UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DANNY W. NEWTON
United States Air Force

ACM 37882

1 October 2013

Sentence adjudged 21 December 2010 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Jeffrey A. Ferguson.

Approved Sentence: Dishonorable discharge, confinement for 25 years and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni; Major Michael S. Kerr; Captain Travis K. Ausland; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel C. Taylor Smith; Major Erika L. Sleger; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

At a general court-martial the appellant was convicted, contrary to his pleas, of attempted sodomy upon a child under 12 years of age, conspiracy to obstruct justice, indecent liberties, and sodomy upon a child under 12 years of age, in violation of Articles 80, 81, 120, 125 and 134, UCMJ, 10 U.S.C. §§ 880, 881, 920, 925, 934. Enlisted

members sentenced him to a dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and reduction to E-1.[1] The convening authority disapproved the forfeitures and approved the remainder of the sentence as adjudged.

The appellant contends the evidence is factually and legally insufficient to prove his guilt of: (1) Any of the offenses due to inconsistent and erroneous statements made by the alleged victim; (2) Conspiracy where the evidence failed to show the appellant's wife intended to or made any agreement to obstruct justice; and (3) Indecent liberties where the Government failed to present evidence that the acts occurred after the effective date of the relevant statute. He also argues the military judge erred by: (1) Denying a defense challenge for cause; and (2) Failing to inquire into the admissibility of and provide a limiting instruction about a prosecution exhibit that stated the appellant asked for a lawyer and refused to answer questions. Lastly, he argues that: (1) The indecent liberties specifications under Article 134, UCMJ, fail to state an offense because they fail to allege the terminal element; and (2) The specification of conspiracy to obstruct justice fails to state an offense because it fails to allege the terminal element of Article 134, UCMJ.

Background

The appellant married Sherry Newton in 2001, after cohabitating with her for several years. At the time of their marriage, Sherry Newton was enlisted in the Air Force and assigned to Offutt Air Force Base (AFB), Nebraska. Sherry Newton had a daughter from a prior relationship, born in December 1997. The child thought the appellant was her natural father, and learned otherwise in 2007. The appellant subsequently enlisted in March 2002, and the couple was assigned to Langley AFB, Virginia, from 2002-2005, and then to Scott AFB, Illinois, in 2005.

Sherry Newton deployed multiple times and in December 2007 was deployed to Iraq. Because the appellant was in training at various places within the United States, her daughter was sent to live with her maternal grandmother.

In late March 2008, the 10-year-old child confided to her grandmother, "I may as well tell you . . . Daddy makes me suck him and he licks me." She was crying as she relayed this information. According to her trial testimony, the child told her grandmother because she was afraid the appellant was going to do it again. When her grandmother asked if she had told her mother about this, the child said she had not done so "because daddy makes mommy so happy." The grandmother immediately called her daughter in Iraq and had the child repeat this information, but she did not report the situation to law enforcement as she thought her daughter was going to "do the right thing" now that she was aware of the allegation.

[1] The Court-Martial Order (CMO), dated 24 March 2011, incorrectly states the sentence was adjudged by a panel of officer and enlisted members. In fact, the appellant was tried and sentenced by a panel of enlisted members. We order a corrected CMO.

Instead of coming directly to her daughter following the end of her deployment in early May 2008, Sherry Newton first spent two weeks elsewhere with the appellant. Then, after she arrived at her mother's house, Sherry Newton engaged in a troubling conversation with her daughter about the allegations while the two were riding in a car, which included telling her not to tell anyone that the appellant had forced her to lick and/or suck his penis. A recording Sherry Newton made of this conversation was found during a search of one of the computers seized from the appellant's residence. The child did as directed and did not tell anyone.

Several months later, however, the child's great-aunt called authorities to report the appellant's actions, having learned it from her sister (the child's maternal grandmother). The appellant and Sherry Newton were both prosecuted for offenses stemming from these allegations.[2]

Implied Bias of Court Member

An accused enjoys the right to an impartial and unbiased panel. *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994). This right is provided in the military justice system by "the Constitution, federal statutes, regulations and directives, and case law." *United States v. Terry*, 64 M.J. 295, 301 (C.A.A.F. 2007).

Rule for Courts-Martial (R.C.M.) 912 includes challenges based upon the concepts of both actual and implied bias. *United States v. Moreno*, 63 M.J. 129, 133 (C.A.A.F. 2006) (citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997); *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997)). The issue sub judice concerns implied bias. R.C.M. 912(f)(1)(N) provides that a member shall be excused for cause whenever it appears that he/she "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."

The test for implied bias is objective, viewed through the eyes of the public, and focuses on the appearance of fairness in the military justice system. *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006) (citations omitted); *Moreno*, 63 M.J. at 134; *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998). Implied bias exists "when most people in the same position would be prejudiced." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996) (citations omitted). The test is "whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *United States v. Rolle*, 53 M.J. 187, 191

[2] Following a litigated court-martial in March 2010, then-Technical Sergeant Sherry Newton was convicted of child endangerment and accessory after the fact to child molestation and was sentenced to confinement for 6 months, forfeitures of $1000 pay per month for 6 months, and reduction to E-3. During the post-trial processing, the convening authority dismissed the accessory specification and reduced the sentence to 105 days confinement, forfeiture of $1000 pay per month for 3 months, and reduction to E-5. She did not testify at the appellant's court-martial and the panel was not provided with this information.

(C.A.A.F. 2000). If the public perceives that an accused received less than a court composed of fair, impartial, and equal members, our superior court has not hesitated to set aside the affected findings and/or sentence. *See Leonard*, 63 M.J. at 403; *Moreno*, 63 M.J. at 135; *United States v. Wiesen*, 56 M.J. 172, 176-77 (C.A.A.F. 2001). However, implied bias should be relied upon sparingly and rarely. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (citations omitted); *Leonard*, 63 M.J. at 402.

We review rulings on challenges for implied bias under a standard that is less deferential than abuse of discretion, but more deferential than de novo review. *Moreno*, 63 M.J. at 134; *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000); *Napoleon*, 46 M.J. at 283. Military judges are required to follow the liberal-grant mandate in ruling on challenges for cause made by an accused. *Moreno*, 63 M.J. at 134 (citing *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005); *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993)). "[I]n the absence of actual bias, where a military judge considers a challenge based upon implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare." *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

During voir dire, Senior Master Sergeant (SMSgt) DS stated his wife had been sexually molested when she was four years old by someone from her neighborhood. To the best of his wife's knowledge, that individual was never prosecuted. By the time of the appellant's trial, SMSgt DS and his wife had been married for 10 years and this experience had not affected their marriage. SMSgt DS testified the incident with his wife would "absolutely not" keep him from looking at the evidence and judging only the facts presented in the appellant's case.

The defense originally challenged SMSgt DS on the grounds of actual bias, arguing he appeared emotional during his responses and he could be seeking vengeance for his wife through this case. Both the trial counsel and the military judge stated they saw no emotional response during SMSgt DS's responses and the military judge rejected the challenge for actual bias, but then asked for the defense's views on implied bias. The defense then argued it was unfair to have a panel member sit in judgment of the appellant when that member's wife had experienced similar abuse as a child.

The military judge denied the challenge on those grounds as well. Although he acknowledged the liberal-grant mandate, he concluded the public would not think it "unreasonable" for SMSgt DS to be on the panel given how long ago the incident happened and since it did not happen to SMSgt DS personally. He also concluded SMSgt DS's answers indicated he and his wife had put this incident behind them, as opposed to dwelling on it. The defense then exercised its peremptory challenge against

another panel member and now, on appeal, argues the military judge erred in failing to grant the challenge based on implied bias.

Viewing the ruling through the eyes of the public and focusing on the appearance of fairness in the military justice system, we find that the military judge did not err. He considered the challenge based upon implied bias, recognized his duty to liberally grant defense challenges, and placed his rationale on the record. We note that a member is not per se disqualified because the member or a close relative has been a victim of a similar crime. *Daulton*, 45 M.J. at 217; *United States v. Brown*, 34 M.J. 105, 110 (C.M.A. 1992); *United States v. Reichardt*, 28 M.J. 113, 116 (C.M.A. 1989). Under the "totality of the circumstances particular to [this] case," including SMSgt DS's physical and substantive responses when discussing this incident, we find the military judge did not abuse his discretion in denying the challenge. *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (citing *Strand*, 59 M.J. at 456). *See also United States v. Bagstad*, 68 M.J. 460, 463 (C.A.A.F. 2010).

Sodomy, Attempted Sodomy, and Indecent Liberties Offenses

The appellant was convicted of committing sodomy with his stepdaughter on divers occasions between November 2003 and April 2008 by putting his penis into her mouth. Based on the child's description that the appellant had "licked" her vaginal area, the appellant was convicted of attempting to engage in sodomy with her on one occasion sometime between August 2005 and April 2008. He was also convicted of taking indecent liberties in her physical presence on divers occasions between August 2005 and April 2008 by showing her visual depictions of individuals engaged in sexually explicit conduct and by exposing his penis to her.[3]

As he did at trial, the appellant argues the evidence is insufficient to convict him of any offenses due to the child's "many inconsistent and erroneous statements" about the events. The appellant argues the child's various statements are inconsistent with each other and reveal that she either knowingly told "tall tales" or is unable to distinguish truth from fantasy such that her testimony is too unreliable to support a finding of guilt.

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citations omitted).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take

[3] The appellant was acquitted of possessing child pornography.

"a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324 (citation omitted), *quoted in United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

In this case, once law enforcement learned of the child's allegations, she was interviewed in September and November 2008 by personnel at a civilian child advocacy clinic in Illinois. During her first interview, she initially denied that anyone had touched her and then indicated she was trying to forget things that happened to her. She told the counselor she had already talked about "it" with her parents and they had promised it would not happen again and she believed them. If the appellant did it again, he would have to move out and this would make her feel bad because she liked living with him as long as he was not doing these things with her. Her mother had told her to "lock it up in a box" and not to answer any questions about it.

During these interviews, the child disclosed the appellant put his "hot dog" into her mouth on multiple occasions. The first incident was in Virginia, probably when she was in the first grade, and the last occurrence was when she was nine years old and in third grade. It always happened in the bedroom or computer room and her father made her do it by telling her to do so and by forcing her with "his arms." He used his hands to guide her hands onto his penis, put his penis in her mouth, told her to keep it there as it would make her happy, and showed her a video of people doing the same activity. The child indicated she would taste something sour while doing it and then the conduct would stop. When asked whether the conduct involved any other part of her, she initially said no, but then said she did not want to talk about which other body parts it involved. Following these interviews, the child was placed in foster care, where she remained through the time of the appellant's trial, by which time she was 13 years old.

During her trial testimony, the child stated she stopped living with the appellant because he "made me put his [penis] in my mouth" and suck on it and he also licked her vagina. She testified that it happened many times and occurred in both Virginia and Illinois, while her mother was away from the house. She also testified the appellant showed her multiple movies of people having sex, including one that depicted a child

aged approximately 13 years old being touched by a man.[4] Under extensive cross examination, the child did not clearly recall what clothing she and the appellant were wearing during these incidents, how the bedding was arranged, and when during the day or night they occurred. The child denied fabricating these allegations because she wanted her mother to come home from her deployment and explained that her life had not been easy since she made the disclosure as she ended up living in multiple foster homes.

The Government called an expert witness in clinical and forensic child psychology with extensive experience in evaluating and treating victims of sexual abuse. The expert reviewed the report of investigation and forensic interviews, was present during the child's interviews with prosecutors, and witnessed her testimony at the trials of the appellant and his wife, although she did not perform an evaluation of the child. In her opinion, the child showed resistance to suggestibility as she consistently stated the appellant had done these activities despite her mother's efforts to push her in another direction, and found she was largely consistent during her multiple interviews.

The expert witness also explained that children are frequently as accurate in reporting abuse as adults, but they often provide less detail than the adults because children tend to only remember details about the incident that were important to them. Like an adult, the child's memory decays over time, but some aspects of the incident will not be forgotten. The expert witness also explained that because children often fear reporting abuse by a parent whom they love, a child's disclosure is often piecemeal and done in a way that allows the child to "test the waters" and pull back if the other parent does not react well.

We recognize the child's description of the events was not entirely consistent over time. However, like the panel members, we were able to observe her through multiple audio and/or video recordings, which included a taped conversation with her mother, two video-recorded interviews conducted at a child advocacy center, as well as her testimony at the appellant's court-martial. The defense also admitted transcripts of the child's testimony at a deposition, at each of her parent's Article 32, UCMJ, 10 U.S.C. § 832, investigations, and her testimony at her mother's court-martial.

Based on our review of the entirety of these materials, as well as the testimony of the child's grandmother and the expert in clinical and forensic child psychology, we find sufficient evidence for a reasonable factfinder to conclude beyond a reasonable doubt that the appellant placed his penis inside his stepdaughter's mouth, licked her vagina, and took indecent liberties with her by exposing his penis to her and showing her pornographic recordings. We ourselves are also convinced beyond a reasonable doubt that the appellant engaged in this behavior. This conclusion resolves the issues related to

[4] None of these recording were found on the appellant's computers, though evidence was presented at trial that portions of the appellant's computers were deleted in April 2008. This panel acquitted the appellant of possessing child pornography but convicted him of indecent liberties for showing her the sexually explicit video recordings.

the appellant's conviction for sodomy and attempted sodomy. His convictions for indecent liberties, however, require additional analysis.

The Government alleged the appellant took indecent liberties with the child on divers occasions between August 2005 and April 2008 by showing her visual depictions of individuals engaged in sexually explicit conduct and argued the appellant used these materials to expose the child to and teach her about sexual activity. Because of statutory changes to the Uniform Code of Military Justice in 2007, this course of misconduct was split between two punitive articles – his actions prior to 1 October 2007 were charged as indecent liberties under Article 134, UCMJ, and his actions on or after 1 October 2007 were charged as indecent liberties under Article 120, UCMJ. The Government's allegation that he took indecent liberties by exposing his penis to the child on divers occasions during the same time frame was also split between those two punitive articles based on these same dates

The two Article 134, UCMJ, specifications do not allege the terminal element of being either prejudicial to good order and discipline (Clause 1) or service discrediting (Clause 2) and thus fail to state an offense. *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012). This is plain and obvious error and we also find these defective specifications resulted in material prejudice to the appellant's substantial right to notice. *Id*. Neither specification alleges a terminal element and neither side mentioned the terminal elements during the trial, including during closing argument. The only time the terminal element was mentioned was during the military judge's instructions to the panel. We find nothing in the record to satisfactorily establish notice to the appellant of the need to defend against the terminal elements, and there is no indication the evidence was uncontroverted as to the terminal elements. *See United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013); *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013). Therefore, following consideration of the entire record, and pursuant to *Humphries*, the findings of guilty to Specifications 2 and 3 of Charge V are set aside and dismissed.

This dismissal leaves the appellant convicted of engaging in indecent liberties under Article 120, UCMJ, between 1 October 2007 and 30 April 2008.[5] At trial, the child testified that the appellant had shown her pornographic videos "a long time ago" while they were living in Illinois (where the family moved in 2005). Her pretrial statements were no more specific – she told her mother that this conduct began in Illinois. During an interview at the child advocacy center, she told the interviewer that the appellant would show her these recordings "once a year." The evidence about when the appellant exposed his penis to the child is similarly vague. At trial, the child testified the appellant had engaged in sexual activity with her while they lived in Virginia and Illinois. She told her interviewer at the child advocacy center that the last incident occurred when she was

[5] The appellant left the child with her maternal grandmother sometime in December 2007 and had no physical contact with her through the end of the charged time frame.

nine years old and in third grade, which would cover the time frame of September 2006 to June 2007. Based on the evidence adduced at trial, we find the evidence both factually and legally insufficient to prove the appellant exposed his penis and showed the child pornographic video-recordings between 1 October 2007 and 30 April 2008. The findings of guilty to Specifications 1 and 2 of Charge III are therefore set aside and dismissed.

Conspiracy to Obstruct Justice

The appellant was convicted of conspiring with his wife on divers occasions to obstruct justice. The elements of that offense, as applied to this case are: (1) the appellant entered into an agreement with his wife to obstruct justice; and (2) while the agreement continued to exist and while the appellant remained a party to the agreement, his wife performed an overt act for the purpose of bringing about the object of the conspiracy. *Manual for Courts-Martial, United States,* Part IV, ¶ 5b (2008 ed.). The overt act alleged in the Specification was that Sherry Newton "did wrongfully endeavor to influence the actions of [her daughter], a child under the age of 12, in the case of [the appellant] by telling [the child] not to tell anyone that [the appellant] forced her to lick and/or suck his penis."

The appellant alleges the evidence is factually and legally insufficient to prove his guilt of conspiracy to obstruct justice because the evidence failed to show his wife intended to or made any agreement to do so.[6] The gist of the appellant's argument is that Sherry Newton did not believe he had molested her daughter, thus she could not have acted with the criminal purpose of obstructing justice when she told her daughter not to discuss the allegations with anyone. Following our review of the record, we disagree.

In late March 2008, the appellant's stepdaughter told her maternal grandmother that the appellant had sexually molested her. Upon hearing this, the grandmother called her daughter in Iraq and had the child repeat this information. Instead of coming directly to her daughter following the end of her deployment in early May 2008, Sherry Newton first spent two weeks with the appellant. She then took her daughter on a car ride and discussed the daughter's allegations. A recording Sherry Newton made of this conversation was found during a search of one of the computers seized from the appellant's residence.

After some small talk, Sherry Newton asked her daughter to repeat what she had previously said on the telephone. The child hesitatingly disclosed that the appellant had told her on multiple occasions to "suck on this" after he pulled down his pants and had threatened to "do something" if she refused. Her mother responded by aggressively cross-examining her about details of the incidents, including what type of furniture and

[6] The appellant also argued the specification failed to state an offense because it did not allege the terminal element of the predicate Article 134, UCMJ, offense. This issue has since been resolved adversely to the appellant. *United States v. Norwood*, 71 M.J. 204 (C.A.A.F. 2012).

blankets were in the rooms where the incidents occurred, which pets they owned at the time, what store she was shopping at while the appellant was doing this, and what season of the year the incidents had occurred. She told her child that some of her details were wrong and suggested the child was fabricating the allegations to get her to return early from her deployment. The child denied that, while repeatedly and tearfully insisting the appellant had done it and was lying so he would not go to jail.

Sherry Newton also tried to convince her daughter that someone else had molested her, saying, "we've got to figure out if somebody else did it," and, "Daddy has already told me . . . [e]verything that's happened . . . . So that's why I'm saying that it happened . . . but maybe you're putting Daddy for that other person . . . . The person who actually made you do it." Rejecting her mother's suggestion that her grandmother's live-in boyfriend may have done it, the child repeatedly said the appellant had molested her.

When her mother asked if she still loved the appellant, the child indicated she did and wanted to see him and live with him but not if he was going to continue to do this. Sherry Newton then brought the appellant into the conversation, saying her daughter had to talk to the appellant if she wanted to live with him again. Calling the appellant on her cellular phone, Sherry Newton pushed the child to discuss specifics of the allegations with him so they could "work it out." The child eventually gave the phone back to her mother, who told the appellant she loved him and hung up.

Sherry Newton then asked how her daughter was feeling. The child tearfully said she was feeling sad and angry because the appellant had been doing things to her. She agreed with her mother that they could be a family again, saying she thought he would not touch her anymore because he had just said they would work it out and be a normal family again. After her daughter agreed they had it "all sorted out" and that she felt more comfortable now, Sherry Newton said "this stays between you, me, and Daddy . . . until it gets worked out. Not grandma, not nobody . . . . Just us three as a family. We're going to take care of it . . . . No talking about it to anyone else." She got her daughter to promise and "pinky swear" that she would not talk to anyone else about it as they would be "fixing it as a family."

After she told her daughter that she loved her and the appellant and "we're going to work this out so everybody's happy," Sherry Newton made her daughter call the appellant again to tell him how she feels now that "we're going to work it out," saying, "This is all you. You're getting older. You need to learn how to talk for yourself." The 10-year-old then told the appellant they were going to work it out as a family. Through the child, the appellant asked his wife how she felt about everything and Sherry Newton responded that they had a good plan, they were going to be a family and were going to work it out as a family, and everyone is "going to be happy." After her mother directed her daughter to say "I love you" to the appellant, the call ended.

Sherry Newton then told her daughter to lie to her grandmother by saying they only talked about how upset the child was about her mother being away. She also told her daughter not to mention she had talked to the appellant or that he would soon be arriving in town.

When the appellant came into town, he and his wife took the child for another car ride. According to the child's testimony, they again talked about her allegations and the adults told her they would work it out as a family, and her mother told her not to tell anyone. The child did as directed and did not tell anyone until after her great-aunt learned of the allegations and called law enforcement.

We find this evidence factually and legally sufficient to sustain the appellant's conviction for conspiring with his wife to obstruct justice. Sherry Newton became aware of her daughter's allegations in late March 2008. She then spent two weeks with the appellant. In May 2008, she told her daughter not to discuss her allegations with anyone besides her and the appellant and she and the appellant both told the child during that conversation that they would be working the situation out "as a family." It is clear that the appellant and his wife had discussed the child's allegations prior to this conversation and had agreed on this course of action. Based on the nature of the child's allegations, both the appellant and his wife would have reason to believe there would be a law enforcement investigation initiated against the appellant if the allegations were reported outside "the family."

Contrary to the appellant's assertions, we find Sherry Newton's interaction with her daughter during that conversation demonstrates that she had criminal intent when she told her daughter not to repeat her allegations. She took this action as part of her agreement with her husband to obstruct justice and to prevent law enforcement from becoming aware of the allegations and opening an investigation into her husband. In fact, their conspiracy was successful for several months, until another family member notified the authorities about the child's allegations.

Although we find the evidence both factually and legally sufficient to sustain the appellant's conviction for conspiring with his wife to obstruct justice, we do not find the evidence factually and legally sufficient to sustain his conviction for conspiring to do so "on divers occasions." Instead, we find Sherry's Newton's conduct telling her daughter not to tell anyone that the appellant had forced her to lick and/or suck his penis was done in the course of a single agreement between her and the appellant to obstruct justice.

Appellant's Invocation of his Right to Counsel

During pretrial litigation regarding a defense motion to suppress, the Government entered into evidence an 18-page "application and affidavit for [a] search warrant," as sworn to by an agent from the Air Force Office of Special Investigations (AFOSI) on

24 October 2008. This document was presented to a civilian United States District Court judge in the Southern District of Illinois in a successful effort to receive a warrant to search computer equipment that had already been seized from the appellant's residence, looking for child pornography and evidence the appellant had trafficked in stolen government property. The military judge ultimately denied the defense motion.

Prior to opening statements, the Government preadmitted several exhibits without defense objection, including another copy of this affidavit. It recites the history of the investigation, including the following paragraph:

> On September 30, 2008, an interview of [the appellant] was conducted simultaneously in conjunction with the interview of S[herry] Newton. [The appellant] was TDY to Maryland at the time and AFOSI agents stationed at the location conducted the interview. [*The appellant*] *immediately requested a lawyer and was not willing to answer any questions*.

(Emphasis added.).

When the AFOSI agent testified at trial, he discussed how the investigation into the appellant had progressed after the AFOSI was notified of the sexual assault allegation made by the child. This included interviewing Sherry Newton and "contact[ing] the [AFOSI] detachment where [the appellant] was [located] to ensure that the interviews were both conducted." At that time, the members were given a copy of the affidavit. In an Article 39(a), UCMJ, session held later during his testimony, the defense asked the military judge to instruct the agent not to comment on the appellant's lack of cooperation and/or decision not to talk to investigators. The military judge did so.

It appears that none of the parties had noticed (or remembered) that the appellant's lack of cooperation was already contained in the sworn affidavit that was in the members' possession. The members were therefore not provided any limiting instructions. The appellant now contends the military judge erred by failing to sua sponte inquire into the admissibility of that statement and providing limiting instructions concerning the members' use of it. The Government concedes that the sentence about the appellant requesting a lawyer and refusing to make a statement should not have been provided to the panel, but argues this did not constitute plain error and that the military judge's failure to provide an instruction was harmless beyond a reasonable doubt.

"The fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the Constitution of the United States or Article 31[, UCMJ, 10 U.S.C. § 831], remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated is inadmissible against the accused." Mil. R. Evid. 301(f)(3); Mil. R. Evid. 304(h)(3) ("A person's failure to deny an accusation or wrongdoing concerning an offense for which [he is under

investigation] does not support an inference of an admission of the truth of the accusation."). As such, "[t]he law generally discourages trial counsel's presentation of testimony or argument mentioning an accused's invocation of his constitutional rights." *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007) (citations omitted).

Whether there has been improper presentation of evidence relating to an accused's invocation of his constitutional rights is a question of law we review de novo. *Id*. (citing *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002)). However, if the appellant failed to preserve this error at trial, he forfeited it absent "plain error." *Id*.; *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011); *United States v. Bungert*, 62 M.J. 346, 347 (C.A.A.F. 2006)). Plain error exists when: (1) there was an error; (2) it was plain, clear or obvious; and (3) the error resulted in material prejudice to an appellant's substantial rights. *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). Similarly, we review the military judge's failure to give an appropriate curative instruction for plain error. *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001); *United States v. Ross*, 7 M.J. 174, 176 (C.M.A. 1979).

Here, the admission of this part of the exhibit was clear and obvious error as there would be no legally-proper reason for the Government to provide this information to the members. It was also clear and obvious error for the military judge to fail to issue a curative instruction regarding the panel's use of this information.

We must now assess the prejudicial impact of these errors. The admission of this evidence is an error of constitutional proportion. *United States v. Whitney*, 55 M.J. 413, 416 (C.A.A.F. 2001); *United States v. Clark*, 69 M.J. 438, 448 (C.A.A.F. 2011); *Pope*, 69 M.J. at 334; *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). The military judge's error in failing to instruct the panel members is a factor we consider as we evaluate whether the appellant was prejudiced.

Because the admission of this sentence is an error of constitutional dimension, we must evaluate whether its admission was harmless beyond a reasonable doubt. Applying this standard, we must set aside the conviction unless our "examination of the record supports the conclusion that there is no reasonable possibility that the error might have contributed to the conviction." *Moore*, 1 M.J. at 392; *Moran*, 65 M.J. at 187; *Clark*, 69 M.J. at 448. "This determination is made on the basis of the entire record, and its resolution will vary depending on the facts and particulars of the individual case," including the circumstances surrounding the admission of the objectionable evidence. *United States v. Sweeny*, 70 M.J. 296, 306 (C.A.A.F. 2011); *United States v. Sidwell*, 51 M.J. 262, 265 (C.A.A.F. 1999). "The question is not whether the members were 'totally unaware' of the error; rather, the essence of a harmless error is that it was 'unimportant in relation to everything else the jury considered on the issue in question.'" *Ashby*, 68 M.J. at 122 (citations omitted). In evaluating whether the error was harmless beyond a reasonable doubt, we consider the effect of the error on the other evidence

presented in the case, the nature of the improper evidence, and any curative instruction given to the members. *Sidwell*, 51 M.J. at 265.

Here, the error was found in a single sentence within a multi-page prosecution exhibit that appears to have been inadvertently admitted by the Government. The reference was not intended or framed in a way that constituted a direct invitation to the members to draw adverse inferences from it. *Moore*, 1 M.J. at 392 n.7. No witness referenced the appellant's exercise of his right to remain silent or his request for counsel. *Id*. An "isolated reference to a singular invocation of rights by [the] appellant" does not have "great potential" to prejudice him. *Sidwell*, 51 M.J. at 265; *United States v. Garrett*, 24 M.J. 413, 416-17 (C.M.A. 1987); *United States v. Riley*, 47 M.J. 276, 278 (C.A.A.F. 1997). The Government did not mention these facts or argue that the members should use them in a manner adverse to the appellant and, thus, it was not "affirmatively exploited by trial counsel to buttress his case against [the] appellant on any of the charged offenses." *Sidwell*, 51 M.J. at 265. Additionally, the defense's lack of objection to the admission of the information is relevant to determine prejudice as it is "some measure of the minimal impact" of the information. *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999),

Although a curative instruction to the members should have been given and would have ensured the appellant suffered no prejudice from the erroneous admission of this information, we are convinced beyond a reasonable doubt that the improper admission of this information was harmless within the context of the appellant's trial. We do not find a reasonable possibility that this evidence might have contributed to his conviction.

Sentence Reassessment

Having found error regarding several specifications, we must consider whether we can appropriately reassess the sentence or whether we must return the case for a rehearing on sentence. After dismissing a charge, this Court may reassess the sentence if we can determine to our satisfaction that, absent the error, the sentence adjudged would have been at least a certain severity, as a sentence of that severity or less will be free of the prejudicial effects of that error. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *Sales*, 22 M.J. at 307-08.

We have now set aside the four indecent liberties and reduced the divers allegations of conspiracy to a single incident. The appellant remains convicted of sodomy, attempted sodomy, and conspiracy to obstruct justice. We note that, even if the appellant was never charged with exposing his penis to his stepdaughter and showing her pornographic video-recordings, evidence of the "indecent liberties" misconduct would

still have been admissible in his court-martial for the other charges. *See United States v. Metz*, 34 M.J. 349, 351-52 (C.M.A. 1992) (holding that uncharged conduct was admissible because it was "interwoven" in the res gestae of the crime); Mil. R. Evid. 404(b) (uncharged misconduct may be admitted for purposes other than the accused's bad character, to include proof of motive, intent, preparation or plan); Mil. R. Evid. 414 ("In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant."); *United States v. Henley*, 53 M.J. 488, 490 (C.A.A.F. 2000); *United States v. Tanksley*, 54 M.J. 169, 176-177 (C.A.A.F. 2000). Additionally, these four specifications did not increase the maximum punishment as the appellant already faced a dishonorable discharge and confinement for life without parole.

Similarly, the maximum sentence was not increased by the "divers occasions" language of the conspiracy specification. The same evidence would have been presented at the appellant's trial, even if he had been originally been charged with conspiring on a single occasions.

Accordingly, we have determined that we can discern the effect of the error and will reassess the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*. Applying those standards and under the circumstances of this case, we are convinced that, absent this error, the panel would have imposed and the convening authority would have approved the same sentence.

Additionally, we have given individualized consideration to this particular appellant, the nature and seriousness of the offenses of which he was convicted, his record of service, and all other matters properly before the panel in the sentencing phase of the court-martial. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We find that the adjudged and approved sentence was appropriate in this case and was not inappropriately severe.

Conclusion

In the sole Specification of Charge II, the words "on divers occasions" are set aside and dismissed. The findings of guilty to Specifications 1 and 2 of Charge III and Specifications 2 and 3 of Charge V are set aside and dismissed.

The remaining approved findings, to include the Specification of Charge II, as modified, and the sentence, as reassessed, are correct in law and fact, and no other error prejudicial to the substantial rights of the appellant occurred.[7] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence, as reassessed, are **AFFIRMED**.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court

[7] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).