IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201800038
Matthew D. NORWOOD Machinist's Mate (Nuclear) First Class Petty Officer (E-6) U. S. Navy Appellant	)	USCA Dkt. No. 20-0006/NA

KERRY E. FRIEDEWALD
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax -7687
Bar no. 37261

TIMOTHY C. CEDER
Lieutenant Commander, JAGC, USN
Senior Appellate Government Counsel
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679, fax -7687
Bar no. 37064

NICHOLAS L. GANNON
Lieutenant Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax -7687
Bar no. 37301

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682 , fax -7687
Bar no. 31714

Index of Brief

Page

Table of Authorities

Page

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

SERVICE COURTS OF CRIMINAL APPEALS CASES

UNITED STATES CIRCUIT COURT OF APPEALS CASES

STATE SUPREME COURT CASES

UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

REGULATIONS, RULES, OTHER SOURCES

Issues Presented

I.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING, OVER DEFENSE OBJECTION, THE ENTIRE VIDEO-RECORDED INTERVIEW OF THE COMPLAINING WITNESS UNDER MILITARY RULE OF EVIDENCE 801(d)(1)(B)(ii) AS A PRIOR CONSISTENT STATEMENT.

II.

WHETHER THE GOVERNMENT TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a dishonorable discharge and one year or more of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

A panel of members sitting as a general court-martial convicted Appellant, contrary to his plea, of sexual abuse of a child, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012). The Members sentenced Appellant to eighteen months of confinement, reduction to pay grade E-1, and a dishonorable discharge. The

Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The Record of Trial was docketed with the lower court on February 15, 2018. Appellant and the United States submitted briefs. On August 9, 2019, the lower court affirmed the findings, except the words "groin" and "inner" for factual insufficiency, and affirmed the sentence, with no sentencing relief for the excepted language. *United States v. Norwood*, 79 M.J. 644 (N-M. Ct. Crim. App. 2019).

On October 7, 2019, Appellant petitioned this Court for review, which this Court granted on January 21, 2020. Appellant filed his Brief and the Joint Appendix on March 23, 2020.

Statement of Facts

A. The United States charged Appellant with sexually abusing his fifteen-year-old niece.

The United States charged Appellant with one Specification of sexual abuse of a child for committing a lewd act upon E.M.N. (the Victim) by touching her breast, buttocks, groin, and inner thigh, for his sexual gratification. (J.A. 47–49.) The Victim was Appellant's fifteen-year-old niece. (J.A. 64.)

B. In opening statements, both sides framed the case as hinging on credibility.

Trial Counsel asserted in the Government's opening statement that witness credibility would decide Appellant's case. (J.A. 54.) She explained that the

evidence would show the Victim "ha[d] no reason to lie about what [Appellant] did to her." (J.A. 52, 54.) Because the case relied on the Victim's credibility, Trial Counsel reasoned: "[a]s soon as you realize that [the Victim] is telling you the truth, the government will have proven its case . . . ." (J.A. 54.)

In Appellant's opening statement, Civilian Defense Counsel stated the Government's witnesses were biased and only there to "try to bolster [the Victim]." (J.A. 59.) He claimed that, because the witnesses did not assist in Appellant's case preparation, "somebody is hiding something here." (J.A. 62.)

C. The United States presented evidence that Appellant sexually abused the Victim.

At trial, the United States' primary evidence was the testimony of the Victim. (J.A. 62–108.)

1. The Victim testified that Appellant touched her breast, buttocks, and thigh while giving her a massage.

The Victim, Appellant's then-fifteen-year-old niece, traveled with her younger brother to Hawaii to visit Appellant. (J.A. 64–65.) One night, while she and Appellant were watching a movie and the Victim's brother was playing video games in another room, Appellant asked to give the Victim a back massage. (J.A. 66–67.) Because her back hurt, she acquiesced. (J.A. 67.) Appellant at first massaged the Victim's back but then progressed to touching her pubic area, breast,

buttocks, and thigh. (J.A. 67–70.) At one point the Victim could feel Appellant's semi-erect penis through her shorts. (J.A. 69.)

During the assault, Appellant asked the Victim "how far [she] had been with someone" and "if there was a boy back where [she] used to live." (J.A. 71.) The Victim told him she "hadn't done anything but kissing, and it was like one boy in 4th grade." (J.A. 71.)

The next day, Appellant apologized to the Victim, stating, "I'm sorry for being an asshole the other night." (J.A. 73.) After the abuse, the rest of the Hawaii trip was "awkward." (J.A. 73.)

2. On cross-examination, Civilian Defense Counsel suggested the Victim met with Trial Counsel to "practice to tell the truth" and testified to things she had not previously reported.

During cross-examination, Civilian Defense Counsel suggested the Victim met with Trial Counsel before trial to "practice to tell the truth." (J.A. 78–79.) Civilian Defense Counsel asked the Victim how many times she talked to Trial Counsel before trial and contrasted that with her refusal to talk to Appellant's Counsel. (J.A. 77–78.) He elicited that she spent an hour and a half with Trial Counsel in the courtroom before trial, answering "the same kind of questions that they asked [her]" at trial. (J.A. 78–79.) When Civilian Defense Counsel impeached the Victim for not having told the forensic interviewer that the rest of

the trip was "awkward," he asked her if she only remembered this fact after "practicing [her] testimony" with Trial Counsel. (J.A. 95.)

Civilian Defense Counsel additionally impeached the Victim with supposed inconsistencies between the forensic interview and her trial testimony: that the Victim told the interviewer she solicited the massage by complaining of a hurt back, (J.A. 84); and that she told the interviewer Appellant used both hands when he groped her, (J.A. 86–87).

He also impeached her with details she supposedly omitted from the forensic interview: that Appellant apologized to her for being an "asshole," (J.A. 91); and that Appellant asked her about having a boy back home, (J.A. 92).

3. Over Appellant's objection, the Military Judge admitted portions of the Victim's videotaped interview as a prior consistent statement.

During the redirect examination of the Victim, and citing Mil. R. Evid. 801(d)(1)(B), the United States moved to admit a videotaped forensic interview of the Victim because Appellant had implied that her testimony was coached. (J.A. 106–21.) The interview occurred shortly after the Victim reported the assault. (J.A. 105–06.) Civilian Defense Counsel denied suggesting the Victim's statements were recently fabricated—he claimed to have been "asking about inconsistent statements" and things she had previously not said—and argued the whole video was unnecessary to respond to his pointed impeachments. (J.A. 112.)

The Military Judge found Appellant had attacked the Victim's credibility "on another ground" by suggesting that "the government has somehow coached" the Victim. (J.A. 118–19.) He admitted portions of the video under Mil. R. Evid. 801(d)(1)(B)(ii) and Mil. R. Evid. 403, excluding the introductory "rapport-building." (J.A. 121–23, 130.) The Military Judge had previously reviewed the full video. (J.A. 121.) After it was admitted, the United States played the video beginning at time stamp 14:14, which corresponds to the transcript at "So it is very important…" (J.A. 131; *see* J.A. 232–56.)

4. The Victim's account of Appellant's abuse to the forensic interviewer mirrored her in-court testimony, with some exceptions.

The Victim told the forensic interviewer the same basic facts about Appellant's abuse as she relayed in her direct examination. (*Compare* J.A. 323–34 *with* J.A. 67–68.) She also generally recalled minor details about the trip that she did not testify about, such as places they went, descriptions of Appellant's apartment, and what video game her brother played. (*See* J.A. 235– 38.)

With three exceptions, the video showed the Victim's testimony was consistent with her interview: she did not tell the interviewer she said anything to prompt Appellant's offer of a massage, (J.A. 232); she told the interviewer he used both hands, "but maybe just one," (J.A. 244–45); and she told the interviewer that Appellant asked if she had a boy back home, (J.A. 233). The three exceptions

were that the Victim in fact had not told the interviewer (1) that the rest of the trip was awkward or (2) that Appellant apologized "for being an asshole." (*See generally* J.A. 232–56.) And (3), the Victim told the interviewer details absent from her testimony: that Appellant asked while he was touching her "if it's okay" and asked when he finished grabbing her breast "if it was good for [her] first time." (J.A. 234, 240.)

D. The United States presented evidence that Appellant exhibited a consciousness of guilt after the trip.

When the Victim returned home, Appellant text messaged the Victim's mother "multiple times on a daily basis" for nearly two weeks, asking how "the kids" were doing. (J.A. 133–34.) Appellant had never "followed up" previous visits to this degree. (J.A. 134.)

About one week after the trip, Appellant called the Victim's father—Appellant's brother. (J.A. 138.) During the call, Appellant was "upset" and "kept repeating that something had happened horribly" and that the Victim's father would "disown" Appellant. (J.A. 140.) Appellant denied that it related to the Victim, but he stated, "If I tell you [what's wrong], you're going to want to kill me." (J.A. 140, 143–44.)

E. Appellant called the Victim's younger brother as a witness, and he testified that he did not see Appellant abuse the Victim.

Testifying in Appellant's case-in-chief, the Victim's younger brother—twelve years old at the time of the abuse—could not recall the time of year for the trip. (J.A. 146, 151.) During the trip, however, he recalled playing computer games "a couple of times," and while doing so he could not see anything happening in the room where the abuse occurred. (J.A. 152.) He claimed that the Victim and Appellant never watched a movie without him. (J.A. 148.)

F. In closing argument, Trial Counsel argued that the Victim's account was credible and consistent. Civilian Defense Counsel argued that the witnesses were "biased" and embellishing their testimony.

In closing, Trial Counsel reiterated that the case turned on the Victim's credibility. (J.A. 154.) She argued that the Members "should be convinced that [the Victim] is telling you the truth," and that "[e]very fact that has been presented to you … confirms it." (J.A. 154–55.) Trial Counsel further stated that the Victim's allegation was neither "wild" nor "overstated" because it was "not a fabrication." (J.A. 162.) Rather, the Victim was telling "the truth" because she "doesn't have any reason to tell you anything other than the truth." (J.A. 162.) Trial Counsel once referred to Appellant as a "child molester" when describing how the Victim's mother reacted to news of Appellant's abuse. (J.A. 158.)

In Appellant's closing, Civilian Defense Counsel argued the Victim was not credible, and that "the government realized [the Victim] cannot stand on her own."

(J.A. 164.) He argued the witnesses were biased and embellishing their testimony because they were "looking back through this sinister lens." (J.A. 164.) Civilian Defense Counsel highlighted the Victim's inconsistent statements and asked the Members to use them to assess her credibility. (J.A. 170, 176–78.) Civilian Defense Counsel argued the Victim's statement to the forensic interviewer that Appellant asked her "if it was good for [her] first time" made no sense and was "ridiculous." (J.A. 178.) Finally, Civilian Defense Counsel argued that none of the United States' witnesses would cooperate with the Defense because they were hiding something, and "something fishy is going on here." (J.A. 179–80.)

In rebuttal, Assistant Trial Counsel stated the evidence supports "only one possible conclusion"—guilt. (J.A. 180–81.) He pointed to the absence of any "possible alternative explanation" and argued that the Victim had no reason to lie about Appellant's abuse. (J.A. 191.)

Countering Appellant's closing argument, Assistant Trial Counsel stated:

> [W]hat defense is asking you to do by saying that there are reasonable doubts in this case, defense is asking you to give child molesters a license to commit these crimes, because if you can't find [Appellant] guilty in this case, the only way . . . a child molester could ever be convicted [is] if he is literally caught in the act.

(J.A. 184.) Assistant Trial Counsel twice referred to Appellant as a "child molester" when he implored the Members to "[h]old this child molester accountable" based on the evidence, (J.A. 184), and asked the Members if it was

surprising that the Government witnesses would be "unwilling to help the child molester prepare his own defense?" (J.A. 189).

Finally, Assistant Trial Counsel argued that the witnesses were uncooperative with Appellant because they "believed" and "wanted to protect" the Victim. (J.A. 189–90.) Appellant objected to this argument. (J.A. 189–90.) The Military Judge overruled the objection, but immediately instructed the Members it was their "exclusive province" to determine witness credibility. (J.A. 190.)

G. The Members convicted Appellant of sexually abusing the Victim.

The Members found Appellant guilty of the Sole Charge and Specification. (J.A. 193.)

H. After receiving evidence and hearing argument from counsel, the Members sentenced Appellant to confinement for eighteen months and a dishonorable discharge.

The United States presented evidence in presentencing of the symptoms of child sexual abuse and the long-term consequences when a child is abused by a family member. (J.A. 194–202.) The Victim read an unsworn statement, describing how Appellant's abuse adversely impacted her. (J.A. 203–04.)

Trial Counsel argued the Members should sentence Appellant to a dishonorable discharge, four years of confinement, and reduction to E-1. (J.A. 205.) Trial Counsel argued this sentence was appropriate using themes of specific and general deterrence and rehabilitation. (J.A. 205–10.)

Trial Counsel anticipated that Appellant might argue that "the conviction in and of itself is enough punishment" and ask for no additional punishment. (J.A. 206.) She told the Members awarding no punishment would be "insulting" to both the Victim and "to the military justice system as a whole." (J.A. 206.) She asked the Members to imagine justifying a sentence of no punishment to a Sailor they convicted of molesting his fifteen-year-old niece. (J.A. 207.) She argued that Appellant's sentence should "send a message" that the Navy does not tolerate sexually abusing children. (J.A. 207.)

Appellant never objected to Trial Counsel's presentencing argument. (*See* J.A. 205–10.) Trial Defense Counsel did not argue "this conviction is enough," but rather, asked the Members to award one year of confinement and no punitive discharge. (J.A. 211.)

The Members sentenced Appellant to reduction to E-1, confinement for eighteen months, and a dishonorable discharge. (J.A. 221.)

Argument

I.

ALTHOUGH THE MILITARY JUDGE ERRED ADMITTING THE ENTIRE VIDEO-RECORDED INTERVIEW UNDER MIL. R. EVID. 801(d)(1)(B)(ii), APPELLANT SUFFERED NO PREJUDCE BECAUSE THE ENTIRE VIDEO WAS ADMISSIBLE UNDER MIL. R. EVID 801(d)(1)(B)(i), AND REGARDLESS, ADMISSION WAS HARMLESS UNDER THE *KERR* FACTORS.

A. Standard of review.

Appellate courts review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision . . . is outside the range of choices reasonably arising from the applicable facts and the law." *Id*. (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)).

"Findings of fact are 'clearly erroneous' when the reviewing court 'is left with the definite and firm conviction that a mistake has been committed.'" *Id*. (quoting *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001)).

B. Military R. Evid. 801(d)(1)(B) presents three threshold criteria for prior consistent statements. Once satisfied, prior consistent statements are admissible when the declarant's motives for testifying are impugned or the declarant's credibility is attacked "on another ground."

Prior consistent statements are not hearsay if certain threshold criteria are met: (1) the declarant of the out-of-court statement testifies; (2) the declarant is cross-examined about the prior statement; and (3) the prior statement is consistent with the declarant's testimony. Mil. R. Evid. 801(d)(i)(B); *see also United States v. Finch*, No. 19-0298, 2020 CAAF LEXIS 136, at *12–13 (C.A.A.F. Mar. 3, 2020). A statement that meets the threshold criteria may be admitted as substantive evidence when it: (i) rebuts an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) rehabilitates the declarant's credibility as a witness when attacked "on another ground." Mil. R. Evid. 801(d)(1)(B). This Rule mirrors the federal rule. *See* Exec. Order No. 13,730, 81 Fed. Reg. 33,331 (May 20, 2016); Fed. R. Evid. 801(d)(1)(B); *see also Finch*, 2020 CAAF LEXIS 136, at *13 (noting corresponding Federal rule is identical to Mil. R. Evid. 801(d)(1)(B)).

C. The Victim's forensic interview met the threshold admissibility requirements for Mil. R. Evid. 801(d)(1)(B), and Appellant does not contest this fact.

The prior statement "'need not be identical in every detail to the declarant's . . . testimony at trial'" for it to be "consistent" under Mil. R. Evid. 801(d)(1)(B).

Finch, 2020 CAAF LEXIS 136, at *13 (quoting *United States v. Vest*, 842 F.2d 1319, 1329 (1st Cir. 1988)). "[T]he prior statement need only be 'for the most part consistent' and in particular, be 'consistent with respect to . . . fact[s] of central importance to the trial.'" *Id*. (quoting *Vest*, 842 F.2d at 1329) (alterations in original).

In *Finch*, most of the victim's prior statements were consistent enough to pass the threshold admissibility requirement of Mil. R. Evid. 801(d)(1)(B) because, even though there were discrepancies between her prior statement and her testimony, they were "relatively inconsequential." *Finch*, 2020 CAAF LEXIS 136, at *23.

However, one of the *Finch* victim's prior statements—that her mother, after learning of the allegation of abuse against the appellant, made the appellant leave when the victim's female friends slept over—did not pass the threshold consistency test. 2020 CAAF LEXIS 136, at *23–24. The statement was not consistent with the victim's testimony and it bolstered the truth of her allegation, an issue "of central importance to the trial." *Id*. (internal citation omitted).

Here, like *Finch*, the Victim's forensic interview is generally consistent with her testimony because most of the additional details in the interview were relatively inconsequential. *See supra* Statement of Facts, Section C.4.; (J.A. 235–38). Also, like *Finch*, the interview contained statements inconsistent with her trial

testimony—that Appellant asked her "if it's okay" and "if it was good for [her] first time," details the Victim omitted at trial. (J.A. 234, 240.) But unlike the inconsistency in *Finch*, which demonstrated the victim's mother's belief in the victim's allegation, these additional remarks by Appellant lent the Victim no extraordinary credibility. Moreover, unlike the innate bolstering in *Finch*, Appellant argued in closing that the Members should negatively assess the Victim's credibility based on these omissions. (J.A. 176–78.) Therefore, the statements here are not so inconsistent as to render the interview inadmissible under Mil. R. Evid. 801(d)(1)(B).

Thus, the Victim's forensic interview was "consistent with respect to . . . fact[s] of central importance to the trial" and met the threshold admissibility requirements for Mil. R. Evid. 801(d)(1)(B). *See Vest*, 842 F.2d at 1329. Appellant does not contest this conclusion. (*See* Appellant's Br. at 10–20, Mar. 23, 2020.)

D. The Military Judge correctly found Appellant's cross-examination implied coaching, but he erred applying subpart (ii) to that impeachment.

This Court in *Finch* noted with approval the approach of federal circuit courts in applying Fed. R. Evid. 801(d)(1)(B)(ii) by first "ascertaining the type of impeachment that has been attempted, and then evaluating whether the prior consistent statements … would actually rehabilitate the declarant's credibility as a

witness." *Finch*, 2020 CAAF LEXIS 136, at *17; *see also United States v. Campo Flores*, 945 F.3d 687, 705–06 (2d Cir. 2019) (following this approach).

1. Appellant's cross-examination alleged coaching by the prosecution.

In *United States v. Frazier*, the Third Circuit held that "there need be only a suggestion that the witness consciously altered his testimony" for impeachment to imply the witness testified based on a recent improper influence. *United States v. Frazier*, 469 F.3d 85, 88 (3d Cir. 2006). "The line between challenging credibility or memory and alleging conscious alteration can be drawn when a district court determines whether the cross-examiner's questions reasonably imply [a charge of improper influence.]" *Id*. at 89 (citing other courts of appeals that have held similarly).

In *Campo Flores*, the Second Circuit analyzed whether that line was crossed and found that the defendant's opening statement alleged a recent improper motive because he suggested the law enforcement agents had a motive to fabricate to cover up a "botched" investigation, which included events right up until the trial began. 945 F.3d at 705; *cf. Frazier*, 469 F.3d at 89–91 (defendant's cross-examination suggested witness consciously altered testimony based on recent improper motive to secure conviction).

Appellant similarly crossed the line "between challenging credibility or memory and alleging conscious alteration," *Frazier*, 469 F.3d at 89, when he

pointedly cross-examined the Victim about her preparation with prosecutors. Appellant asked the Victim how many times she talked to the prosecutors, where and for how long she met with them to prepare, and whether they asked her the same questions they did at trial. (J.A. 78.) He further asked if the Victim "ever before had to practice to tell the truth," (J.A. 79), and accused her of remembering a new detail only after she practiced her testimony with prosecutors, (J.A. 95). Like the *Campo Flores* defendant's emphasis on the agent's motive to cover up the "botched" investigation, Appellant's emphasis on the Victim's trial preparation implied a recent improper influence. Appellant's cross-examination went beyond "tr[yng] to shed light on [the Victim's] motive to hide things from the defense" to implying the prosecutors perfected her testimony through coaching. (Appellant's Br. at 14.) Thus, Appellant's cross-examination reasonably suggested that the Victim "consciously altered [her] testimony" after being coached by the prosecutors. *See Frazier*, 469 F.3d at 88; *see also Stevenson v. State*, 149 A.3d 505, 511–14 (Del. 2016) (applying *Frazier* and finding defendant's cross-examination regarding witnesses' trial preparation alleged conscious alteration after coaching by prosecution).

Appellant's argument that this Court, per *Frost*, should look to "the record in its entirety" to determine that Appellant did not allege coaching is inapt. (Appellant's Br. at 13 (quoting *Frost*, 79 M.J. at 111).) In *Frost*, the Court looked

to the appellant's overall theory at trial to determine that the appellant's alleged improper influence pre-dated the prior consistent statement—not whether the appellant's impeachment implied a recent improper influence. 79 M.J. at 111. Thus, *Frost* is inapplicable to the determination here. Moreover, a defendant's cross-examination can allege a recent improper influence even if the larger defense theory—"the record in its entirety"—does not turn on that improper influence. *Cf. Campo Flores*, 945 F.3d at 705 (finding admission of prior consistent statements under Fed. R. Evid. 801(d)(1)(B)(ii) not error because, "[a]lthough defendants' opening statement challenges to [the agent's] memory were brief and were not their main challenges, they were in fact made").

Therefore, the Military Judge correctly found that Appellant alleged the Trial Counsel coached the Victim.

2. The Military Judge erred in concluding that coaching constituted an attack "on another ground."

In *United States v. Allison*, this Court found that a suggestion that "trial counsel may have shaped [the witness'] testimony" was a charge of recent improper influence. *United States v Allison*, 49 M.J. 54, 57–58 (C.A.A.F. 1998); *see also United States v. Heath*, 76 M.J. 576, 578 (A. Ct. Crim. App. 2017) (questions about witness' preparation with prosecutors implied recent improper influence).

Despite *Allison*, the Military Judge categorized Appellant's charge as an attack "on another ground." (J.A. 119.) The lower court correctly held this was an erroneous view of the law, finding that "[s]imply referring to the impeachment as a charge of coaching does not create a different ground for purposes of Mil. R. Evid. 801(d)(1)(B)." *Norwood*, 79 M.J. at 656.

3. Portions of the Victim's forensic interview were still admissible under the erroneously cited subpart (ii) to rehabilitate the Victim's credibility.

For a prior consistent statement to be admissible under Mil. R. Evid. 801(d)(1)(B)(ii), two additional criteria apply: (1) the declarant's credibility must be "attacked on another ground" other than those listed in Mil. R. Evid. 801(d)(1)(B)(i); and (2) the statement "must actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." *Finch*, 2020 CAAF LEXIS 136, at *18–19. Although the Rule does not specify what other grounds of attack qualify under this subpart, this Court approvingly noted in *Finch* that "the Drafters' Analysis lists 'charges of inconsistency or faulty memory' as two examples." *Id*. at *15 (quoting Manual for Courts-Martial, United States, App. 22 at A22-61 (2016 ed.) (MCM)).

In *United States v. J.A.S.*, the Sixth Circuit held the victim's videotaped forensic interview was admissible to rehabilitate the victim's credibility because it was "largely consistent" with the victim's testimony and rebutted the appellant's

impeachment based on inconsistencies. *United States v. J.A.S.*, 862 F.3d 543, 544–45 (6th Cir. 2017). Similarly, in *United States v. Cox*, the victim's prior consistent statement to a detective was admissible because it rehabilitated the victim's credibility after the appellant alleged his memory was faulty. *United States v. Cox*, 871 F.3d 479, 487 (6th Cir. 2017).

As in *J.A.S.* and *Cox*, portions of the Victim's forensic interview were admissible as prior consistent statements to rebut Appellant's charges of omissions and inconsistencies. The United States agrees with Appellant that the portions of the interview relevant on these points were those that showed: (1) the Victim did not tell the interviewer she said anything to prompt Appellant's massage offer (J.A. 232); (2) the Victim was not inconsistent about what hand Appellant used (J.A. 244–45); and (3) that the Victim told the interviewer that Appellant asked her if she had a boy back home (J.A. 233). (Appellant's Br. at 16–17.) However, as discussed in the next Section and contrary to Appellant's assertion, the irrelevant portions of the video were harmless.

E. Even if the forensic interview—in whole or in part—was inadmissible, Appellant suffered no prejudice.

Article 59(a), UCMJ, provides that the "finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a) (2012). For two reasons, Appellant suffered no prejudice.

1. Appellant was not prejudiced by the Military Judge's erroneous application of subpart (ii) because the entire forensic interview was admissible under subpart (i).

In *United States v. Robinson*, this Court found that the military judge's error in admitting evidence from an illegal traffic stop was harmless because the facts otherwise established a legal basis for admission. *United States v. Robinson*, 58 M.J. 429, 433–34 (C.A.A.F. 2003); *see also United States v. Miller*, 46 M.J. 80, 84 (C.A.A.F. 1997) (error admitting excited utterance harmless partly because facts supported admission on another basis); *United States v. Carista*, 76 M.J. 511, 515 (A. Ct. Crim. App. 2017) (detailing history of "tipsy coachman" doctrine).

Like *Robinson*, the Military Judge reached the right outcome but for the wrong reason. Two principles govern the admission of statements under Mil. R. Evid. 801(d)(1)(B)(i): (1) the prior statement must precede any motive to fabricate or improper influence it is offered to rebut; and (2) where multiple motives to fabricate or multiple improper influences are asserted, "the statement need not precede all such motives or inferences, but only the one it is offered to rebut." *Frost*, 79 M.J. at 110.

Here, the statement was admissible under subpart (i) because the forensic interview was a prior consistent statement that preceded and rebutted the alleged improper influence. (*See* J.A. 105–06, 223.) Additionally, Appellant's charge of coaching implicated the entirety of the Victim's testimony, and thus, admission of

the entire forensic interview was necessary to rebut the impeachment. *See United States v. Blankinship*, 784 F.2d 317, 320 (8th Cir. 1986) ("Where portions of a witness' prior statement are used to impeach [a witness], other portions of the statement are admissible if they relate to the subject matter about which he was cross-examined, and meet the force of the impeachment") (internal quotations omitted).

Because the entire interview was admissible under subpart (i), Appellant suffered no prejudice from the Military Judge's error in applying subpart (ii).

2. Even if the alternative basis for admission does not dispel any claim of prejudice, admission of the interview was harmless under the *Kerr* factors.

This Court weighs four factors to determine whether non-constitutional evidentiary error substantially influenced the members' verdict: (1) the strength of the Government's case; (2) the strength of the defense's case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999); *see also Finch*, 2020 CAAF LEXIS 136, at *24–25. The Government bears the burden of demonstrating that any erroneous admission of evidence was harmless. *Frost*, 79 M.J. at 111.

a. The United States' case was strong.

The Victim provided substantial, detailed testimony that Appellant sexually abused her when he touched her breast, thigh, and buttocks. (J.A. 67–71.) In

addition, three witnesses testified that in the two weeks following the abuse, Appellant made admissions or behaved in a manner suggesting consciousness of guilt. (J.A. 73, 133–34, 138–40, 143–44.) The Court should give considerable weight to the strength of the United States' case.

b. Appellant's case was weak.

In *United States v. Hall*, this Court described the appellant's case as "weak, even implausible," where the appellant's theories were squarely rebutted by the government's evidence. *United States v. Hall*, 66 M.J. 53, 55–56 (C.A.A.F. 2008). Appellant's case was similarly weak and implausible. Appellant's defense required the Victim to have fabricated the entire ordeal, yet no evidence established a motive to fabricate. (*See* J.A. 191.) Additionally, Appellant's theory that the Government witnesses were "hiding something" amounted to speculation. (*See* J.A. 159.) Further, Appellant's substantive defense was implausible, relying primarily on the faulty recall of the Victim's twelve-year-old brother, who could not even remember the time of year for the subject trip, (J.A. 146–51), and who admitted playing computer games facing away from where the abuse occurred, (J.A. 152). The Court should give no weight to Appellant's weak and implausible case.

c. Although of high quality, the forensic interview was not especially material to the Government's case.

In *United States v. Durbin*, this Court held erroneously admitted testimony was harmless given the few references to it. *United States v. Durbin*, 68 M.J. 271, 276 (C.A.A.F. 2010). The Court reasoned that—even if the inadmissible testimony were construed as an admission of the appellant's guilt—the testimony was still not material to the government's case, as evidenced by only three brief references to the testimony in argument and the testimony's minimal weight in comparison to the other evidence. *Id*. Thus, admission of the testimony was harmless because it "did not play a major role in [the appellant's] prosecution." *Id*.

Here, like *Durbin*, the forensic interview did not play a major role in Appellant's prosecution. Like the high quality of the testimony in *Durbin*, which demonstrated an admission of guilt, the interview here was of high quality—the Members could see and hear the Victim's first formal account of the assault. Nevertheless, the interview did not feature prominently in argument—in twenty-two pages of closing and rebuttal arguments, Trial Counsel briefly mentioned the forensic interview twice. (J.A. 157, 191.) The Trial Counsel spent far more time arguing the strength of the other Government evidence: the Victim's compelling testimony and the evidence demonstrating Appellant's consciousness of guilt. (*See* J.A. 154–63, 180–91.) Thus, in comparison to the strength of the Government's

case, the forensic interview, although of high quality, was not material to Appellant's prosecution.

Each of the *Kerr* factors weighs in favor of the United States; therefore, the Government has met its burden to show that admission of the forensic interview, whether in whole or in part, did not have a substantial influence on the findings. *See Frost*, 79 M.J. at 111. Accordingly, Appellant was not prejudiced.

II.

NONE OF THE TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANT RELIEF.

A. Standard of review.

This Court reviews allegations of prosecutorial misconduct and improper argument *de novo*. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). Where no objection is made, the Court reviews for plain error. *Id*. Under plain error analysis, an appellant bears the burden to demonstrate that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *Id*. (citations omitted).

Whether preserved or forfeited and reviewed for plain error, "[b]oth standards . . . culminate with an analysis of whether there was prejudicial error." *Andrews*, 77 M.J. at 401 (citation omitted).

B. Prosecutors may strike hard blows and may forcefully argue reasonable inferences from the evidence, and the propriety of those arguments are reviewed in the context of the entire court-martial.

Prosecutorial misconduct is "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. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017) (internal quotations omitted). Such misconduct occurs when "the prosecuting attorney 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Id*. (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." *Berger*, 295 U.S. at 88.

Improper argument is "one facet of prosecutorial misconduct." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). While prosecutors may not argue their personal opinions or make statements calculated to inflame the passions of the jury, *United States v. Fletcher*, 62 M.J. 175, 179–83 (C.A.A.F. 2005), "[p]rosecutors can argue the record, highlight any inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence." *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008). Challenged statements are reviewed in the "context of the entire court-martial" rather than in isolation. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000).

C. Trial Counsel argued the evidence supported the Victim's truthfulness; she did not improperly vouch for the Victim. There is no plain error.

"The prosecutor should not argue in terms of counsel's personal opinion, and should not imply special or secret knowledge of the truth of witness credibility." ABA Prosecution Standard 3-6.8(b); *see also United States v. Young*, 470 U.S. 1, 18–19 (1985); *Fletcher*, 62 M.J. at 179–80. Improper vouching occurs when trial counsel "places the prestige of the government behind a witness through personal assurances of the witness' veracity." *Fletcher*, 62 M.J. at 180 (internal citations and quotations omitted).

In *Voorhees*, this Court held the trial counsel improperly vouched for the credibility of his witnesses by trying to "convince the members to convict based on his purported integrity, credibility, and experience" rather than the evidence. 79 M.J. at 11–12. His improper argument included calling a Government witness "an outstanding airman" and assuring members that a witness was credible. *Id*. at 11–12. He also improperly bolstered the testimony of Government witnesses, stating, "That was the truth;" and "It's the truth. It's what happened." *Id*.

Here, unlike *Voorhees*, Trial Counsel tied the Victim's credibility to the evidence in the Record and the Members' assessment; she did not offer personal assurances or unsupported bolstering. In opening statement, she said, "[a]s *you'll see throughout this trial*," the Victim had no reason to lie, and "you'll evaluate the

credibility of [the Victim] whom *you'll soon see* has no reason to lie." (J.A. 52, 54 (emphasis added).) The comments properly presented Trial Counsel's good-faith belief that the evidence admitted at trial would support the Government's theory—that the Victim did not have a motive to fabricate. *See* R.C.M. 913(b).

Similarly, in closing argument, Trial Counsel again argued the Victim's truthfulness by pointing to evidence in the Record. She reiterated the Government's theory, devoid of personal opinion: "Members, you should be convinced that [the Victim] is telling you the truth. Every fact that has been presented … confirms it." (J.A. 154–56, 159–62). She also rebutted Appellant's theory that inconsistencies undermined the Victim's credibility, telling the Members, "You know [the Victim told the truth] because her account of what happened isn't a wild accusation." (J.A. 157–59, 161–62.) The statements on credibility related to the Members' conclusions, not Trial Counsel's personal opinion. *See Fletcher*, 62 M.J. at 180. And unlike *Voorhees*, Trial Counsel did not personally assure the Members that the Victim was "outstanding," nor did she flatly assert the Victim told the truth.

As Trial Counsel reasonably commented on the inferences to be drawn from the evidence, she did not improperly vouch for the Victim, and there is no plain error. *See Baer*, 53 M.J. at 237; *see also* R.C.M. 919(b).

D. Describing Appellant as a "child molester" was not plain error. Counsel's limited use of the term was a fair comment on the evidence and responded to Appellant's closing argument.

The prosecutor should maintain a professional attitude toward opposing counsel and defendants. ABA Prosecution Standard 3-6.2(a); *see also Fletcher*, 62 M.J. at 181–83. To that end, trial counsel is "prohibited from making arguments calculated to inflame the passions or prejudices of the jury." *Fletcher*, 62 M.J. at 183. In determining whether trial counsel's argument was "calculated to inflame the members' passions or possible prejudices," this Court considers the "direction, tone, and theme" of the "entire argument." *See Baer*, 53 M.J. at 238.

1. The Prosecution's three references to Appellant as a "child molester" were fair comment on the evidence; they were not intentionally used to inflame the passions of the jury.

While "commentary on the evidence" is proper, "personal attack[s] on the defendant" are not. *Fletcher*, 62 M.J. at 183. However, "the law permits the prosecution considerable latitude to strike hard blows based on the evidence and all reasonable inferences therefrom." *United States v. Rude*, 88 F.3d 1538, 1548 (9th Cir. 1996) (internal citation and quotation omitted). "Unflattering characterizations of a defendant will not provoke a reversal when such descriptions are supported by the evidence." *United States v. Delgado*, 672 F.3d 320, 335 (5th Cir. 2012) (en banc) (internal citation and quotation omitted).

In *United States v. Bentley*, the court found no plain error in trial counsel's reference to the appellant as a "sexual predator" because it was a "descriptive phrase that further[ed] the government's theory of the case." *United States v. Bentley*, 561 F.3d 803, 810–11 (8th Cir. 2009). This was distinguishable from impermissible uses in cases "where invectives serve only to inflame passions." *Id*.

Like *Bentley*, Trial Counsel's references to Appellant as a "child molester" were permissible because they furthered the Government's theory and reflected the evidence. Because the evidence showed Appellant molested his minor niece, Trial Counsel's references were a comment on the evidence, not a personal attack on Appellant. *Cf. Voorhees*, 79 M.J. at 11 (trial counsel personally attacked defendant rather when he repeatedly referred to appellant as perverted, deplorable, disgusting, chauvinistic, narcissistic, and a pig). Additionally, the Prosecution's use of the term was limited—in their combined twenty-two pages of closing and rebuttal argument, they directly referred to Appellant as a "child molester" only three times. (J.A. 158, 184, 189.)

Although the Prosecution's references to Appellant as a "child molester" were certainly hard blows, they were not foul ones, since the term was based on the evidence that Appellant sexually abused a minor. *See Rude*, 88 F.3d at 1548; *see also Berger*, 295 U.S. at 88. Moreover, the limited use of the term did not consume the "direction, tone, and theme" of the "entire argument" such that the

term risked inflaming the passions of the Members. *See Baer*, 53 M.J. at 238; *see also Rude*, 88 F.3d at 1548 ("there is a point at which prosecutorial comments are no longer reasonably descriptive and therefore serve no purpose other than to incite prejudice in the jury"); *cf. Kellogg v. Skon*, 176 F.3d 447, 452 (8th Cir. 1999) (use of "monster" and "sexual deviant" error because terms focused jury on grossness of alleged conduct rather than whether defendant was guilty). Therefore, the use of "child molester" was fair comment on the evidence, and there is no plain error.

2. Assistant Trial Counsel's argument regarding child molestation cases did not ask the Members to perform a role outside evaluating the evidence. There is no plain error.

"If the prosecutor presents rebuttal argument, the prosecutor may respond fairly to arguments made in the defense closing argument . . . ." ABA Prosecution Standard 3-6.8(d); *accord United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005).

In *Young*, the prosecutor impermissibly asked the jury to perform a role outside evaluating the evidence when he exhorted the jury to "do its job"—meaning convict the defendant. 470 U.S. at 18. Similarly, in *Baer*, this Court held that the trial counsel's invocation of the "Golden Rule argument[] asking the members to put themselves in the victim's place" was improper because it risked members deciding based on "blind outrage and visceral anguish" rather than the evidence. 53 M.J. at 237–38 (internal quotation and citation omitted).

Here, unlike *Young* and *Baer*, Assistant Trial Counsel's comments did not ask the Members to perform a role outside evaluating the evidence. The argument—that "if you can't find [Appellant] guilty in this case . . . the only way a child molester could ever be convicted [is] if he is literally caught in the act"—reflected the Government's theory that the Victim's testimony was sufficient to convict Appellant. (J.A. 184.) As such, Assistant Trial Counsel's argument did not ask the Members to convict based on implications to child molesters generally; rather, the argument reframed the evidence to dispel Appellant's claims that the Government had not met its burden of proof. (J.A. 170.) There is no plain error, and the lower court erred finding otherwise. *Norwood*, 79 M.J. at 663.

3. Even if Assistant Trial Counsel's argument was plain error, for the following reasons and under the *Fletcher* factors analyzed in Section II.F., Appellant was not prejudiced.

In *Young*, the jury's deliberations were not compromised by the prosecutor's improper arguments in rebuttal because the jury, viewing the comments "within the context of the entire trial," would have understood that "defense counsel's comments clearly invited the reply." 470 U.S. at 11, 18–20 (internal citation and quotation omitted); *see also United States v. Gilley*, 56 M.J. 113, 121–23 (C.A.A.F. 2001) (citing *Young*'s "invited reply" rule to hold that appellant was not prejudiced by prosecutor's argument that he invoked Fifth Amendment). So too, here, would the Members have understood Assistant Trial Counsel's argument to be fairly

responding to Appellant's assertion that the Government had not carried its burden through the Victim's testimony alone. Therefore, even if the comment was improper, Appellant was not prejudiced. *See also infra* Section II.F.

E. Trial Counsel's presentencing argument properly directed the Members to consider general deterrence in determining an appropriate sentence.

During presentencing argument, trial counsel may refer to "generally accepted sentencing philosophies," including general deterrence. R.C.M. 1001(g). Trial counsel may make general deterrence arguments "when they are not the Government's only argument and when the military judge properly instructs the members about conducting an individualized consideration of the sentence." *United States v. Akbar*, 74 M.J. 364, 394 (C.A.A.F. 2015) (citation omitted); *see also United States v. Lania*, 9 M.J. 100, 104 (C.M.A. 1980) ("may not invite the court members to rely on deterrence to the exclusion of other factors").

In *Akbar*, this Court concluded trial counsel's sentencing argument, requesting the members "send a message about the value of life, loyalty, and the bond among the band of brothers," was a general deterrence argument. *Id*. Because the military judge properly instructed the panel on general deterrence, "there was nothing improper in asking the members to send a general deterrence message." *Id*.

Here, like *Akbar*, Trial Counsel's sentencing argument was a request for the Members to send a general deterrence message. Anticipating that Appellant may ask the Members to impose no punishment, Trial Counsel reframed the general deterrence sentencing philosophy by asking the Members how they might explain to a co-worker that they convicted a Sailor of sexually abusing his niece but awarded no punishment. (J.A. 206–07.) She further asked how Appellant's own shipmates might react if Appellant "shows up [tomorrow] to do his job like nothing happened." (J.A. 207.) She used this reframing to argue that the sentence "should send a message that [Appellant's] crime is not tolerated by the Navy." (J.A. 207.)

Since this was one of several sentencing philosophies Trial Counsel proposed, and the Military Judge properly instructed on general deterrence, arguing general deterrence was appropriate. (*See* J.A. 205–10 (arguing specific deterrence and rehabilitation); R. 627–35.) There is no plain error.

F. Regardless of any error, Appellant suffered no prejudice from the Government's comments, either in findings or sentencing.

Appellate courts assess prejudice from improper argument by examining the "cumulative impact" of alleged prosecutorial misconduct on an appellant's substantial rights and fairness and integrity of his trial. *Fletcher*, 62 M.J. at 184 (citation omitted). In other words, prosecutorial misconduct only merits relief where the trial counsel's comments were "so damaging that [this Court] cannot be confident that the members convicted [or sentenced] the appellant on the basis of

the evidence alone." *Id.*; *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2014) (applying *Fletcher* factors to improper sentencing argument). Criminal convictions are "not to be lightly overturned on the basis of a prosecutor's comments standing alone." *Young*, 470 U.S. at 11.

Where improper argument occurs, this Court considers three factors to determine whether an appellant suffered prejudice in findings or sentencing: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Fletcher*, 62 M.J. at 184; *Halpin*, 71 M.J. at 480. If the weight of the evidence is strong enough, that factor alone can establish lack of prejudice as to either findings or sentence. *Pabelona*, 76 M.J. at 13; *Halpin*, 71 M.J. at 480.

1. Appellant suffered no prejudice as to findings.

Two of the three *Fletcher* factors favor the United States outright. The first *Fletcher* factor, which marginally favors Appellant, is not dispositive.

a. The alleged misconduct was moderately severe, weighing in favor of Appellant.

In assessing the "severity" of prosecutorial misconduct, this Court considers five "indicators of severity": (1) the raw number of instances of misconduct as compared to the overall length of the argument; (2) whether the misconduct was confined to rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations; and (5)

whether the trial counsel abided by any rulings from the military judge. *Fletcher*, 62 M.J. at 184.

The first and second indicators marginally favor Appellant. Trial Counsels' comments amounted to less than a dozen improper comments over twenty-seven pages of argument. (*See also* Appellant's Br. at 27 (arguing Trial Counsel made a dozen improper arguments).) While the raw number still pales in comparison to *Fletcher*'s dozens of improper comments, 62 M.J. at 184–85, the allegedly improper comments nonetheless spanned opening, closing, and rebuttal.

The third and fourth indicators also marginally favor Appellant. The alleged misconduct occurred on each day of this two day trial. Additionally, the Members deliberated for only thirty-five minutes, albeit in a case that was factually straight forward and involved a single Charge and Specification. (*See* R. 567, 570); *cf. Andrews*, 77 M.J. at 402 (finding fourth indicator favored appellant where panel deliberated less than three hours).

The fifth indicator favors United States. Appellant objected just once, a "measure of the minimal impact of a prosecutor's improper comment," *Gilley*, 56 M.J. at 123, and Trial Counsel complied with that ruling. (J.A. 190.)

If this Court finds merit in all of Appellant's allegations, then the misconduct would be moderately severe and this *Fletcher* factor would favor

Appellant. Needless to say, these severity indicators would sway in favor of the United States if the Court finds error in only some of the comments.

b. The Military Judge issued a curative instruction after Appellant's sole objection, and the Members are presumed to have followed the law. This factor favors the United States.

Absent evidence to the contrary, this Court presumes that court-martial members follow a military judge's instructions. *United States v. Short*, 77 M.J. 148,151 (C.A.A.F. 2018).

Appellant objected only once during arguments—claiming that Assistant Trial Counsel improperly argued that Government witnesses believed the Victim. (J.A. 189.) Though he overruled the objection[1], the Military Judge nonetheless instructed the Members that it was their "exclusive province" to determine witness credibility. (J.A. 190.) This curative instruction directly addressed and immediately followed Assistant Trial Counsel's comment. *Cf. United States v. Clifton*, 15 M.J. 26, 29–31 (C.M.A. 1983) (finding military judge's curative instructions inadequate when they did not address trial counsel's references to appellant's exercise of constitutional rights). Appellant offers no evidence to rebut

[1] The lower court erred finding that the Military Judge should have sustained the objection. *See Norwood*, 79 M.J. at 664. Assistant Trial Counsel's comment fairly responded to Appellant's theory that Government witnesses were somehow conspiring because they all refused to speak with the Defense. (J.A. 179, 189–90). Thus, Appellant invited the reply. *See Gilley*, 56 M.J. at 12. Regardless, there is no prejudice.

the presumption that the Members understood and followed this instruction. (Appellant Br. at 28–29.) As such, this Court should presume the Members followed the Military Judge's instructions. This factor favors the United States.

c. The weight of the evidence favors the United States.

The United States presented the Victim's consistent and credible testimony that Appellant abused her, as well as corroboration through Appellant's admissions and evidence of his consciousness of guilt. In comparison, Appellant's defense relied on speculation and the imperfect recall of the Victim's then-twelve-year-old brother. *See also supra* Section I.E.2.b (arguing Appellant's case was weak). If Trial Counsels' arguments were improper, any "excess zeal" was not "so egregious that it tainted the conviction." *Fletcher*, 62 M.J. at 185 (citation and internal quotation omitted). Even if the Court substantiates all of Appellant's improper argument claims, the weight of the evidence against Appellant dispelled any prejudicial effect. *Pabelona*, 76 M.J. at 13.

Appellant fails to demonstrate prejudice as to findings, notwithstanding that the first *Fletcher* factors weighs marginally in his favor.

2. Appellant suffered no prejudice as to sentence.

The *Fletcher* factors favor the United States as to sentence. Trial Counsel made one allegedly improper argument based on a hypothetical that never materialized. Appellant did not ask the Members to award no punishment; rather,

he asked for one year of confinement and no punitive discharge. (J.A. 211.) The misconduct was not severe, nor did it require curative instruction. *Cf. United States v. Frey*, 73 M.J. 245, 249 (C.A.A.F. 2014) (finding unsubstantiated sentencing argument that appellant would be a serial recidivist if not confined was severe).

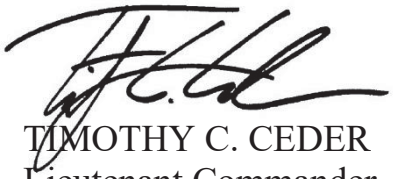
This Court should be "confident that Appellant was sentenced on the basis of the evidence alone." *Id*. at 251 (internal quotation and citation omitted). That evidence included: that Appellant sexually abused his minor niece; the Victim's emotional statement regarding the impacts of Appellant's actions on her life; and the potential repercussions when a minor is sexually abused by a family member. (J.A. 194–202, 203–04.) Even if Trial Counsel's comment was improper, it was surrounded by "powerful and proper sentencing argument" about this evidence. *Frey*, 73 M.J. at 251.

Additionally, the adjudged eighteen-month sentence was well below the maximum authorized twenty years and was nearer to Appellant's requested one year of confinement than Trial Counsel's requested four-year sentence. MCM, App. 12 at A12-4; (J.A. 205, 211); *see also Frey*, 73 M.J. at 251 (no prejudice in part because members adjudged lighter sentence than government requested and gave appellant confinement he asked for). Taken together, Appellant fails to demonstrate prejudice as to sentence.

Conclusion

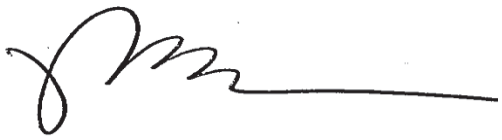
The United States respectfully requests that this Court affirm the lower court's decision.

KERRY E. FRIEDEWALD
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687
Bar no. 37261



TIMOTHY C. CEDER
Lieutenant Commander, JAGC, USN
Senior Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679, fax (202) 685-7687
Bar no. 37064

NICHOLAS GANNON
Lieutenant Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37301



BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

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KERRY E. FRIEDEWALD
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687
Bar no. 37261