referring a portion of Appellant's trial to be transcribed by another court reporter. It also appears that once the court reporter was able to focus on Appellant's record, he was able to transcribe the bulk of it between 25 June 2018 and 6 July 2018. The military judge signed the final authentication on 20 July 2018, although the SJAR was not signed and served on the Defense until 6 August 2018. Another significant **[*34]** factor in the delay was defense counsel's request for an extension of 20 days in which to file Appellant's clemency matters, which the acting staff judge advocate granted. On the whole, if the processing of Appellant's case was less than excellent, we nevertheless do not find the delay so egregious as to adversely affect the perceived fairness and integrity of the military justice system. *See Toohey, 63 M.J. at 362*.

Appellant contends that even if he did not suffer a violation of due process rights under *Moreno*, this court should exercise its authority under *Article 66*, UCMJ, to grant relief for unreasonable and unexplained post-trial delay even in the absence of prejudice. *See United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F. 2002)*. After considering the factors enumerated in *United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*, we conclude that such an exercise of our authority is not warranted in this case.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c)*, UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings and sentence are

AFFIRMED.[7]

End of Document

[7] We note an error in the promulgating order, in which the phrase "recution to the Grade of E-1" should read "reduction to the Grade of E-1." We direct this error be corrected in a new court-martial order.

User Name: Morgan CHRISTIE
Date and Time: Monday, February 13, 2023 9:44:00AM CST
Job Number: 190195578

Document (1)

1. *United States v. Scamahorn, 2006 CCA LEXIS 71*

Client/Matter: -None-
Search Terms: 2006 CCA LEXIS 71
Search Type: Natural Language
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Content Type	Narrowed by
Cases	Court: Federal > Military Justice

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United States v. Scamahorn

United States Navy-Marine Corps Court of Criminal Appeals

March 27, 2006, Decided

NMCCA 200201583

Reporter
2006 CCA LEXIS 71 *

UNITED STATES v. Ryan J. SCAMAHORN, Corporal (E-4), U. S. Marine Corps

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Motion granted by *United States v. Scamahorn, 63 M.J. 322, 2006 CAAF LEXIS 825 (C.A.A.F., June 14, 2006)*

Review granted by *United States v. Scamahorn, 64 M.J. 236, 2006 CAAF LEXIS 1268 (C.A.A.F., Oct. 30, 2006)*

Affirmed by *United States v. Scamahorn, 64 M.J. 236, 2006 CAAF LEXIS 1761 (C.A.A.F., Oct. 30, 2006)*

Prior History: Sentence adjudged 21 August 2001. Military Judge: C.H. Wesely. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st MARDIV (Rein), Camp Pendleton, CA.

Core Terms

military, nonjudicial, sentence, charges, specifications, false pretenses, larceny, defense team, civilian, assigned error, dishonorable, asserts, court-martial, withdraw, firearm, just debt, circumstances, caliber, ineffective assistance of counsel, failure to pay, car parts, confinement, clock, defense counsel, larceny charge, implied bias, speedy trial, subterfuge, withdrawn, mistrial

Case Summary

Procedural Posture
After appellant was convicted at a general court martial convened by Commanding General, 1st MARDIV (Rein), Camp Pendleton, CA of violating a lawful order, four specifications of larceny, and obtaining services under false pretenses, which convictions were contrary to pleas, and after the convening authority approved the sentence as adjudged, review pursuant to Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)* was sought.

Overview
Appellant was charged with larceny involving handguns and involving his receipt of goods and services from an auto supply store. After he was convicted and sentenced, he appealed, claiming deprivation of effective assistance of counsel and speedy trial rights. The court affirmed. First, using a 3-part test to analyze the effective assistance claim, the court held that no error resulted from earlier dismissals of certain charges, that the dismissals were not subterfuges, and that no other alleged errors by counsel prejudiced appellant. Second, denial of appellant's challenge to a member of the court was not an abuse of discretion. Third, records of nonjudicial punishment were improperly admitted, but no prejudice resulted. Fourth, it rejected claims of error based on governmental sentencing argument and on the trial court's denial of a mistrial, noting that in neither case did prejudice result. After ruling that the evidence was both factually and legally sufficient to support the convictions and that the sentence was not inappropriately severe, the court applied a 4-factor test and concluded that appellant's due process rights were not compromised by post-trial appellate delay.

Outcome
The court concluded that the findings and sentence were correct in law and fact and that no error materially prejudicial to the substantial rights of appellant was committed. It thereupon approved of the disposition below.

LexisNexis® Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Evidence > Inferences & Presumptions > Presumptions

Military & Veterans Law > Military Justice > Counsel

HN1 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

All service members are guaranteed the right to effective assistance of counsel at courts-martial. The United States Navy-Marine Corps Court of Criminal Appeals applies a presumption that counsel provided effective assistance. This presumption is rebutted only by a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms. Second-guessing, sweeping generalizations, and hindsight will not suffice. Even if there is error, that error must be so prejudicial as to indicate a denial of a fair trial or a trial whose result is unreliable. An appellant alleging ineffective assistance of counsel thus must surmount a very high hurdle.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **De Novo Review, Ineffective Assistance of Counsel**

Whether a defendant has had ineffective assistance of counsel involves a mixed question of law and fact. The question of whether ineffective assistance of counsel resulted and whether the error was prejudicial are both determined by a de novo review.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

Evidence > Inferences & Presumptions > Presumptions

Military & Veterans Law > Military Justice > Counsel

HN3 **De Novo Review, Ineffective Assistance of Counsel**

The United States Navy-Marine Corps Court of Criminal Appeals applies a three-prong test to determine if the presumption of competence of counsel has been overcome: (1) are the allegations true? If so, is there a reasonable explanation for counsel's actions? (2) If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? (3) If defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result? If the issue can be resolved by addressing the third prong, the court does not need to determine whether counsel's performance was deficient.

Military & Veterans Law > ... > Courts Martial > Sessions > Arraignments

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN4 **Sessions, Arraignments**

R.C.M. 707(a)(1), Manual Courts-Martial allows the Government 120 days to bring an accused to trial from the date charges are preferred. When there are multiple charges preferred on different dates, each charge has a separate 120-day clock based on its date of preferral. R.C.M. 707(b)(2). Dismissal of the charges terminates the 120-day clock unless the dismissal is a subterfuge to allow the Government to proceed without exceeding the time allowed by R.C.M. 707. R.C.M. 707(b)(3)(A)(i) provides a new 120-day clock from the date charges are repreferred after a proper dismissal. The clock is tolled by the appellant's arraignment. R.C.M. 707(b)(1).

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5 **Judicial Review, Standards of Review**

The implied premise of the cumulative-error doctrine is the existence of errors, no one perhaps sufficient to merit reversal, yet in combination they all necessitate the disapproval of a finding or sentence. Assertions of

error that are without merit are not sufficient to invoke this doctrine.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN6 **Judges, Challenges to Judges**

A member of a court-martial must be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. R.C.M. 912(f)(1)(N), Manual Courts-Martial. Military judges are enjoined to be liberal in granting challenges for cause. This rule includes challenges for actual bias as well as implied bias.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN7 **Judges, Challenges to Judges**

Actual bias and implied bias are separate tests, but do not constitute separate grounds for a challenge to a member of a court-martial. There is implied bias when most people in the same position would be prejudiced. The focus for implied bias is on the perception or appearance of fairness of the military justice system. When there is no actual bias, implied bias should be invoked rarely.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN8 **Judges, Challenges to Judges**

The United States Navy-Marine Corps Court of Criminal Appeals reviews rulings on challenges to members of the court-martial for abuse of discretion. On questions of whether a member exhibits actual bias, the court gives the military judge great deference, because it recognizes that the military judge observed the demeanor of the participants in the voir dire and challenge process. This is because a challenge for cause for actual bias is essentially one of credibility. The appellate court, however, gives less deference to the military judge when reviewing a finding on implied bias because it is objectively viewed through the eyes of the public. It thus applies an objective standard when reviewing the judge's decision regarding implied bias.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9 **Judicial Review, Courts of Criminal Appeals**

A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. The United States Navy-Marine Corps Court of Criminal Appeals will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

Military & Veterans Law > Military Justice > Nonjudicial Punishments

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Real Evidence & Writings

HN10 **Military Justice, Nonjudicial Punishments**

The guidelines governing admissibility of records of nonjudicial punishment are: 1. The admissibility of such records, including the procedural requirements for determining admissibility, is dependent on whether the document is regular or irregular on its face. 2. When an objection is based on an irregularity on the document's face, the Government must disprove that irregularity. 3. The burden to overcome the defense objection through additional evidence is on the Government, and must be accomplished without compelling the accused to provide that evidence. 4. If, however, the record of nonjudicial

punishment is regular on its face, that document is entitled to the presumption of regularity and the inferences that naturally flow from that presumption. In that case, the burden is on the accused to object and present credible evidence to overcome that presumption. For example, if the record of nonjudicial punishment contains entries that reflect the accused was informed of his right to consult counsel and to refuse nonjudicial punishment, and that the accused did not invoke those rights, the accused may present evidence that he did not make those entries prior to punishment being imposed. 5. The record would then be inadmissible unless the Government establishes, by independent evidence, that the accused had been advised of his rights and had not refused nonjudicial punishment.

Evidence > Inferences & Presumptions > Inferences

Military & Veterans Law > Military Justice > Nonjudicial Punishments

HN11[] **Inferences & Presumptions, Inferences**

It may be properly inferred that a service member's right to refuse nonjudicial punishment was waived when: (1) the record of nonjudicial punishment shows the accused was made aware of his right to refuse nonjudicial punishment; (2) the absence of any indication of the exercise of that right; and, (3) the imposition of nonjudicial punishment. However, no such inference can be made when there is an affirmative assertion of the right to refuse nonjudicial punishment followed by the imposition of that punishment. Where that occurs, the burden is on the Government to present evidence that the accused changed his mind and accepted the nonjudicial punishment.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Nonjudicial Punishments

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN12[] **Judicial Review, Courts of Criminal Appeals**

Where a reviewing court determines that a military judge erred in admitting evidence of nonjudicial punishment, the reviewing court must determine whether the error had a substantial influence on the sentence adjudged. If it did, the error is materially prejudicial to the substantial rights of an accused. Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)*.

Military & Veterans Law > Military Justice > Judicial Review > Judge Advocate General

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN13[] **Judicial Review, Judge Advocate General**

Where the staff judge advocate's recommendation is served on defense counsel in accordance with R.C.M. 1106(f)(1), Manual Courts-Martial and defense counsel fails to comment on any matter included therein, R.C.M. 1106(f)(6) provides that any error is waived unless it rises to the level of plain error.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Prohibition Against Improper Statements

Military & Veterans Law > ... > Courts Martial > Evidence > Objections & Offers of Proof

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN14[] **Prosecutorial Misconduct, Prohibition Against Improper Statements**

The lack of defense objection to an allegedly improper comment made by a prosecutor is relevant to a determination of prejudice because the lack of a defense objection is some measure of the minimal impact of that comment. Thus, absent an objection at trial, an appellant is not entitled to relief from such a comment unless there is plain error. Therefore, an appellant who charges that such an improper comment was made has the initial burden of persuasion under the

plain error analysis, and must make a showing that the error was plain or obvious and materially prejudicial to a substantial right.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Mistrial

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

Criminal Law & Procedure > Trials > Motions for Mistrial

HN15[] Abuse of Discretion, Mistrial

The United States Navy-Marine Corps Court of Criminal Appeals will not grant relief for a military judge's failure to grant a mistrial unless there is clear evidence of abuse of discretion. A mistrial is a drastic remedy to be used sparingly to prevent manifest injustice only, and it is appropriate only when circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Withdrawal of Charges > General Overview

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

HN16[] Commencement of Criminal Proceedings, Withdrawal of Charges

The Government may, at any time and for any reason, withdraw charges prior to findings. R.C.M. 604, Manual Courts-Martial.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Trial Procedures > Instructions > General Overview

HN17[] Courts Martial, Court-Martial Member Panel

Absent evidence to the contrary, members of a general court-martial are presumed to comply with the military judge's instructions.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN18[] Trial Procedures, Burdens of Proof

The tests for legal and factual sufficiency of the evidence are well-known. For legal sufficiency, the United States Navy-Marine Corps Court of Criminal Appeals considers the evidence in the light most favorable to the Government, and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. For factual sufficiency, the court weighs all the evidence in the record of trial, recognizing that it did not see or hear the witnesses, and determine whether it is convinced of the appellant's guilt beyond a reasonable doubt. Reasonable doubt does not mean, however, that the evidence contained in the record must be free from any and all conflict.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN19[] Judicial Review, Courts of Criminal Appeals

The United States Navy-Marine Corps Court of Criminal Appeals cannot affirm a finding of guilty on a theory not presented by the Government and not instructed upon by the military judge.

Military & Veterans Law > Military Offenses > Larceny & Wrongful Appropriation

HN20[] Military Offenses, Larceny & Wrongful Appropriation

The Government is under no obligation to allege or even elect a specific theory of larceny to prosecute an offense

under Unif. Code Mil. Justice art. 121, *10 U.S.C.S. § 921*. Rather, the Government need only allege that an accused did "steal" the property of another.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Military & Veterans Law > Military Offenses > General Article > Deceit & Fraud

Military & Veterans Law > Military Offenses > Larceny & Wrongful Appropriation

HN21[] **Mens Rea, General Intent**

The criminal intent required for a violation of Unif. Code Mil. Justice art. 134, *10 U.S.C.S. § 934*, is similar to that required for larceny by false pretense per Unif. Code Mil. Justice art. 121, *10 U.S.C.S. § 921*. Manual Courts-Martial pt. IV, para. 78c. A false pretense with respect to larceny is a false representation of a past or existing fact by means of any act, word, symbol, or token, including a representation that a person presently intends to perform a certain act in the future. Manual Courts-Martial, pt. IV, para. 46c(1)(e). Thus, a false representation that a person presently intends to pay for an item (for *10 U.S.C.S. § 934*) and for related services (for *10 U.S.C.S. § 921*) is a false representation of an existing fact--the present intention--and thus a false pretense if there was no intent to pay. A false pretense may also exist by silence or failure to correct a known misrepresentation. A false pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth. Manual Courts-Martial, pt. IV, para. 46c(1)(e). Additionally, obtaining services under false pretenses requires the specific intent to permanently deprive or defraud another of the use and benefit of the service. Manual Courts-Martial, pt. IV, paras. 78b(4) and 49c(14).

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN22[] **Posttrial Procedure, Actions by Convening Authority**

The mandate given to the United States Navy-Marine Corps Court of Criminal Appeals under Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)* requires that it affirm only such part or amount of the sentence as it determines, on the basis of the entire record, should be approved. The appeals court does not enter the realm of clemency, an area reserved for the convening authority. However, it is compelled to act when it finds inappropriate severity within an adjudged and approved sentence. R.C.M. 1107(b), Manual Courts-Martial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

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HN23[] **Criminal Process, Speedy Trial**

Where an appellant claims that he has been denied due process and suffered presumptive prejudice as a result of the time that has elapsed since his case was docketed with the United States Navy-Marine Corps Court of Criminal Appeals, the court analyzes the appellant's due process right to speedy appellate review under the same standards as his right to speedy post-trial review. Four factors are considered: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, the court concludes that the length of the delay is "facially unreasonable," it must balance the length of the delay with the other three factors. Moreover, in extreme cases, the delay itself may give rise to a strong presumption of evidentiary prejudice.

Counsel: CAPT JEFFREY STEPHENS, USMC, Appellate Defense Counsel.

LT JENNIE GOLDSMITH, JAGC, USNR, Appellate Defense Counsel.

LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel.

Judges: BEFORE J.W. ROLPH, J.F. FELTHAM, J.D. HARTY. Chief Judge ROLPH and Judge FELTHAM concur.

Opinion by: J.D. HARTY

Opinion

HARTY, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of violating a lawful order, four specifications of larceny, and obtaining services under false pretenses, in violation of Articles 92, 121, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 892*, *921*, and *934*. The members sentenced the appellant to a dishonorable discharge, confinement for 36 months, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence **[*2]** as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

We have considered the record of trial, the appellant's 10 assignments of error, [1] the appellant's sworn declaration, and the Government's Answer. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c), UCMJ*.

[*3] Background

The appellant frequented an indoor shooting range in Oceanside, California, where he rented handguns for use at that range. The range used Range Waiver forms to record the names of individuals who shot on a particular date, and lane tickets to record who rented a particular firearm and whether that person was military or civilian. Three firearms were discovered missing from the range: a Sig Sauer P220 .45 caliber on 14 August 1999; a Desert Eagle .50 caliber on 5 September 1999; and another Sig Sauer P220 .45 caliber on 20 November 1999. Based on Range Waiver forms and lane tickets, it was determined that the appellant was at the range on the above dates and on each occasion was in the group of shooters who rented the missing firearms.

The appellant gave separate statements to the Naval Criminal Investigative Service (NCIS) and the shooting range manager stating that he took the Sig Sauer in August 1999 by mistake, but later decided to keep the firearm after discovering it in his possession. He tried to return the Sig Sauer in November 1999 by renting another Sig Sauer, leaving the rented firearm in a gun case at the shooting lane, and returning the stolen Sig **[*4]** Sauer as if it was the rented firearm. This plan was interrupted by a range employee who asked the appellant about the gun case left at the shooting lane. The appellant then retrieved the gun case containing the second Sig Sauer.

The appellant admitted to NCIS that he took the Desert Eagle .50 caliber firearm, but told the range manager that he was only with the person who took that weapon. The second Sig Sauer firearm was retrieved from the

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[1] I. THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL. II. THE DENIAL OF APPELLANT'S CHALLENGE FOR CAUSE AGAINST MAJOR L CONSTITUTED AN ABUSE OF DISCRETION. III. APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL WHEN HE WAS NOT BROUGHT TO TRIAL WITHIN 120 DAYS OF THE FIRST PREFERRAL OF CHARGES.

IV. THE MILITARY JUDGE ERRED TO THE PREJUDICE OF APPELLANT BY ALLOWING EVIDENCE TO BE ADMITTED OF HIS PRIOR NON-JUDICIAL [SIC] PUNISHMENT WITHOUT COMPLYING WITH *UNITED STATES v. BOOKER, 5 M.J. 238 ([C.M.A.] 1977)*. V. TRIAL COUNSEL IMPROPERLY ARGUED DURING PRESENTENCING THAT THE MEMBERS SHOULD AWARD SPECIFIC TERMS OF YEARS FOR INDIVIDUAL OFFENSES. VI. THE MILITARY JUDGE ABUSED HER DISCRETION BY DENYING APPELLANT'S MOTION FOR A MISTRIAL. VII. BASED ON THE CUMULATIVE EFFECT OF ASSIGNMENTS OF ERROR I-VI, APPELLANT WAS DENIED A FAIR TRIAL. VIII. THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION OF LARCENY OF AUTO PARTS AT PEP BOYS OR OBTAINING SERVICES UNDER FALSE PRETENSES SINCE THERE WAS NO EVIDENCE OF CRIMINAL INTENT. IX. A DISHONORABLE DISCHARGE AND SENTENCE OF THREE YEARS CONFINEMENT IS AN INAPPROPRIATELY SEVERE PUNISHMENT FOR APPELLANT'S OFFENSES WHEN ALL THE ITEMS ALLEGEDLY TAKEN WERE RETURNED OR PAID FOR PRIOR TO PREFERRAL OF CHARGES. X. APPELLANT HAS BEEN DENIED SPEEDY POSTTRIAL REVIEW OF HIS COURT-MARTIAL IN THAT 1,030 DAYS HAVE PASSED FROM THE DOCKETING OF THIS CASE WITHOUT ALL PLEADINGS BEING FILED. (SUPPLEMENTAL ASSIGNMENT OF ERROR).

appellant's barracks room, and the Desert Eagle .50 caliber firearm was retrieved from an individual living at an off-base address provided by the appellant. Prior to NCIS investigating the firearm thefts, the agency was aware that the appellant was already under investigation by the Oceanside, California, Police Department for taking cars to a Pep Boys retail store for repairs, and then driving off without paying for parts and services.

On 24 February 2000, two specifications of larceny were preferred concerning the Sig Sauer .45 caliber handgun stolen in August 1999 and the Desert Eagle .50 caliber handgun stolen in September 1999. On 5 April 2000, a single specification of dishonorably failing to pay a just debt to a Pep Boys was preferred **[*5]** and referred to the same special court-martial to be tried with the larcenies. Without explanation, the larceny charge and both specifications were withdrawn from a special court-martial and dismissed on 25 April 2000. Appellate Exhibit I. The remaining charge of dishonorable failure to pay a just debt was withdrawn and dismissed, without explanation, on 13 July 2000. Appellate Exhibit I. As of 13 July 2000, there were no charges pending against the appellant.

On 24 July 2000, charges were preferred alleging the larceny of all three handguns, two larcenies of car parts from Pep Boys, and two specifications of obtaining services from Pep Boys by false pretense. [2] These charges were referred to a general court-martial on 20 October 2000, along with additional charges preferred on 11 August 2000 and second additional charges preferred on 11 October 2000. The appellant was arraigned on these charges on 1 November 2000. Additional facts will be included with our resolution of the appellant's assignments of error.

[*6] Effective Assistance of Counsel

In his first assignment of error, the appellant avers that he was denied effective assistance of counsel, because: (1) he requested his defense team to file a speedy trial motion and it did not; (2) the defense team failed to conduct an adequate investigation into the facts, causing the civilian counsel to withdraw from the case in the middle of the defense case in chief, resulting in a two-month delay in restarting the trial; (3) the defense team displayed a general failure to prepare as evidenced by unexplained absences of defense counsel at hearings, ignoring deadlines, not filing written motions, not requesting immunity for defense witnesses, and not challenging the denial of a witness request; and, (4) the defense team failed to present any evidence other than the appellant's unsworn statement during pre-sentencing. The Government contends that some of the appellant's assertions are not supported by the record, those that are supported by the record do not overcome the presumption of attorney competence, and, even if they did overcome the presumption, that there is no prejudice.

1. The law.

HN1[↑] All service members are guaranteed the **[*7]** right to effective assistance of counsel at courts-martial. *United States v. Gonzalez, 62 M.J. 303, 2006 CAAF LEXIS 113, at *13 (C.A.A.F. 2006)*(citing *United States v. Davis, 60 M.J. 469, 473 (C.A.A.F. 2005)*). We apply a presumption that counsel provided effective assistance. *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*;*United States v. Garcia, 59 M.J. 447, 450 (C.A.A.F. 2004)*. This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *Davis, 60 M.J. at 473* (citing *United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001))*. "Second-guessing, sweeping generalizations, and hindsight will not suffice." *Id***.**

Even if there is error, that error must be so prejudicial "as to indicate a denial of a fair trial or a trial whose result is unreliable." *Id.* (citing *United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001))*. An appellant alleging ineffective assistance of counsel "'must surmount a very high hurdle.'" *United States v. Saintaude, 61 M.J. 175, 179 (C.A.A.F. 2005)* **[*8]** (quoting *United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997))*.

HN2[↑] Ineffective assistance of counsel involves a mixed question of law and fact. *Davis, 60 M.J. at 473* (citing *United States v. Anderson, 55 M.J. 198, 201 (C.A.A.F. 2001))*. Whether an appellant received ineffective assistance of counsel and whether the error was prejudicial are determined by a *de novo* review. *Id*. (citing *Anderson, 55 M.J. at 201; United States v. Cain, 59 M.J. 285, 294 (C.A.A.F. 2004)*; and *United States v. McClain, 50 M.J. 483, 487 (C.A.A.F. 1999))*.

HN3[↑] This court applies a three-prong test to determine if the presumption of competence has been

[2] The four specifications concerning Pep Boys were withdrawn at an unknown date and repreferred as part of the Second Additional Charges preferred on 11 October 2000. A single specification of disobeying a general order, by possessing a firearm in the barracks, was also preferred.

overcome:

(1) Are the allegations true; if so, "is there a reasonable explanation for counsel's actions?";

(2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and

(3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

Garcia, 59 M.J. at 450 **[*9]** (quoting *United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002)*). If the issue can be resolved by addressing the third prong, we need not determine whether counsel's performance was deficient. *United States v. Quick, 59 M.J. 383, 386 (C.A.A.F. 2004)*(citing *Strickland, 466 U.S. at 697*).

2. Effectiveness in regard to speedy trial.

Relying on *United States v. Robinson, 47 M.J. 506 (N.M.Ct.Crim.App. 1997)*, the appellant alleges that the convening authority's dismissal of the charges on 25 April 2000 and 13 July 2000, and repreferral of the same or similar charges on 24 July 2000, was a subterfuge to avoid the running of the Rule for Courts-Martial 707, Manual for Courts-Martial, United States (2000 ed.) 120-day speedy trial clock. The appellant asserts that his speedy trial clock began on 24 February 2000, the date the first set of charges were preferred. Counsel for the appellant did not raise this issue at trial, giving rise to part of the appellant's ineffective assistance claim.

If the speedy trial issue was waived by not being raised at trial, the defense team may have provided ineffective assistance **[*10]** if that issue had merit. If the speedy trial issue is without merit, failing to raise it at trial would not result in prejudice, and, therefore, no relief would be warranted based on a claim of ineffective assistance of counsel. Our analysis of this speedy trial issue will partially resolve the issue of ineffective assistance of counsel and also resolve the appellant's third assignment of error, alleging a denial of his R.C.M. 707 speedy trial rights.

HN4[↑] R.C.M. 707(a)(1) allows the Government 120 days to bring an accused to trial from the date charges are preferred. [3] When there are multiple charges preferred on different dates, each charge has a separate 120-day clock based on its date of preferral. *Id*. at (b)(2). Dismissal of the charges terminates the 120-day clock unless the dismissal is a subterfuge to allow the Government to proceed without exceeding the time allowed by R.C.M. 707. *Robinson, 47 M.J. at 510*. R.C.M. 707(b)(3)(A)(i) provides a new 120-day clock from the date charges are repreferred after a proper dismissal. The clock is tolled by the appellant's arraignment. *Id*. at (b)(1). The original larceny charge and its two specifications of larceny **[*11]** were withdrawn and dismissed on the 60th chargeable day. The single specification of dishonorably failing to pay a just debt was withdrawn and dismissed on the 99th chargeable day. New charges were preferred on 24 July 2000, including the two original larceny charges, plus an orders violation, three additional larcenies, and two specifications of obtaining services under false pretenses, one of which was based on what was originally preferred on 5 April 2000 as a dishonorable failure to pay just debt.

Applying the R.C.M. 707 120-day clock, the Government had until 21 November 2000 to bring the appellant to trial on the charges preferred on 24 July 2000, and longer for the additional charges preferred on 11 August 2000 and 11 October 2000. The appellant was arraigned on the new charges on 1 November 2000, well within the **[*12]** 120 days allowed, unless the earlier dismissals were improper.

a. Subterfuge dismissals.

This court, in *Robinson*, although ultimately agreeing that a convening authority has unfettered discretion to dismiss charges, held that under the unique circumstances of that case, the dismissal of charges was a subterfuge and that the speedy trial clock was not reset. *Robinson, 47 M.J. at 510*. We noted that the conditions and constraints initially placed on the appellant in that case never changed during the period between the dismissal action and repreferral. Those conditions included being kept on legal hold, suspension of transfer orders, inability to work in his assigned area of expertise, and restrictions on his ability to take leave. *Id*. (citing *United States v. Britton, 26 M.J. 24, 26 (C.M.A. 1988)*. Specifically limiting our holding to the facts before us, we found subterfuge where: (1) dismissal on day 120 (115th chargeable day) of preferred, but unreferred, charges was for the sole purpose of avoiding the 120-day rule; (2) repreferral of

[3] The clock begins upon the earlier of preferral of charges or the institution of pretrial restraint. The appellant was not placed into pretrial restriction until 7 August 2000. Charge Sheet.

essentially identical specifications occurred 5 days later; (3) there was no practical interruption in **[*13]** the pending charge and specifications; and (4) there was no real change in the legal status of the appellant during that 5-day period. *Id. at 511*.

We find the facts of the appellant's case distinguishable from *Robinson*. First, the *Robinson* holding addressed the dismissal of preferred, but unreferred, charges on the 115th chargeable day. Here, the appellant's case was farther along in the military justice process, as evidenced by the referral of charges, indicating a more diligent attempt to proceed than was the case in *Robinson*. Second, dismissal of charges on the 60th and 99th chargeable days is far short of the time allowed to bring the appellant to trial. Third, although the three dismissed specifications carried over to the final charge sheet in the same or similar form, additional charges were also included in the final charges. Fourth, the two larcenies dismissed on 25 April 2000 were not preferred anew until three months later. There was, therefore, a practical interruption in the larceny charge and its two specifications.

The appellant's pretrial status did not change when the original larceny charges were dismissed, because a completely unrelated additional **[*14]** charge had been preferred and referred to the same special court-martial on 5 April 2000. There was, however, a significant and practical interruption in the appellant's pretrial status as to the dismissed larcenies. While a lack of change in pretrial status can be circumstantial evidence of a subterfuge dismissal involving same or similar charges, that evidentiary nexus is far less compelling when unrelated charges are involved. Here, the dishonorable failure to pay a just debt charge was unrelated to the dismissed larcenies. We find, therefore, absolutely no indication that the two larceny charges, originally preferred on 24 February 2000, were dismissed as a subterfuge to avoid the R.C.M. 707 speedy trial rule.

Eleven days after the charge alleging a dishonorable failure to pay a just debt to Pep Boys was withdrawn and dismissed, multiple charges were preferred, including two specifications of stealing car parts from Pep Boys and two specifications of obtaining services from Pep Boys under false pretenses. Those four specifications were then withdrawn and dismissed at an unknown date, leaving four referred specifications to proceed to trial by general court-martial. On 11 October 2000, five **[*15]** specifications of stealing auto parts from two Pep Boys locations in Oceanside, California, were preferred along with five specifications of obtaining services under false pretenses from the same Pep Boys locations at the same time as the larcenies of parts.

Applying a *Robinson* analysis to these facts we find the following:(1) the dishonorable failure to pay a just debt concerning Pep Boys was already referred to trial by special court-martial; (2) its withdrawal and dismissal occurred on the 99th chargeable day; (3) preferral of related but more specific charges occurred 11 days later showing in greater detail the scope and seriousness of the appellant's potential misconduct; [4] (4) there was a practical interruption in the dishonorable failure to pay a just debt charge during those 11 days; and, (5) there is no indication appellant suffered under the weight of charges during the 11-day period during which no charges were pending.

[*16] The appellant does not tell us what his pretrial status was. According to the Charge Sheet, he was in pretrial restriction beginning 7 August 2000; however, that was after the dismissal of the dishonorable failure to pay a just debt charge and the preferral of the related larceny and obtaining services under false pretenses charges. He does not assert that he was on legal hold, had transfer orders suspended, was unable to work in his assigned area of expertise, suffered restrictions on his ability to take leave, or was in any way treated differently than any other service member during the relevant period. This distinguishes the appellant from Robinson, who suffered all of these burdens.

The record does not suggest, and we do not find, that the charge of dishonorable failure to pay a just debt was dismissed on 13 July 2000 in order to avoid the speedy trial clock. Absent a subterfuge dismissal, the appellant was brought to trial within the time allowed for the charges preferred on 24 July 2000.

Because we find that the appellant was brought to trial on all charges within the time allowed, we also find that he was not prejudiced by his defense team not raising this issue at trial. **[*17]** Absent prejudice, the appellant has failed to establish that he received ineffective assistance of counsel based on this claimed deficiency.

3. Failure to conduct an adequate investigation.

The appellant asserts that his defense team's failure to conduct an adequate investigation into the facts resulted

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[4] See R.C.M. 401(c)(1), Discussion (dismissal and repreferral may be appropriate when the charge does not adequately reflect the nature or seriousness of the offense.).

in the defense team moving to withdraw from the case during the trial, which further resulted in a two-month delay when the civilian counsel's motion to withdraw was granted. The appellant speculates that the defense team's failure to interview Specialist (Spc) W, U.S. Army, and failure to review prior written statements of Mr. H, a potential Government rebuttal witness to Spc W's testimony, was the root cause of the withdrawal.

On 20 July 2001, the defense called Spc W as a witness in its case-in-chief. Spc W. testified that he, rather than the appellant, was the person who stole the Desert Eagle .50 caliber firearm referred to in Additional Charge II, Specification 2. Spc W testified that he had participated in a videotaped interview with civilian counsel in January 2001. After Spc W testified, the military judge put the court-martial in an overnight recess. On the morning **[*18]** of 21 July 2001, the parties reviewed proposed instructions and then recessed again. At 1335, 21 July 2001, the parties returned to court, and civilian counsel moved to withdraw from further representation of the appellant. The civilian counsel explained that there were irreconcilable differences between himself and the appellant that:

> prohibits my involvement in certain aspects that are still pending which will follow in this case . . . I am speaking about continued evidence which is to be presented and closing arguments made to the jury and conflicts resulting from that -- potential conflicts resulting from that . . . I have considered not commenting on evidence as the trial goes on; however, that was -- I believe that will prejudice my client given the attention that I believe has been drawn to that particular fact at this point. But further, there is also some evidence that my client and I cannot agree as to whether it should be called or not, and that is part of the conflict that is now on-going . . . If I'm ordered to stay on the case, and I am told to represent my client, then I will be making motions regarding certain testimony that I have come to find out that I **[*19]** do not believe it [sic] warrants this court's consideration . . . .

Record at 670-73. The trial defense counsel also requested to be removed from the case for the same reasons. *Id*. at 671. The military judge denied both motions, but agreed to a defense continuance request to determine how to proceed. *Id*. at 675.

On 6 August 2001, during an *Article 39(a)*, UCMJ, session, the appellant stated that he was retaining a different civilian counsel to replace his prior civilian counsel. The military judge scheduled the court-martial to resume on 20 August 2001. *Id*. at 685. The court-martial did resume on 20 August 2001, at which time the new civilian counsel presented the remaining defense witnesses. *Id*. at 687.

Following the defense case-in-chief, the Government requested to put on a rebuttal witness, Mr. H, to contradict the testimony of Spc W concerning who was with the appellant at the time the Desert Eagle .50 caliber handgun was stolen. The military judge denied the Government's request to call the rebuttal witness. *Id*. at 733.

The record contradicts the appellant's assertion regarding the issue of failure to investigate. First, the civilian counsel **[*20]** videotaped his interview of Spc W in January 2001, contradicting the appellant's claim that witness interviews did not occur. Second, the appellant's elongated theory asserts that: (1) if the defense team had interviewed all possible witnesses, they would have discovered that the Mr. H listed on the Range Waiver form for 5 September 1999, and not Spc W, was with the appellant when the Desert Eagle .50 caliber firearm was stolen; (2) had the defense team discovered Spc W was not with the appellant on 5 September 1999, they would not have called Spc W to testify that he was with the appellant that day; (3) had the defense team not called Spc W, it would not have had to withdraw from representing the appellant; and, (4) if the defense team had not withdrawn as counsel, there would not have been a two-month delay in the trial.

This reasoning is contradicted by the record. First, even if the defense had discovered that the Mr. H listed in the Range Waiver form for 5 September 1999 had given prior statements indicating he was with the appellant when one of the firearms was stolen, those statements are not necessarily inconsistent with SPC W's testimony that he was with the appellant at **[*21]** the same time. Second, the military judge did not grant the defense motions to withdraw. Rather, the appellant replaced civilian counsel by hiring a different counsel. Third, the continuance granted on 21 July 2001 delayed the trial for 30 days, not two months as alleged by the appellant.

Even if the appellant's factual assertions were correct, he has not shown any prejudice. We do not believe the outcome of this trial would have been any different even if the facts were as the appellant has submitted them. [5]

[5] We encourage all appellate counsel to carefully review the

Absent prejudice, we do not find that the appellant received ineffective assistance of counsel based on a failure to investigate.

4. General failure to prepare.

The appellant asserts that his defense team was deficient based on a general failure to prepare, as evidenced by counsel not appearing for hearings, not meeting filing deadlines, not filing written **[*22]** motions, and not requesting immunity for defense witnesses.

The record reflects that appellant's first civilian counsel was not present at early *Article 39(a)*, UCMJ, sessions that dealt with administrative matters, such as setting trial milestones. Trial defense counsel, however, was present for each *Article 39(a)*, UCMJ, session, and represented civilian counsel's availability for each milestone. There is nothing unusual about a member of the defense team being absent from an *Article 39(a)*, UCMJ, session, particularly civilian counsel. We do not find this practice to constitute ineffective assistance of counsel. Again, the appellant does not assert what prejudice he suffered as a result of civilian counsel not being at these sessions.

Regarding the appellant's assertion that the defense team failed to meet deadlines, the record makes clear that the motion and witness request deadlines were abandoned by both parties due to pretrial agreement negotiations. The parties, in good faith, believed that a pretrial agreement would result from those negotiations. It is not deficient practice for the defense team to not file motions or witness requests by prescribed deadlines under these **[*23]** circumstances. [6] With regard to written motions, the appellant does not suggest what written motions should have been filed, except the speedy trial motion discussed previously, or how not filing motions has prejudiced him.

We are not aware of any witness that was denied as a result of not filing a written witness request. One defense witness testified by telephone as a result of his not being called when he was physically present. While the appellant is correct that the members were denied an opportunity to judge that witness' credibility in the courtroom, that is a two-edged sword, and, by itself, does not support a finding of prejudice. With regard to witness immunity, we note that all defense witnesses testified without grants of immunity. Therefore, we do not see how not requesting immunity under these circumstances could have prejudiced the appellant. **[*24]** Again, absent prejudice, there cannot be ineffective assistance of counsel.

5. Failing to present evidence during presentencing.

The appellant asserts that the defense team's failure to present character witnesses, documents concerning the appellant's military career, his awards, information about his family, and the fact that he was a cooperating informant for the NCIS was ineffective assistance. We disagree.

The appellant called Mr. S, who testified that the appellant was a good Marine who followed orders. Record at 715. Prosecution Exhibit 26, containing 13 pages from the appellant's service record, shows that the appellant's family consists of a mother and step-father, and a daughter who lives with someone other than the appellant. We can tell the appellant's history of assignments, that he participated in Operation Southern Watch, that he received a Meritorious Mast, and we are informed of his proficiency and conduct marks and composite scores. The appellant wore his awards in court, and the military judge reminded the members of those awards in her sentencing instructions. Record at 828. The appellant provided additional details about his military career and family **[*25]** during his unsworn statement, in which he asserted: "My defense team here did an excellent job. I want to thank them." *Id*. at 814.

Other than wanting his NCIS cooperation revealed, the appellant does not tell us what he would have submitted in extenuation and mitigation in addition to what was already presented. A great deal of information about the appellant was provided to the members. We will not speculate what else might have been presented. We do not find any prejudice resulting from the defense team's handling of the sentencing phase of this case. Without prejudice, we do not find ineffective assistance of counsel.

4. Cumulative effect of error.

HN5[↑] "The implied premise of the cumulative-error doctrine is the existence of errors, 'no one perhaps sufficient to merit reversal, [yet] in combination [they all] necessitate the disapproval of a finding' or sentence. *United States v. Banks, 36 M.J. 150, 170-71 (C.M.A. 1992)*. Assertions of error without merit are not sufficient

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records of trial to ensure the facts counsel present are supported by that record.

[6] We do not hold that counsel are relieved from meeting these deadlines, only that not meeting them under these conditions was not ineffective assistance.

to invoke this doctrine." *United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999)*. We do not find merit in any of the individual allegations of deficient performance. **[*26]** We note that as a result of the legal representation the appellant received, the Government withdrew multiple specifications and the members found the appellant not guilty of five remaining specifications. Under these circumstances, we determine the appellant's first assignment of error is without merit.

Member Challenge

In his second assignment of error, the appellant claims that the military judge erred by denying his challenge for cause against Major (Maj) L, claiming the member demonstrated a rigid sentencing attitude and difficulty with the concept of reasonable doubt. The appellant preserved this issue for appellate review by using his peremptory challenge on Maj L, stating that he would otherwise have used the peremptory challenge on another identified member.

HN6[] A court member must be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial "free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). Military judges are enjoined to be liberal in granting challenges for cause. *See* *United States v. Miles, 58 M.J. 192, 194 (C.A.A.F. 2003)*. This rule includes **[*27]** challenges for actual bias as well as implied bias. *United States v. Schlamer, 52 M.J. 80, 92 (C.A.A.F. 1999)*(citing *United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 1997)*.

HN7[] Actual bias and implied bias are separate tests, but not separate grounds for a challenge. *Miles, 58 M.J. at 194*. There is implied bias "'when most people in the same position would be prejudiced.'" *United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996)*(quoting *United States v. Smart, 21 M.J. 15, 20 (C.M.A. 1985)*. The focus for implied bias is on the perception or appearance of fairness of the military justice system. *See* *United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995)*. When there is no actual bias, implied bias should be invoked rarely. *United States v. Rome, 47 M.J. 467, 469 (C.A.A.F. 1998)*.

HN8[] We review rulings on challenges for abuse of discretion. *United States v. Lavender, 46 M.J. 485, 488 (C.A.A.F. 1997)*. On questions of actual bias, we give the military judge great deference, because we recognize that the military judge observed the demeanor of the participants **[*28]** in the *voir dire* and challenge process. *United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000)*(citing *United States v. Warden, 51 M.J. 78, 81 (C.A.A.F. 1999))*. This is because a challenge for cause for actual bias is essentially one of credibility. *Miles, 58 M.J. at 194-95*. This court, however, gives less deference to the military judge when reviewing a finding on implied bias because it is objectively viewed through the eyes of the public. *Napolitano, 53 M.J. at 166*. We, therefore, apply an objective standard when reviewing the judge's decision regarding implied bias. *Miles, 58 M.J. at 195*.

During general *voir dire*, the members were instructed that they could not have any "preconceived idea or formula as to either the type or amount of punishment that should be adjudged," and that they must first hear all the evidence and be in closed session deliberations on sentencing before they determine an appropriate sentence, and then only after "considering all the alternate punishments." Record at 68-69. During general *voir dire* by the military judge, Maj L, by way of negative responses, **[*29]** agreed that: (1) he would follow the law and the military judge's instructions in arriving at an appropriate sentence; (2) he would keep an open mind regarding sentence until all the evidence was presented and he had been instructed on the law; (3) his decision on an appropriate sentence would be based on the matters properly presented during the trial; (4) he would not have a set sentence in mind until the trial is over; (5) he would not have a fixed, preconceived, inelastic, or inflexible attitude concerning a particular type of punishment that he felt must or should be imposed simply because of the nature or number of the offenses; and (6) he had not formed an opinion as to the sentence that should be imposed. *Id.* at 76-77.

The civilian counsel conducted individual *voir dire* of Maj L, covering 16 pages of transcript. From the answers to those questions, we know the following: (1) Maj L recommended charges be brought against another Marine once in 13 years; (2) he was the Executive Officer of 1st Combat Engineer Battalion; (3) he believes that a Marine should be discharged if convicted of theft; (4) he does not draw any conclusions from someone being charged; (5) he believes **[*30]** it is important that people not be falsely accused; (6) he had no opinion on whether the charges in the instant case are legitimate, because he had not heard any evidence; (7) he would not draw any conclusions from the charges alone; (8) he had not drawn any conclusions; (9) he believes the burden is on the Government to prove its case in order to prevent an innocent person from being

convicted; (10) he does not believe the defense has to put on any evidence; (11) he would draw his own conclusions, and those conclusions would be drawn from the evidence only; and, (12) the Government does not have the burden to disprove other possible conclusions that may be drawn from the same evidence. Record at 132-46.

The appellant challenged Maj L for cause, claiming the member showed an inelastic sentencing attitude as evidenced by his stated belief that there is no room in the Marine Corps for a thief, and because the member would not require the Government to disprove all possible conclusions that can be drawn from the same facts. *Id*. at 252-53. The military judge denied the challenge, stating in part:

> I found [Maj L] to be rather philosophical in his answers. He was pretty thorough **[*31]** in his explanations of why he believed the things he believed. And he did have some opinions and he stated those opinions openly, but he did not demonstrate at any time an inflexibility. To me, he demonstrated an openness to new ideas to learning the standards and learning what the rules are.

Id. at 259.

We agree with the military judge. Although Maj L held the personal opinion that thieves, in general, should not be in the Marine Corps, he would not form an opinion *in this case* until all the evidence was presented and he was instructed on the law. The record does not show actual bias on Maj L's part. Nor, based on all the circumstances, does the record establish that Maj L's participation in the appellant's court-martial raises a significant question of legality, fairness, or impartiality, to the public observer. We, therefore, find no implied bias. The military judge did not abuse her discretion by denying the appellant's challenge of Maj L.

Record of Nonjudicial Punishment

In his fourth assignment of error, the appellant avers that the military judge erred by admitting over defense objection a record of nonjudicial punishment that was irregular on **[*32]** its face. The record of nonjudicial punishment indicated the appellant invoked his right to refuse nonjudicial punishment. However, nonjudicial punishment was imposed the same day. [7] The Government concedes it was error to admit the entry over defense objection, however, it asserts there was no prejudice.

HN9[↑] A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *United States v. McDonald, 59 M.J. 426, 430 (C.A.A.F. 2004)*(citing *United States v. Tanksley, 54 M.J. 169, 175 (C.A.A.F. 2000))*. We will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. Miller, 46 M.J. 63, 65 (C.A.A.F. 1997)*(citing *United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987))*.

Established precedent, when read together, convinces us that ***HN10***[↑] the following guidelines should be followed **[*33]** when dealing with the admissibility of records of nonjudicial punishment. [8]

1. The admissibility of records of nonjudicial punishment, including the procedural requirements for determining admissibility, is dependent on whether the document is regular or irregular on its face.

2. When an objection is based on an irregularity on the face of the document, the Government must disprove that irregularity. For example, if an accused objects to a record of nonjudicial punishment based on a failure to show the accused was afforded the opportunity to consult with counsel, the Government may prove, through other evidence, that the accused was afforded the opportunity to consult with counsel. [9] *United States v. Kahmann, 59 M.J. 309, 314 (C.A.A.F. 2004)*.

[*34] 3. The burden to overcome the defense objection through additional evidence is on the Government, and must be accomplished without compelling the accused to provide that evidence. *Id*.; *see United States v. Cowles, 16 M.J. 467, 468 (C.M.A. 1983)*.

4. If, however, the record of nonjudicial punishment is regular on its face, that document is entitled to the presumption of regularity and the inferences that

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[7] Prosecution Exhibit 26 at page 9.

[8] These guidelines are equally applicable to the admissibility of records of summary court-martial. *See United States v. Wheaton, 18 M.J. 159, 160 (C.M.A. 1984)*.

[9] If an accused objects to a record of summary court-martial based on a failure to show the review required under *Article 64*, UCMJ, was conducted, the Government may prove, through other evidence, that the required review was completed. *Kahmann, 59 M.J. at 314*.

naturally flow from that presumption. *See* United States v. Wheaton, 18 M.J. 159, 160 (C.M.A. 1984)(If the record of nonjudicial punishment shows that an accused has been notified of his right to counsel, it can be presumed either that he consulted counsel or waived his right to counsel.) In that case, the burden is on the accused to object and present credible evidence to overcome that presumption. For example, if the record of nonjudicial punishment contains entries that reflect the accused was informed of his right to consult counsel and to refuse nonjudicial punishment, and that the accused did not invoke those rights, the accused may present evidence that he did not make those entries prior to punishment being imposed. United States v. Mack, 9 M.J. 300, 324 (C.M.A. 1980). **[*35]**

5. The record would then be inadmissible unless the Government establishes, by independent evidence, that the accused had been advised of his rights and had not refused nonjudicial punishment. *Id*.

Here, the record of nonjudicial punishment, on its face, shows the appellant was informed of his right to consult counsel and his right to refuse nonjudicial punishment for a violation of Article 86, UCMJ. The record of nonjudicial punishment provided for the affirmative acceptance or refusal of nonjudicial punishment, and shows that an affirmative election was made refusing nonjudicial punishment. The next entry on that record, however, reflects the imposition of nonjudicial punishment for a violation of Article 86, UCMJ, on the same date the appellant refused nonjudicial punishment. This inconsistency makes the document irregular on its face, and, therefore, not entitled to the presumption of regularity. The appellant objected to the document's admissibility, thereby requiring the Government to produce other evidence to show that the appellant changed his mind and accepted nonjudicial punishment. [10] The appellant could not be compelled to provide that information for the Government. **[*36]**

The military judge overruled the appellant's objection stating:

> It seems on the face of the document that the accused was given his rights, and possibly even exercised his rights. What's missing is some documentation that he's changing his mind and accepting. I don't think that undermines the entry sufficiently to make it invalid for the members. Certainly we have a good faith basis for believing that NJP didn't happen or that it happened over his objection. [11] I imagine that would be in the paperwork that's back at the unit. You could certainly present that.

Record at 806. The military judge, by the above language, gave the exhibit the presumption of regularity, drew an inference based on that presumption, and placed the burden on the appellant to show that the inference she drew from the document was incorrect.

[*37] In Wheaton, 18 M.J. at 161, our superior court held that ***HN11***[↑] it may be properly inferred that the right to refuse nonjudicial punishment was waived when: (1) the record of nonjudicial punishment shows the accused was made aware of his right to refuse nonjudicial punishment; (2) *the absence of any indication of the exercise of that right*; and, (3) the imposition of nonjudicial punishment. No such inference can be made when there is an affirmative assertion of the right to refuse nonjudicial punishment, as we have here, followed by the imposition of that punishment. Here, the burden was properly on the Government to present evidence that the appellant changed his mind and accepted the nonjudicial punishment. The military judge's drawing an inference of nonjudicial punishment waiver, placing the burden on the appellant to rebut that inference, and admitting the record of nonjudicial punishment over defense objection, was clearly erroneous. *See* Miller, 46 M.J. at 65.

HN12[↑] Having determined that the military judge erred, we must determine whether the error had a substantial influence on the sentence adjudged. United States v. Sowell, 62 M.J. 150, 153 (C.A.A.F. 2005); **[*38]** United States v. Griggs, 61 M.J. 402, 410 (C.A.A.F. 2005)(citing United States v. Boyd, 55 M.J. 217, 221 (C.A.A.F. 2001)). If it did, the error is materially prejudicial to the appellant's substantial rights. Art. 59(a), UCMJ.

Prosecution Exhibit 26 consisted of 13 pages from the appellant's service record, including two records of nonjudicial punishment. The first nonjudicial punishment was imposed on the appellant on 30 December 1999 for absenting himself from his appointed place of duty so he could sleep, as both an orders violation and an

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[10] Absent objection by the defense, the prosecution is under no obligation to introduce such evidence. Kahmann, 59 M.J. at 313.

[11] We believe the military judge meant the court DID NOT have a good faith belief that the nonjudicial punishment did not occur or was imposed over the appellant's objection.

unauthorized absence. The nonjudicial punishment record, to which the appellant objected, was for an unauthorized absence from 2 April 2001 to 5 April 2001. This was after the acts for which the appellant was convicted, and three months before the members were selected. [12] The charge sheet in this case did not contain any offense charged under *Article 86*, UCMJ.

[*39] The trial counsel referred to both nonjudicial punishments in his sentencing argument stating:

> I ask you to take a look at the prosecution exhibit. This is not a Marine that has never been in trouble before. This is a Marine whose record shows that he's gone to NJP. And if you look at the nature of the offenses, they're not earth shattering. But what they do tell us on the *Article 92* and *86* is that this Marine does what he wants to do when he wants to do it.
>
> He takes himself off duty when he feels like and *goes UA for a couple of days*. If you notice, the first NJP was in front of a Captain.
>
> *The second one, he was in front of a Major.* I'm sure he had an excuse for why he left or why he did what he did just like today. Telling us he's trying to take the hit for his friends.

Record at 817-18 (emphasis added). The military judge, however, did not directly refer to either nonjudicial punishment in describing matters to be considered in selecting a sentence. *Id*. at 828.

The trial counsel devoted 17 words in his sentencing argument to this nonjudicial punishment. The point of his argument would have been the same if only referring to the first record **[*40]** of nonjudicial punishment, which was properly admitted. There was no similarity between the *Article 86*, UCMJ, offense for which the second nonjudicial punishment was imposed and the charges before the court-martial, and the nonjudicial punishment was not emphasized by the trial counsel or military judge. The appellant was sentenced to 36 months of confinement out of a possible 20 years and 6 months. Under these circumstances, we do not believe the erroneous admission of the nonjudicial punishment had any effect on the sentence imposed. Therefore, the military judge's error was not materially prejudicial to the appellant's substantial rights. *Article 59(a)*, UCMJ.

Although not raised as an error, we note that the nonjudicial punishment in question was listed in the staff judge advocate's recommendation (SJAR). The appellant submitted clemency matters pursuant to R.C.M. 1105, including the assertion of trial errors, prior to receiving the SJAR. The appellant did not list the admission of the record of nonjudicial punishment as one of those errors, and did not submit a response to the SJAR pursuant to R.C.M. 1106. ***HN13***[↑] Where, as in this case, the SJAR is served on the defense counsel in accordance **[*41]** with R.C.M. 1106(f)(1), and the defense fails to comment on any matter in the recommendation, R.C.M. 1106(f)(6) provides that any error is waived unless it rises to the level of plain error. *United States v. Wellington, 58 M.J. 420, 427 (C.A.A.F. 2003)*. We do not find plain error.

Sentence Argument

In his fifth assignment of error, the appellant asserts that the trial counsel committed plain error by arguing for a specific term of confinement for each individual offense. We disagree.

We note that the appellant did not object to trial counsel's argument during trial. As our superior court has noted, ***HN14***[↑] "the lack of defense objection is relevant to a determination of prejudice because the lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comment." *United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001)*(quoting *United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)*(internal quotation marks omitted)). Thus, absent an objection at trial, the appellant is not entitled to relief under this assignment of error unless there is plain error. *United States v. Barrazamartinez, 58 M.J. 173, 175 (C.A.A.F. 2003)*; **[*42]** *Carpenter, 51 M.J. at 396*.

The appellant has the initial burden of persuasion under the plain error analysis, and must make a showing that the error was plain or obvious and materially prejudicial to a substantial right. *Carpenter, 51 M.J. at 396* (citing *United States v. Powell, 49 M.J. 460, 464-65 (C.A.A.F. 1998))*; *United States v. Harvey, 60 M.J. 611, 615 (N.M.Ct.Crim.App. 2004)*, *rev. granted*, *61 M.J. 50 (C.A.A.F. 2005)*. Here, the appellant fails.

There is nothing in the record to indicate that the members were overly swayed to adjudge a harsh sentence because of the trial counsel's argument. The sentence appears to be more a function of the

[12] The appellant's charges covered the period May 1998 to September 1999, and the members were selected on 18 July 2001.

appellant's serious crimes than of the trial counsel's argument. The appellant's counsel was in the best position to determine the prejudicial effect of the argument, yet made no objection. Further, the military judge correctly instructed the members concerning the maximum authorized confinement, that the confinement must be stated in whole terms, and that a single sentence shall be adjudged for all offenses. Record at 824, 826. Even if it was error to argue **[*43]** for individual terms of confinement for each offense, doing so was not plain error, as we discern no prejudice to the appellant. We find this assignment of error to be without merit.

Mistrial

In his sixth assignment of error, the appellant claims the military judge abused her discretion by denying his motion for mistrial. The motion resulted from the Government's withdrawal of four specifications prior to resting its case-in-chief. We do not find error.

HN15[↑] We will not grant relief for a military judge's failure to grant a mistrial unless there is clear evidence of abuse of discretion. *United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000)*(citing *United States v. Dancy, 38 M.J. 1, 6 (C.M.A. 1993))*. A mistrial is a drastic remedy to be used sparingly to prevent manifest injustice only. *United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F. 2003)*(citing *United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990))*. A mistrial is appropriate only when "circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Barron, 52 M.J. 1, 4 (C.A.A.F. 1999)* **[*44]** (quoting *United States v. Waldron, 15 C.M.A. 628, 36 C.M.R. 126, 129 (C.M.A. 1966))*(internal quotation marks omitted).

Here, the trial counsel moved to withdraw four specifications after the members received their cleansed charge sheet and before resting its case-in-chief. The appellant moved for a mistrial, claiming he had been prejudiced by having extra charges in front of the members that the Government knew it could not prove. The military judge denied the motion for mistrial, and instructed the members to cross out the withdrawn specifications on their cleansed charge sheets and told them they could not consider those specifications for any reason. Record at 548.

The Government's withdrawal of specifications did not create a manifest injustice. ***HN16***[↑] The Government may, at any time and for any reason, withdraw charges prior to findings. R.C.M. 604. We find that the military judge's instructions to the members secured the fairness and impartiality of the trial. ***HN17***[↑] Absent evidence to the contrary, court members are presumed to comply with the military judge's instructions. *Thompkins, 58 M.J. at 47* (citing *Tennessee v. Street, 471 U.S. 409, 415, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)*; **[*45]** *Lakeside v. Oregon, 435 U.S. 333, 340 n.11, 98 S. Ct. 1091, 55 L. Ed. 2d 319 (1978)*; *United States v. Holt, 33 M.J. 400, 403 (C.M.A. 1991)*. "In the clear absence of manifest injustice," the military judge did not abuse her discretion by denying the appellant's motion for mistrial. *Id. at 47-48*. We do not see any practical difference between the Government withdrawing and dismissing specifications before resting and those same specifications being dismissed by the military judge in response to a defense motion for a finding of not guilty at the end of the Government's case. *See* R.C.M. 917. In either event, the specifications appear on the cleansed charge sheet, but are subsequently removed from the members' consideration. This issue is without merit.

Factual and Legal Sufficiency

In his eighth assignment of error, [13] the appellant asserts the evidence is factually and legally insufficient to establish the criminal intent required for the charges of larceny of car parts and obtaining car repair services to install those car parts under false pretenses.

[*46] ***HN18***[↑] The tests for legal and factual sufficiency are well-known. For legal sufficiency, we consider the evidence in the light most favorable to the Government, and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987)*; *United States v. Reed, 51 M.J. 559, 561-62 (N.M.Ct. Crim.App. 1999)*, *aff'd*, *54 M.J. 37 (C.A.A.F. 2000)*; *see also Art. 66(c)*, UCMJ. For factual sufficiency, we weigh all the evidence in the record of trial, recognizing that we did not see or hear the witnesses, and determine whether we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner, 25 M.J. at 325*; *see also Art. 66(c)*, UCMJ. Reasonable doubt does not

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[13] We have reviewed the appellant's seventh assignment of error alleging cumulative error based on assignments of error I through VI, and also find it without merit. *See* *Gray, 51 M.J. at 61* (Individual assertions of error without merit are not sufficient to invoke the doctrine of cumulative error).

mean, however, that the evidence contained in the record must be free from any and all conflict. Reed, 51 M.J. at 562.

The evidence shows that the appellant took his car to Pep Boys on 4 September 1999, at which time a work order was prepared for the sale and installation of **[*47]** two tires and a pinion seal on the appellant's car. Prosecution Exhibit 24. By signing the work order, the person who brought the car in expressly authorized Pep Boys to perform the contracted services and to provide the contracted materials, and granted an express mechanic's lien "to secure amount of repairs for work performed . . . ." *Id*. The work order contains the appellant's name (misspelled as "Scanran"), an incomplete base address, and the appellant's home phone number was the Camp Pendleton Base Locater phone number.

Pep Boys' procedure is to give the original work order to the service department. Once the work is done, the customer receives the original invoice in order to pay the customer service department for the parts and labor. If the customer drives off without paying, the original invoice will be missing from the company files and a duplicate invoice will have to be reprinted for the files. Pep Boys did not have the original invoice for the 4 September 1999 work performed on the appellant's car, indicating that his car had been driven off without anyone paying for the parts and service. Pep Boys reported the failure to pay to the police approximately three weeks **[*48]** later. When the appellant learned the police were involved, he returned to Pep Boys, acknowledged that he owed the debt, paid the debt, and apologized to the store owner.

The appellant asserts that this evidence is not factually or legally sufficient to show that he possessed the necessary criminal intent for the charge of larceny or for obtaining services under false pretenses, because he eventually paid for the parts and service. We disagree.

1. Larceny of car parts from Pep Boys.

The appellant was charged with larceny of the car parts installed on his car by Pep Boys. The specification itself does not state whether this was a wrongful taking, withholding or obtaining under false pretenses larceny. [14] ***HN19***[↑] This court, however, cannot affirm a finding of guilty on a theory not presented by the Government and not instructed upon by the military judge. *See* United States v. Pacheco, 56 M.J. 1, 11 (C.A.A.F. 2001) (citing United States v. Standifer, 40 M.J. 440, 445 (C.M.A. 1994); United States v. Riley, 50 M.J. 410, 415 (C.A.A.F. 1999); Dunn v. United States, 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979); and Rewis v. United States, 401 U.S. 808, 814, 91 S. Ct. 1056, 28 L. Ed. 2d 493 (1991)). **[*49]** The military judge instructed the members on the larceny theories of wrongful taking and wrongful withholding, but not on wrongful obtaining under false pretenses. Record at 784. We cannot, therefore, affirm the finding of guilty as to Additional Charge II, Specification 3, under any theory other than a wrongful taking or wrongful withholding. Under the circumstances of this case, however, we find there was a wrongful taking larceny of the car parts. This requires a specific intent to permanently deprive Pep Boys of the use and benefit of the tires and pinion seal installed on the appellant's car. Manual for Courts-Martial, United States (1998 ed.), Part IV, P 46b(1)(d). The appellant's driving his car away from Pep Boys without paying for those parts is strong circumstantial evidence of his specific intent. *Id*., P 46c(1)(e).

[*50] We find this evidence is legally sufficient to convince a rational trier of fact beyond a reasonable doubt that the appellant committed a wrongful taking larceny of the car parts. After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt of this offense. The evidence is, therefore, factually sufficient as well.

2. Obtain services under false pretenses from Pep Boys.

The appellant was also charged with obtaining, under false pretenses, the mechanical services provided to install the same car parts. ***HN21***[↑] The criminal intent required for an Article 134, UCMJ, violation (obtaining services under false pretenses) is similar to larceny by false pretense under Article 121, UCMJ. M.C.M., Part IV, P 78c; *see* United States v. Caver, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994); United States v. Flowerday, 28 M.J. 705, 707 (A.F.C.M.R. 1989). A false pretense with respect to larceny is a false representation of a past or existing fact by means of any act, word, symbol, or

[14] ***HN20***[↑] The Government is under no obligation to allege or even elect a specific theory of larceny to prosecute an offense under Article 121, UCMJ. Rather, the Government need only allege that an accused did "steal" the property of another. United States v. O'Hara, 14 C.M.A. 167, 33 C.M.R. 379, 381 (C.M.A. 1963).

token, including a **[*51]** representation that the person "presently intends to perform a certain act in the future." M.C.M., Part IV, P 46c(1)(e). Thus, a false representation that he or she presently intends to pay for parts (for *Article 121*, UCMJ) and services (for *Article 134*, UCMJ) is a false representation of an existing fact--the present intention--and thus a false pretense if there was no intent to pay. "A false pretense may also exist by silence or failure to correct a known misrepresentation." *United States v. Johnson, 39 M.J. 707, 710 (N.M.C.M.R. 1993)*, *aff'd*, *40 M.J. 318 (C.M.A. 1994)*; *see also United States v. Dean, 33 M.J. 505, 510 (A.F.C.M.R. 1991)*. A false pretense "must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth." M.C.M., P 46c(1)(e); *United States v. Hecker, 42 M.J. 640, 645 (A.F.Ct.Crim.App. 1995)*. Additionally, obtaining services under false pretenses requires the specific intent to permanently deprive or defraud another of the use and benefit of the service. M.C.M., Part IV, P 78b(4) and P 49c(14).

In this case, **[*52]** the services required to install the parts on the appellant's car were contracted for and obtained through the signing of the work order. Prosecution Exhibit 24. That document created a mechanic's lien on the appellant's car in an amount equal to the services provided. By entering into this contract, the appellant represented a present intent to pay for the services when they were complete. That is the false pretense upon which he obtained the services. The appellant's driving away without paying for the services is circumstantial evidence that he did not intend to pay for the services at the time he entered into the contract. The appellant's actions are also consistent with the specific intent to permanently deprive or defraud. The fact that he eventually did pay, after legal action had been instituted, does not convince us otherwise.

We find this evidence is legally sufficient to convince a rational trier of fact beyond a reasonable doubt that the appellant wrongfully obtained services from Pep Boys under false pretenses. After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves **[*53]** are convinced beyond a reasonable doubt of the appellant's guilt of these offenses. The evidence is, therefore, factually sufficient as well.

Sentence Severity

In his ninth assignment of error, the appellant asserts that a sentence including a dishonorable discharge and 36 months of confinement is inappropriately severe for the offenses and the person. We disagree. Taking into account all the facts and circumstances, and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy, 50 M.J. 286, 287-88 (C.A.A.F. 1999)*, we believe the sentence is appropriate.

HN22[↑] Our mandate under *Article 66(c)*, UCMJ, requires that we affirm only such part or amount of the sentence as we determine, on the basis of the entire record, "should be approved." We do not enter the realm of clemency, an area reserved for the convening authority. However, we are compelled to act when we find inappropriate severity within an adjudged and approved sentence. *United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988)*; R.C.M. 1107(b). *See generally United States v. Spurlin, 33 M.J. 443, 444 (C.M.A. 1991).* **[*54]**

The appellant's crimes are certainly dishonorable and warrant a substantial period of confinement. We are mindful of the approved sentences of similar cases in the field as we discharge our statutory mandate. After careful review and consideration of the record, we find the imposition of 36 months of confinement and a dishonorable discharge to be appropriate for this offender and these offenses. Accordingly, we approve the sentence as adjudged and approved below.

Post-Trial Appellate Delay

In his tenth assignment of error, ***HN23***[↑] the appellant claims that he has been denied due process and suffered presumptive prejudice as a result of the time that has elapsed since his case was docketed with this court. Although the period of delay complained of begins with docketing with this court, we analyze the appellant's due process right to speedy appellate review under the same standards as his right to speedy post-trial review. *See United States v. Oestmann, 61 M.J. 103, 104 (C.A.A.F. 2005)*.

We analyze an appellant's due process right to speedy appellate review by looking to four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's **[*55]** assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005)*(citing *Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004))*.

If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude

that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id*. Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id*. (quoting *Toohey, 60 M.J. at 102*).

The appellant's case was docketed with this court on 19 August 2002. The Government filed its Answer on 29 July 2005. Total delay from docketing to the last pleading filed is approximately one month short of three years. We do not find this facially unreasonable.

Even if this period of delay is facially unreasonable, we would not find a due process violation. Following 20 enlargements of time citing "other case-load commitments," the appellate defense counsel filed the appellant's Brief, asserting nine assignments of error, on 30 September 2004. [15] **[*56]** A different appellate defense counsel filed a supplemental assignment of error on 21 June 2005, asserting for the first time a denial of speedy appellate review. Following seven enlargements of time, the first four of which were uncontested, the Government filed its Answer. The record of trial consists of five volumes, including 835 pages of transcript plus exhibits.

We find no assertion of the right to a timely appeal until the appellant's counsel filed his supplemental assignment of error with this court. Moreover, the appellant has failed to demonstrate any prejudice from the delay. Finally, we find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. We conclude that the appellant's due process rights have not been violated as a result of the appellate processing of this case.

We are also aware **[*57]** of our authority to grant relief under *Article 66*, UCMJ, in the absence of any showing of actual prejudice. *Id*.; *Toohey, 60 M.J. at 100*; *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*. Applying the factors we recently enumerated in *United States v. Brown, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)*(en banc), we do not believe that the period of appellate review alone, or the total period of post-trial review, affects the findings and sentence that should be approved in this case and therefore, decline to grant relief.

[15] We note the amount of time this case was in appellate defense counsel's hands for factual information only and not to insinuate the appellate review delay is invited error.

Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

Chief Judge ROLPH and Judge FELTHAM concur.

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