**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Major BARRY N. NIXON**
**United States Air Force**

**ACM 37622**

**14 November 2012**

Sentence adjudged 4 September 2009 by GCM convened at the United States Air Force Academy, Colorado. Military Judge: Nancy J. Paul.

Approved sentence: Confinement for 18 years.

Appellate Counsel for the Appellant: Chester H. Morgan, II, Esquire (civilian counsel) (argued); Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Phillip T. Korman; Captain Shane A. McCammon; and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Captain Brian C. Mason (argued); Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Joseph Kubler; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HARNEY, Judge:

The appellant was tried by a general court-martial comprised of officer members at the United States Air Force Academy, Colorado, between 1 and 4 September 2009. The appellant was charged with one specification of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920; one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928; two specifications of indecent acts with a child, in violation of Article 134, UCMJ, 10 U.S.C. § 934; and one specification of

assault with intent to commit rape, in violation of Article 134, UCMJ.[1] Contrary to his pleas, the appellant was convicted of the rape charge and specification. Consistent with his pleas, the appellant was convicted of the specification alleging assault consummated by a battery, and the two specifications alleging indecent acts with a child. The appellant pled guilty by exceptions and substitutions to the specification of assault with intent to commit rape. The Government elected to prove the offense as charged, and the members found the appellant guilty by exceptions. The members sentenced the appellant to confinement for 18 years. The convening authority approved the sentence as adjudged.

On appeal, the appellant raises 16 issues for this Court's review.[2] We have examined the record of trial, the assignments of error (AOE), and the Government's reply thereto. We find no error that prejudiced a substantial right of the appellant and affirm the findings and sentence.

*Background*

In 2005, the appellant confessed to his wife, SSN, that he had molested two of his three daughters, ANS and STN. A third daughter, ANN, eventually alleged that the appellant had molested her as well. The appellant was charged with rape, indecent acts, and assault with intent to commit rape against STN. The alleged acts of molestation against ANS and ANN were barred from prosecution by the statute of limitations. The Government sought to admit evidence of these uncharged acts under Mil. R. Evid. 414. Additional facts relevant to the assigned errors are discussed in the analysis below.

*Uncharged Acts Under Mil. R. Evid. 414 (AOE I)*

The appellant argues that the military judge abused her discretion by admitting evidence of uncharged acts of molestation under Mil. R. Evid. 414. The appellant asserts that the evidence of the uncharged acts was not logically relevant to any issue on findings, and that the military judge failed to conduct the required balancing test under Mil. R. Evid. 403. We disagree.

Prior to trial, trial defense counsel filed a motion in limine to exclude victim testimony regarding uncharged prior acts the appellant allegedly committed against his daughters, ANS and ANN. After considering the evidence, briefs, and arguments from both sides, the military judge denied the motion and admitted the evidence under Mil. R. Evid. 414 and 404(b) to show the appellant's predisposition to commit the charged acts against STN.

[1] The appellant was charged, pursuant to Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934, with rape and indecent acts with a child, respectively, as applicable to sexual assault offenses committed prior to 1 October 2007. *See Manual for Courts-Martial, United States (MCM)*, A27, ¶ 90 (2008 ed.).
[2] The assignments of error are listed in the Appendix to this opinion.

The evidence consisted of statements from ANS, ANN, and STN. ANS stated that the appellant inappropriately touched her between 1998 and 2003. In 1998, he placed his hand down her pants and touched her crotch, telling her he was checking to see how big her vagina was. The appellant also took her hand and put it on his penis. He asked her if it bothered her if he had an erection. She said it did. He told her to keep what he had done a secret. She was about 13 years old when this happened. In 2003, the appellant lay down next to ANS and began spooning her. She asked him to leave; he complied. ANN stated that, when she was about 13 years old, the appellant entered her bedroom, lay on top of her, and then touched her breasts. On another occasion, he watched her while she showered. STN stated that, when she was between 10 and 12 years old, the appellant fondled her breasts, pubic region, and placed his fingers in her vagina to see if she was pregnant. He also put her hand on his penis and started moving it around. STN also stated that the appellant penetrated her vagina with his penis, once on her parents' bed and once in the bathtub. He likewise asked her to keep what he had done a secret.

We review the admissibility of evidence under Mil. R. Evid. 414 for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). The abuse of discretion standard is a "strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citations omitted).

Mil. R. Evid. 414(a) states: "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." *Id*. The rule establishes a presumption in favor of admitting evidence of prior similar crimes in child molestation cases to show an appellant's predisposition to commit the designated crimes under the rule. *United States v. Tanner*, 63 M.J. 445, 448 (C.A.A.F. 2006) (citing *United States v. Wright*, 53 M.J. 476, 482-83 (C.A.A.F. 2000)). Before admitting evidence under Mil. R. Evid. 414, a military judge must make three threshold findings: (1) that the accused is charged with an offense of child molestation, (2) that the evidence proffered is evidence of the accused's commission of another offense of child molestation, and (3) that the evidence is relevant under Mil. R. Evid. 401 and 402. *Ediger*, 68 M.J. at 248; *Wright*, 53 M.J. at 482 (citations omitted).

Additionally, the military judge must apply a balancing test under Mil. R. Evid. 403. *Ediger*, 68 M.J. at 248. In *Wright*, our superior court set forth some factors to consider when conducting the balancing test. They include the following: (1) strength of proof of the prior act, (2) probative weight of the evidence, (3) potential for less prejudicial evidence, (4) distraction of the fact finder, (5) time needed for proof of prior conduct, (6) temporal proximity, (7) frequency of the acts, (8) presence or lack of intervening circumstances, and (9) relationship between the parties. *Wright*, 53 M.J. at

482; s*ee also Ediger*, 68 M.J. at 248-49; *United States v. Henley*, 53 M.J. 488, 490 (C.A.A.F. 2000). This list is neither "exclusive nor exhaustive." *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001). Although the court is not required to make detailed findings of fact under Rule 403, it is important that the court fully evaluate the evidence and make a clear record of the reason behind its findings. *Id.*; *see also Wright*, 53 M.J. at 482 (citations omitted). We will give the evidentiary ruling less deference when the military judge does not articulate the balancing analysis on the record. *Dewrell*, 55 M.J. at 138.

The appellant argues that the military judge abused her discretion because evidence of the uncharged acts between the appellant and ANS and ANN was not logically relevant to any issue on findings. Specifically, he asserts that the evidence was not relevant because the alleged molestation of ANS and ANN did not tend to prove or disprove the allegations of rape and assault with intent to rape STN. He points out that he pled guilty to the specifications of indecent acts with STN. He argues that if he were contesting those allegations, then the testimony of ANS and ANN might be logically relevant to show whether or not he had a propensity to perform indecent acts on STN. However, because he pled guilty, the only relevant question was whether or not he raped and/or assaulted STN with the intent to commit rape, acts which were never alleged by ANS or ANN. The appellant also argues that the military judge's Mil. R. Evid. 403 balancing test was inadequate because she incorrectly applied the *Wright* factors.

The Government counters that the appellant's uncharged molestation of ANS and ANN is relevant to a charge of rape against STN. The Government argues that when a father digitally penetrates the vagina of one daughter, that incident has a clear and obvious connection to his penile penetration of another daughter. Moreover, the Government argues that the appellant's uncharged molestation of ANS and ANN shows his propensity, opportunity, plan, and intent to rape STN. The fact that the Government had additional evidence of the appellant's propensity to molest his daughters did not undermine the relevancy of the evidence. Rather, that evidence spoke to the extent and depth of the appellant's intent and propensity to molest his daughters. The Government also argues that the military judge properly applied the *Wright* factors.

We find that the military judge did not abuse her discretion when she denied the defense's motion in limine and admitted the evidence under Mil. R. Evid. 414. At the outset, the military judge made the required threshold findings in her ruling. She found that the appellant was charged with an act of child molestation as defined in Mil. R. Evid. 414(a); that the proffered evidence was evidence that he committed another offense of child molestation as defined by Mil. R. Evid. 414; and that the evidence was relevant under Mil. R. Evid. 401 and 402. *Ediger*, 68 M.J. at 248; *United States v. Bare*, 65 M.J. 35, 36 (C.A.A.F. 2007). Here, the testimony of ANS and ANN centered on acts of a similar nature. Our superior court has stated that it has "never required the exact same acts of sexual molestation for the admission of evidence under M.R.E. 414." *Ediger*,

68 M.J. at 251 (citations omitted). ANS and ANN testified about their own molestation by the appellant, who was charged with an offense of child molestation via the rape, indecent acts, and assault with intent to commit rape against STN. That the appellant committed sexually deviant acts against his two older daughters when they were about the same age as his youngest daughter is probative of whether or not he vaginally penetrated his youngest daughter when he admittedly molested her. Indeed, testimony from ANS and ANN could have equally persuaded the members that vaginal penetration was less probable since neither of them testified he'd ever vaginally penetrated them.

We also find that the military judge adequately considered "the potential for undue prejudice that is inevitably present when dealing with propensity evidence." *Ediger*, 68 M.J. at 248 (quoting *United States v. James*, 63 M.J. 217, 222 (C.A.A.F. 2006)). In her written ruling, the military judge found the facts noted above. She also set forth the *Wright* factors, finding that the "strength of the evidence of the prior acts, in this case, is extremely strong." She concluded that ANS, ANN, and STN would testify to the prior acts and would be subject to cross-examination; that the girls were the appellant's daughters, lived in the family home with the appellant, and were about the same age when the appellant inappropriately touched them; that the appellant committed the acts upon them when no one else was present or everyone was asleep; and that the appellant had asked them to keep the acts a secret. The military judge also found that the evidence of the uncharged acts showed the appellant's propensity, opportunity, plan, preparation, knowledge, and intent. She further stated that there would be "little danger" of distraction of the fact finder, that presentation of the evidence would not be unduly lengthy, that a close proximity existed between the charged and uncharged acts, and that a relationship existed between the parties. The military judge also stated that the members would receive an instruction on how to properly consider the evidence. At the conclusion of findings, the military judge did provide such a limiting instruction.

We note that the military judge did not specifically articulate that she balanced the probative value of the evidence against its unfair prejudicial value when finding the evidence admissible. Giving her ruling less deference, as we must, we nevertheless find that the military judge did not abuse her discretion in admitting the evidence of uncharged acts under Mil. R. Evid. 414.[3] Her written ruling sufficiently shows that she conducted the balancing test and considered the *Wright* factors.

[3] The appellant argues that the military judge's ruling should be given no deference in light of *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). In *Manns*, our superior court held that military judges are entitled to less deference if they fail to articulate their analysis of the balancing test under Mil. R. Evid. 403 on the record, and no deference if they fail to conduct the balancing test. *Id*. This case is distinguishable from *Manns* because we find that the military judge conducted the required balancing test.

*Challenge for Cause (AOE II)*

The appellant next argues that the military judge abused her discretion by denying his challenge for cause against Lieutenant Colonel (Lt Col) EP. We disagree. During voir dire, Lt Col EP indicated that he knew someone who had been the victim of a sexual assault and that he generally was aware of sexual assault statistics. The military judge conducted the following colloquy with Lt Col EP during individual voir dire:

> MJ: If I was getting my information down correctly, I think you stated that you did know someone who had or was the victim of a sexual assault. Is that correct?
>
> [Lt Col EP]: Yes, ma'am.
>
> MJ: Can you just elaborate on that a little bit more?
>
> [Lt Col EP]: Actually it was my spouse who years ago before we were married told me of a story that happened to her personally.
>
> MJ: And what was the offense that she disclosed to you?
>
> [Lt Col EP]: The specifics?
>
> MJ: Uh-huh. Correct. Just general information: Was it a touching? Was it a rape? That type of thing?
>
> [Lt Col EP]: No, it was a touching and attempted rape as far as I know.
>
> MJ: And the individual involved in the case, who was that? The other individual I should ask.
>
> [Lt Col EP]: It was her fiancé then.
>
> MJ: About how old was she at the time?
>
> [Lt Col EP]: Well, she was probably 21.
>
> MJ: And did she report the offense?
>
> [Lt Col EP]: She did not.
>
> MJ: Do you know if she ever sought counseling for the offense?

[Lt Col EP]: As far as I know, no.

MJ: And when your spouse told you of this, did she mention it in a conversation or bring it up in a conversation and that was it, or have you on subsequent occasions discussed the event? I guess what I want to know is: did you talk about it once where it just came up at the right time in the conversation, or have you since then several times discussed it?

[Lt Col EP]: No, we haven't since then. It was during a conversation.

MJ: So essentially she has just referenced it or she has only talked about it one time?

[Lt Col EP]: Correct.

MJ: She was 21 at the time?

[Lt Col EP]: Correct.

MJ: And I think you also – do you think that having a spouse who has reported to you that she was assaulted, do you think that would have any effect on your ability to impartially sit as a member in this case?

[Lt Col EP]: Knowing me, no I don't think it has any bearing.

MJ: Do you still think you can give the accused a fair trial?

[Lt Col EP]: Yes, I can.

MJ: And then I think you also stated that either you had read, or heard or received information on statistics involving re-offenders. Can you just kind of give me some general information about that?

[Lt Col EP]: Well, before I became a radiologist I was a family practice physician so part of my medical training was to teach us about evaluating rape victims.

MJ: How long ago has it been since you served in Family Practice?

[Lt Col EP]: That was the last time probably before radiology so 11-12 years ago.

MJ: Have you read or heard any statistics that are more timely?

[Lt Col EP]: Not recently, no.

MJ: Do you think you would have any ability [sic] disregarding anything you may have heard, or anything you may have read in regards to those stats, and basically decide the decisions that you have to decide in this case solely on the evidence that you're going to hear in this case?

[Lt Col EP]: [Affirmative response]

MJ: That was an affirmative.

MJ: Do you think you can disregard any information in that area that you've previously heard?

[Lt Col EP]: Yes, I can disregard that.

MJ: Do you think or do you recall those statistics that you reviewed – oh my gosh, that was almost 12 years ago – do you even recall if those statistics at all discussed whether counseling, or lack thereof, had an effect on recidivism?

[Lt Col EP]: I don't remember that far.

MJ: Trial counsel, any additional questions for [Lt Col EP]?

ATC2: Just one, Your Honor.

MJ: Certainly.

ATC2: Sir, don't tell your wife I asked you this: But how old is your wife now?

[Lt Col EP]: [Chuckling]: She is 44.

After individual voir dire, the appellant challenged Lt Col EP for cause because his spouse had been the victim of a sexual assault and because he had either read or received information on statistics involving re-offenders. The military judge denied the challenge for cause to Lt Col EP, ruling that the incident with his spouse had occurred 22 years prior and that he had reviewed the statistics 11-12 years prior:

MJ: I don't think even given the liberal grant mandate, I don't think anything regarding the spouse -- this was something that must have come up in general conversation at one time in their married life and they've

> never spoke about it since. They've never talked about it since. She's never talked about it since. It was in reference to a fiancé; obviously, that's a little bit different than – well, significantly different than the case we have here. This is an adult victim. I think given that he was a Family Practice physician, he has assured me that anything – I mean, he said he doesn't even really recall. He could disregard it. He may have seen something regarding statistics, but he didn't even recall that. I don't think that there's even an implied bias in regard to Lt Col [EP] so that challenge is denied.

The appellant contends the military judge abused her discretion when she denied the defense challenge for cause against Lt Col EP. 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 the member "[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); *Moreno*, 63 M.J. at 134; *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). 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. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004).

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).

We find that the military judge properly exercised her discretion in denying the defense challenge for cause against Lt Col EP. The military judge addressed the grounds for the defense challenge for cause on the record in the context of the liberal grant mandate. Several factors regarding the sexual assault against Lt Col EP's spouse dispelled any implied bias. The sexual assault took place 22 years prior to the appellant's court-martial and before Lt Col EP even knew his wife. She never reported the incident to law enforcement and never received counseling. They had only spoken about the incident once since they have known each other. A prior experience with or connection to the crime in question is not per se disqualifying. *United States v. Terry*, 64 M.J. 295, 303, 305 (C.A.A.F. 2007) (citations omitted) (the fact that a member was close to someone who had been a victim of a similar crime is not grounds for per se disqualification). Several factors regarding Lt Col EP's medical training also dispelled any implied bias. Whether Lt Col EP reviewed re-offender statistics or learned about how to evaluate rape victims is not per se disqualifying. *See Daulton*, 45 M.J. at 217. As he told the military judge, Lt Col EP reviewed those statistics as part of his prior medical training, 11-12 years before the appellant's court-martial, when he was a family practice doctor and well before he became a radiologist. He also stated that he didn't recall what materials he may have reviewed.

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. She considered the challenge based upon implied bias, recognized her duty to liberally grant defense challenges, and placed her rationale on the record. Under the "totality of the circumstances particular to [this] case," we find no reason to disturb her ruling. *Terry*, 64 M.J. at 302 (citing *Strand*, 59 M.J. at 456).

*Poster-Sized Photographs (AOE III)*

During findings, the prosecution called ANS, ANN, and STN as witnesses. As ANS was testifying, the prosecution sought to admit a poster-sized photograph of her when she was in the seventh grade.[4] The defense objected on the grounds of relevance, arguing that the photograph would unduly prejudice the members. Trial counsel responded that the photograph showed what ANS looked like when the incidents to which she testified occurred, and that the evidence fell within the parameters of Mil. R. Evid. 414. When pressed by the military judge, trial counsel also stated that the photographs of ANS and her sisters showed propensity: "What these photographs show specifically is that we have three girls who look very similar and who were all asked in some sort of way to keep a secret." Trial counsel continued by saying that "all of the girls were roughly the same age, the same build at the time these incidents happened to them." The military judge overruled the defense objection and admitted as prosecution

[4] Trial counsel offered poster-sized school photographs of ANS, ANN, and STN depicting how they looked at the age when they were allegedly molested by the appellant. Trial counsel positioned the photograph on an easel as each girl testified, and also displayed the photographs during findings and sentencing arguments.

exhibits photographs of each girl as she looked at the time of either the charged misconduct or the uncharged misconduct admitted under Mil. R. Evid. 414. The military judge did not conduct a balancing test on the record.

The appellant argues that the military judge abused her discretion by admitting the photographs because they were irrelevant and served no purpose other than to inflame the members during findings, deliberations, and sentencing. Moreover, the appellant argues that the military judge failed to conduct a balancing test under Mil. R. Evid. 403; if the military judge had conducted such a test, she would have found that the evidence unfairly prejudiced the appellant. The Government argues that the photographic evidence was relevant and the military judge did not abuse her discretion. According to the Government, evidence was presented at trial showing that the appellant molested his daughters when they were much younger than they appeared at the time of trial. As such, photographs of the children at the ages that the appellant molested them allowed the members to better assess if this evinced a propensity or intent on the part of the appellant to rape STN.

We review a military judge's decision to admit evidence or to refuse to suppress evidence for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *White*, 69 M.J. at 239.

We conclude that the photographs in this case were demonstrative evidence. Demonstrative evidence "illustrates or clarifies the testimony of a witness." *United States v. Pope*, 69 M.J. 328, 332 (C.A.A.F. 2011) (quoting *United States v. Heatherly*, 21 M.J. 113, 115 n. 2 (C.M.A. 1985)). If the evidence is used to prove a "complex, central, or difficult to understand point, [then] it may have a place in the court-martial." *Pope*, 69 M.J. at 332 (quoting Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* § 403.02[9], at 4-33 (6th ed. 2006)). Our superior court has found no abuse of discretion under Mil. R. Evid. 403 when the challenged demonstrative evidence was "relevant, highly probative of critical issues, and not unfairly prejudicial." *United States v. White*, 23 M.J. 84, 88 (C.M.A. 1986) (finding no abuse of discretion for judge to admit photographs showing evidence of battered child syndrome; probative value far outweighed any danger of unfair prejudice). *See also United States v. Burks*, 36 M.J. 447, 453 (C.M.A. 1993) (finding no abuse of discretion to admit color photograph of crime scene and black and white photographs of the autopsy; probative value far outweighed any danger of prejudicial value). *But see Pope*, 69 M.J. at 333 (finding abuse of discretion to admit demonstrative evidence that was irrelevant with minimal probative value, but also finding the evidence had no substantial impact on the findings).

Demonstrative exhibits are "inadmissible where they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant, or where the exhibit's character

is such that its probative value is substantially outweighed by the danger of unfair prejudice." *Pope*, 69 M.J. at 332 (citations omitted). The decision to permit or deny the use of demonstrative evidence generally has been found to be within the sound discretion of the trial judge. *Heatherly*, 21 M.J. at 115 n.2. Courts will afford substantial discretion to a military judge's evidentiary ruling when an objection invokes a Mil. R. Evid. 403 balancing test. When the military judge fails to conduct that test on the record, that ruling is entitled to less deference. *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009).

Before admitting the photographs into evidence, the military judge did not conduct a balancing test on the record under Mil. R. Evid. 403. Thus, we will give her ruling less deference than if she had conducted such a test. Even so, we find that the military judge did not abuse her discretion when she admitted the photographs. The photographs of the appellant's children at the time he molested them were relevant to show propensity under Mil. R. Evid. 414, especially since the molestations occurred when they were a good deal younger than they appeared at the time of trial. Moreover, the photographs were not unfairly prejudicial, especially when considered in light of existing case law. The photographs are school photographs that show the girls when they were about 12 years old. In *White*, the court upheld the admissibility of photographs of a battered child. *White*, 23 M.J. at 88. In *Burks*, the court upheld the admissibility of photographs of a murder crime scene and of an autopsy. *Burks*, 36 M.J. at 453.

We also find that admitting the photographs did not prejudice a substantial right of the appellant. The prosecution presented evidence, through the girls, of the circumstances surrounding the molestation incidents, to include their ages. Thus, even without the photographs, the members could still have found the appellant guilty of the charged offenses against STN.

*Article 134, UCMJ, and Terminal Element (AOE XVI)*

The appellant argues that the specifications of Charge III failed to allege the terminal element for an Article 134, UCMJ, offense and thus failed to state an offense. The appellant cites *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). We will analyze this issue in two parts: (1) the appellant's guilty plea to Specifications 1 and 2 of Charge III and (2) the appellant's plea of guilty by exceptions and substitutions to Specification 3 of Charge III.

Whether a specification states an offense is a question of law we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense if it alleges every element of the offense, either expressly or by necessary implication. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012), cert. denied, __ S. Ct. __ (U.S. 25 June 2012); *Fosler*, 70 M.J. at 229; *Crafter*, 64 M.J. at 211; R.C.M. 307(c)(3). In *Fosler*, a contested case, our superior court held that, where the specification failed to allege the terminal element under Article 134, UCMJ, the

specification failed to state an offense. The Court dismissed the specification as defective. *Fosler*, 70 M.J. at 233; s*ee also United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012) (finding error to omit the terminal element in an adultery specification, which prejudiced a substantial right of the accused). The *Fosler* decision did not involve a guilty plea; that scenario was addressed in *Ballan*. *See also United States v. Nealy*, 71 M.J. 73, 77 (C.A.A.F. 2012); *United States v. Watson*, 71 M.J. 54 (C.A.A.F. 2012). In *Ballan*, the Court held that:

> [W]hile it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication, in the context of a guilty plea, where the error is alleged for the first time on appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused.

*Ballan*, 71 M.J. at 30 (citing Article 59, UCMJ, 10 U.S.C. § 859). The *Ballan* Court further held that, where the military judge describes Clauses 1 and 2 of Article 134, UCMJ, for each specification during the plea inquiry and where the record "conspicuously reflect[s] that the accused 'clearly understood the nature of the prohibited conduct'" as a violation of Clause 1 or 2 of Article 134, UCMJ, there is no prejudice to a substantial right. *Id.* (citing *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008) (brackets in original) (internal quotation marks omitted).

1. Specifications 1 and 2 of Charge III

The appellant pled guilty to Specifications 1 and 2 of Charge III, indecent acts with a child under the age of 16. Neither specification alleged the terminal element of Article 134, UCMJ.[5] During the plea inquiry, the military judge described and defined each of the elements, including the terminal element. The military judge asked the appellant if he understood his guilty plea admitted that these elements accurately described his conduct, to which the appellant answered in the affirmative. The military judge then asked the appellant to describe his conduct in his own words, which he did. The military judge further asked the appellant if his conduct was either prejudicial to good order and discipline or service discrediting. The appellant agreed that his conduct was prejudicial to good order and discipline and was service discrediting, and explained why. Thus, while the failure to allege the terminal elements in the specification[s] was error, under the facts of this case, the error was insufficient to show prejudice to a substantial right. *Ballan*, 71 M.J. at 36; *see also Nealy*, 71 M.J. at 77; *Watson*, 71 M.J. at 59.

[5] Under Article 134, UCMJ, the Government must prove beyond a reasonable doubt that the accused engaged in certain conduct and that the conduct satisfied one of three criteria, often referred to as the terminal element. Those criteria are that the accused's conduct was (1) to the prejudice of good order and discipline, (2) of a nature to bring discredit upon the armed forces, or (3) a crime of offense not capital. *Id.*

2. Specification 3 of Charge III

Specification 3 of Charge III, as charged, alleged a violation of Article 134, UCMJ, assault with intent to commit rape. In pertinent part, it reads as follows:

> In that [the appellant] . . . did . . . with intent to commit rape, commit an assault upon [STN], a female under 16 years of age, by placing his hand on her bare breast, pulling her underwear down, and placing his body on top of her body.

The specification as charged did not allege the terminal element of Article 134, UCMJ. The appellant pled guilty to the specification, but excepted the words: "with intent to commit rape," "by placing his hand on her bare breast," and "by placing his body on top of her body." He substituted therefore the words: "with intent to gratify the sexual desires of the said [appellant]" and "not the wife of the said [appellant]." As modified by his exceptions and substitutions, the specification still included the element of assault. On its face, the modified specification alleged an indecent assault, not an indecent act. As such, we find that the appellant entered a plea of guilty to indecent assault in violation of Article 134, UCMJ, as follows:

> In that [the appellant] . . . did . . . commit an assault upon [STN], a female under 16 years of age, not the wife of the [appellant], by pulling her underwear down, with the intent to gratify the sexual desires of the said [appellant].

*See Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 63b(1)-(3) (2005 ed). During the guilty plea inquiry, pursuant to *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969), however, the military judge read and reviewed with the appellant the elements of indecent acts with a child, in violation of Article 134, UCMJ,[6] not the

[6] The elements of indecent acts with a child under Article 134, UCMJ, are as follows:

(1) That the accused committed a certain act upon or with the body of a certain person;
(2) That the person was under 16 years of age and not the spouse of the accused;
(3) That the act of the accused was indecent;
(4) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

*MCM*, Part IV, ¶ 87b(1)(a)-(e) (2005 ed). These elements mirror what the military judge read to the appellant during the *Care* inquiry:

> MJ: . . . The elements of the offense to which you've pled are
> That first of all, at or near Emu Plains, Australia, between on or about 1 July 2004 and on or about 30 April 2005, you committed a certain act upon the body of [STN] by pulling her underwear down;
> Second, that at the time of this act, she was a female under the age of 16 years;
> Third, that your act was indecent;
> Four, that she was not your spouse;

elements of indecent assault.[7] The defense did not object, and the appellant proceeded to admit facts that satisfied each element of indecent acts with a child. At the conclusion of the *Care* inquiry, the military judge found the appellant guilty of Specification 3 of Charge III, by exceptions and substitutions. The military judge then asked the appellant and defense counsel if they had any questions about the findings, to which they both replied in the negative.

We first address whether the *Care* inquiry into Specification 3 of Charge III was provident given the apparent difference between the elements of the offense to which the appellant pled guilty (indecent assault) and the elements of the offense to which he had the colloquy with the military judge (indecent acts with a child). We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citation omitted). In doing so, we apply the substantial basis test and look at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea. *Inabinette*, 66 M.J. at 322; *United States v. Prater*, 32 M.J. 433, 436 (C.M.A.1991) (a plea of guilty should not be overturned as improvident unless the record reveals a substantial basis in law or fact to question the plea).

"An accused must know to what offenses he is pleading guilty," *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008), and a military judge's failure to explain the elements of the charged offense is error. *Care*, 40 C.M.R. at 253. Accordingly, "a military judge must explain the elements of the offense and ensure that a factual basis for each element exists." *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). In complex offenses, failure to explain the elements will generally result in reversal. *See United States v. Pretlow*, 13 M.J. 85, 88-89 (C.M.A. 1982). However, a guilty plea is not automatically improvident and "may meet required standards if on the basis of the whole record the showing is clear that the plea was truly voluntary, even if the trial judge has not personally addressed the accused and determined that the defendant possesses an understanding of the law in relation to the facts." *Care*, 40 C.M.R. at 252. S*ee also United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992) (plea not improvident despite

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Five, that you committed the act with intent to gratify your sexual desires; and

Six, that, under the circumstances, your conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[7] The elements of indecent assault under Article 134, UCMJ, are as follows:

(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

*MCM*, Part IV, ¶ 63b(1)-(3) (2005 ed).

military judge's failure to read the elements). In such cases, an explanation of the elements of the offense is not required to establish the providence of a guilty plea if the record otherwise establishes that the appellant understood the elements of the offense. *See United States v. Kilgore*, 44 C.M.R. 89, 91 (C.M.A. 1971); *United States v. Nystrom*, 39 M.J. 698, 701 (N.M.C.M.R. 1993).

In this case, we find no substantial question of law or fact calling into question the appellant's guilty plea to indecent assault. Although the military judge articulated the elements for indecent acts with a child in determining the providency of the appellant's pronounced plea to indecent assault, she nevertheless found a sufficient factual basis to support his plea of guilty to indecent assault: (1) that the appellant picked STN up from her bed, carried her into his bedroom and placed her on his bed, (2) that he climbed into the bed and pulled her underwear down to her knees, (3) that STN was 13 years old at the time, (4) that STN was not his wife, (5) that he had no reason to pull down her underwear except to gratify his sexual desires, and (6) that his actions were both prejudicial to good order and discipline and service discrediting. Furthermore, the appellant agreed he understood the nature of his offense and admitted to facts satisfying each of the elements of that offense. Indeed, the excepted and substituted language in the appellant's self-crafted plea demonstrates that he understood the nature of the offense to which he was pleading guilty. When read as a whole, the record convinces us that the military judge was satisfied that the appellant understood the nature of the offense to which he was pleading guilty, which is a basic aim of *Care*. In our opinion, the appellant was on fair notice, and his guilty plea to indecent assault is provident.

Having found the appellant's guilty plea to indecent assault provident, we now turn to whether the failure to allege the terminal element prejudiced a substantial right of the appellant during his guilty plea inquiry. During the plea inquiry, the military judge described and defined each of the elements, including the terminal element. The military judge asked the appellant if he understood his guilty plea admitted that these elements accurately described his conduct, to which the appellant answered in the affirmative. The military judge then asked the appellant to describe his conduct in his own words, which he did. The military judge further asked the appellant if his conduct was either prejudicial to good order and discipline or service discrediting. The appellant agreed that his conduct was prejudicial to good order and discipline and was service discrediting and explained why. We find that, although the failure to allege the terminal elements in the specification was error, under the facts of this case, the error was insufficient to show prejudice to a substantial right. *Ballan*, 71 M.J. at 36; s*ee also Nealy*, 71 M.J. at 77; *Watson*, 71 M.J. at 59.

*Variance (AOE IV)*

The appellant next argues that his conviction for Specification 3 of Charge III, as modified by the court members, must be set aside because the resulting conviction

amounted to a fatal variance. As noted earlier, the appellant pled guilty to and was found guilty of indecent assault under Article 134, UCMJ. Even so, the Government elected to prove -- unsuccessfully -- the charged offense of assault with intent to commit rape under Article 134, UCMJ. The findings worksheet presented the members with a variety of options. The members rejected the option of finding the appellant guilty of an assault with the intent to rape, as charged, because their findings did not include the elements of "not the wife of the said [appellant]," "with intent to gratify the sexual desires of the said [appellant]," or "with intent to commit rape." The members also rejected the option of finding the appellant guilty of the offense to which he pled guilty -- indecent assault. Instead, the members appeared to return a finding of guilty by exceptions to assault consummated by a battery under Article 128, UCMJ, as follows: "[d]id . . . commit an assault upon [STN], a female under 16 years of age, by pulling her underwear down and placing his body on top of her body." Assault consummated by a battery is a lesser included offense to indecent assault. *See United States v. Jones*, 68 M.J. 465, 473-74 (C.A.A.F. 2010); *United States v. Carr*, 65 M.J. 39, 40 (C.A.A.F. 2007). Given the unusual posture of this case, we hold as a matter of law that the appellant's provident plea of guilty to indecent assault takes precedence over the members' findings of guilty to assault consummated by a battery. The appellant had already pled guilty to indecent assault, which by definition included the members' findings of guilty to the lesser offense of assault consummated by a battery. We therefore find it unnecessary to address whether a fatal variance existed with respect to Specification 3 of Charge III.

*Findings and Sentencing Arguments (AOE V and XII)*

The appellant next challenges portions of the Government's findings and sentencing arguments. The appellant first argues that trial counsel improperly commented on the appellant's right to plead not guilty during findings argument. The appellant testified during findings, during which he explained why he pled guilty to some offenses and not guilty to other offenses, his interactions with his daughters, and his version of the events surrounding the rape allegation in the Specification of Charge I and the assault with intent to commit rape allegation in Specification 3 of Charge III. The Government cross-examined the appellant. During closing arguments on findings, trial counsel referred to the appellant's statements from his direct and cross-examination. Trial defense counsel did not object. The appellant argues that trial counsel's argument was an improper comment on his right to plead not guilty. We disagree.

Whether there has been an improper reference to an appellant's constitutional rights is a question of law we review de novo. *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002). Having failed to preserve the asserted errors at trial, we apply a plain error standard of review. *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007). To establish plain error, the appellant must show (1) that an error was committed; (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to a substantial right of the appellant. *Id*. The law generally discourages trial counsel

from presenting testimony or argument that mentions the invocation of a constitutional right unless an accused invites such testimony or argument in rebuttal to his own case. *United States v. Robinson*, 485 U.S. 25, 32 (1988); *Moran*, 65 M.J. at 181. An argument by trial counsel that comments upon an accused's exercise of his or her constitutionally protected rights "is beyond the bounds of fair comment." *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992). Although it is permissible for trial counsel to "strike hard blows . . . they must be fair." *United States v. Doctor*, 21 C.M.R. 252, 259 (C.M.A. 1956). A trial counsel's statement implicating an accused's assertion of a right is not per se impermissible. Rather, it may be appropriate if made in rebuttal and may be harmless "within the context of the entire court-martial." *Moran*, 65 M.J. at 186 (citing *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000)).

In opening statement, trial defense counsel told the members that the appellant would testify, that he had pled guilty to some allegations of indecent acts with STN in Specifications 1 and 2 of Charge III, and that he would "admit" or explain his actions with respect to STN on the allegations of rape and assault with intent to commit rape. On direct examination, the appellant testified that he did not rape STN, did not ever attempt to rape STN, and did not have the intent to rape STN. The appellant admitted to a lot of "inappropriate touching" of his daughter ANS; that his wife eventually found out about the inappropriate touching of ANS and STN; that he knew it was inappropriate to take a bath with STN; and, despite being embarrassed, he allowed her to touch his exposed penis on the pretense of it being an instructional act. He further testified that, when he placed STN on the bed and pulled down her underwear, his intent was to "inappropriately touch" her pelvic area. He testified that this was the last time he had "inappropriately" touched STN or any other child. He testified that he apologized to his daughters for his inappropriate actions. At the conclusion of direct examination, the appellant testified that he did not plead guilty to the rape and the assault with intent to commit rape because "I need my children to know the truth. I need my family to know the truth. That did not occur and, therefore, I do not plead guilty to those." When asked why he pled guilty to the indecent acts, the appellant replied, "Because those are true, ma'am. I did do those acts as I stated back in 2005 and again I state it now." During cross-examination, the appellant reiterated that he had inappropriately touched STN and ANS. He also admitted that he understood the punishments he faced for the offenses to which he pled guilty and the offense for which he was being prosecuted, which included life in prison.

The portion of the trial counsel's findings argument to which the appellant objects reads as follows:

> TC: If you remember, on my cross-examination, I talked about how Major Nixon, with the charges that he's pled guilty to, is facing 21½ years in prison as a maximum sentence. Now, I'm not going to argue for a moment that that's not a long time. I think anybody with the prospect of facing that would be quite unnerving. But think about what he pled guilty to. He pled

> guilty to what he couldn't get away from. He had never told anybody the details of what he'd done to his daughters, and they'd never told anybody until these letters came out, the details. All he said was inappropriate touching. Inappropriate touching?
>
> TC: So Major Nixon took a shot. No doubt, he reviewed the evidence, the evidence that you've seen, and realized "the only thing I've admitted to is touching, and the only thing that I'm charged with that I can plead guilty to is touching, and that's it, because that's all I've admitted to. It doesn't mean, as the defense counsel may argue, "He's pled guilty to what he's done. He's admitted to you what he's done." He's admitted to you what he was trapped in by his own words because he'd never told anybody he had tried to have sex with [STN] He'd never told anybody he'd assaulted her with an intent to commit rape. He'd never told anybody his penis penetrated her vagina, because he'd never given details. Although he told [BNN], his son; he told his wife, he'd apologized to his daughters, he'd mentioned inappropriate actions in his e-mails, he'd never given details. But he was trapped by those words of inappropriate touching, and so he pled guilty to them. His incredible motive to lie on the stand and that motive is a potential life sentence. [STN] has no motive to lie, and I'll get to that later.

We find trial counsel's argument proper when viewed within the context of the entire court-martial. Trial counsel's argument included reasonable comments on the evidence and the appellant's testimony, as well as reasonable inferences therefrom. R.C.M. 919(b). The appellant chose to testify, explained his reasons for pleading guilty and not guilty to the offenses charged, and repeatedly characterized his actions as "inappropriate." As such, trial counsel was free to address the appellant's testimony with "hard but fair blows." Trial counsel did not comment on the appellant's right to plead not guilty, but provided proper argument in response to the appellant's own testimony. Defense counsel did not object and seek a curative instruction. In light of the entire record, we find no error in the trial counsel's argument.

The appellant next argues that trial counsel employed several improper courtroom tactics that prejudiced the appellant during portions of his findings and sentencing arguments: (1) that the trial counsel "vouched" for the believability of certain events in rebuttal argument during findings, (2) that the trial counsel made an improper comment during rebuttal argument on findings, and (3) that trial counsel improperly called the appellant a "liar" during his sentencing argument.

In his rebuttal argument on findings, trial counsel argued as follows:

TC: Defense counsel spent some time talking about [STN's] memories fading over time, and I want to start with this. *I believe completely* the story that happened November of 2001. *I believe completely* that Major Nixon took his daughter, [STN], into the bathtub in November of 2001, a year and a half before he raped her. And defense counsel wants to make a big deal out of the fact that the stuff he did to [STN] in this "alleged" rape, as they call it, was something that was so different. He'd never done that with his other girls, so that must be some reason that it's not true.

TC: First of all, they misstated the evidence. He never pulled down [ANS's] underwear. Second of all, guess what he did in November of 2001? Something he'd never done with the other girls. He got naked with [STN] in a bathtub, and a year and a half later, he did it again when he raped her. *And he can admit to that now because he knows full well he can't be charged with that.*

DC: Objection, Your Honor.

DC: If he is saying he could admit to that because he can't be charged with it, that's improper argument.

MJ: That's correct.

MJ: Please disregard that last comment.

(Emphasis added.)

Improper vouching occurs when the trial counsel "plac[es] the prestige of the government behind a witness through personal assurances of the witness's veracity." *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005) (quoting *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)). "Improper vouching can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed." *Id.* at 180. Here, trial counsel twice vouched for the credibility and believability of the appellant's own testimony about an incident that occurred with STN in November 2001 when he stated he "believed completely" the details of the incident. Although error, the improper vouching did not prejudice a substantial right of the appellant. Rather, it was confined to one paragraph of the trial counsel's eight page rebuttal argument.

Additionally, assistant trial counsel improperly argued that "he [appellant] can admit to that now because he knows full well he can't be charged with that." The military judge sustained the defense counsel's objection and cautioned the members to

disregard the statement. We find that the military judge's curative instruction was sufficient to overcome any prejudice to a substantial right of the appellant.

Finally, during sentencing argument, trial counsel argued as follows:

> ATC1: Now, Major Nixon took the stand during this court-martial. He sat up there yesterday and told you that he didn't rape [STN]. He told you that, "well, in November 2001, I took her into the bathtub and got into the bathtub with her, and I got an erection and it braised [sic] up against her, but I never raped her." Well, [STN] got up and told you what happened to her. *Members, you believed what she [STN] said, which means Major Nixon is a liar, and he lied to you."*
>
> CIV DC: Objection.
>
> MJ: Objection, Counsel. I will not allow that.
>
> MJ: Please disregard that last comment from the trial counsel. There is no evidence that the accused testified falsely before you.

(Emphasis added.)

Trial counsel's reference to the appellant as a "liar" during the sentencing argument was error. *Fletcher*, 62 M.J. at 182-83. The military judge sustained the defense counsel's objection and instructed the members to disregard trial counsel's comment. We find the military judge's curative instruction was sufficient to overcome any prejudice to a substantial right of the appellant.

*Mental Health Records (AOE VI)*

Prior to trial, the prosecution requested that the military judge review in camera the mental health records of STN, ANN, ANS, and SSN. The military judge conducted that review and released 11 pages (out of 78) to the trial and defense counsel before the court-martial convened. The portions of the mental health records the military judge released to both sides consisted of a billing statement, a subpoena addressed to the therapist to appear at the court-martial with the complete mental health records, and the therapist's assessment summary of her initial session with STN, ANN, ANS, and SSN. The portions of the mental health records the military judge did not release to both sides consisted of the complete case notes the therapist prepared for each session she conducted with STN, ANN, ANS, and SSN.

The appellant argues that the military judge improperly withheld disclosure of portions of ANN's and STN's mental health records on two grounds: (1) the records

tended to show an "untruth" by ANN about her sexual activity, as disclosed to her therapist and her mother, SSN; and (2) the records indicated possible sexual abuse of STN at the hands of her brother, which she could have mistaken for the alleged rape by the appellant. The Government argues that the military judge properly reviewed the mental health records in camera and released the appropriate material to the defense. The Government avers that the two incidents cited by the appellant pertain to unrelated sexual assaults properly excluded under Mil. R. Evid. 412 and 513. According to the Government, any variations in the version of events reported by ANN to the therapist and what her mother may have recalled are not evidence of any "falsity." With respect to STN, the Government asserts that the appellant's theory, based upon what his wife *might have said* about what STN *might have told her*, amounts to nothing more than mere supposition.

R.C.M. 701(a) states that the trial counsel shall provide certain information to the defense as part of discovery, except as otherwise provided in subsections (f) and (g)(2). R.C.M. 701(f) states in part that "[n]othing in this rule shall be construed to require the disclosure of information protected from disclosure of information protected by the Military Rules of Evidence." *Id*. Mil. R. Evid. 513(a) states that a patient has a privilege to refuse to disclose and prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist (or assistant), in a case arising under the UCMJ, if the communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. Mil. R. Evid. 513(d) outlines the exceptions to the privilege,[8] and Mil. R. Evid. 513(e)(3) states that the military judge shall examine the evidence or proffer thereof in camera if necessary to rule on a motion.

Additionally, Mil. R. Evid. 412(a) states, in relevant part, "The following evidence is not admissible in any proceeding involving alleged sexual misconduct . . . (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim's sexual predisposition." *Id.* Mil. R. Evid. 412(b) admits such evidence in three instances: (1) the evidence is offered to prove that someone other than the accused was the source of the semen, injury, or other physical evidence; (2) the evidence is offered to prove consent; and (3) the evidence, if excluded, would violate the constitutional rights of the accused. Mil. R. Evid. 412(c) outlines the procedures for determining the admissibility of evidence under Mil. R. Evid. 412(b).

[8] The exceptions set forth under Mil. R. Evid. 513(d) are as follows:

> (1) death; (2) when the communication is evidence of abuse or in a proceeding in which one spouse is charged with a crime against the other spouse or child of either spouse; (3) when the law imposes a duty to disclose; (4) when the psychotherapist (or assistant) believes the patient is a danger to himself or others; (5) when the communications contemplates the future commission of a crime; (6) when necessary to ensure the safety and security of military personnel, dependents, property, classified information, or the accomplishment of the mission; (7) when the accused offers the communications in defense, extenuation, or mitigation; or (8) when constitutionally required.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Jenkins*, 63 M.J. 426, 428 (C.A.A.F. 2006). We conclude that the military judge did not abuse her discretion when she released to the parties only 11 of the 78 pages of the mental health records. In our opinion, she properly reviewed the records in camera, pursuant to Mil. R. Evid. 513(e)(3), and released the appropriate material. Additionally, none of the exceptions listed in Mil. R. Evid. 513(d)(1)-(8) would have otherwise permitted the military judge to admit the entirety of the mental health records.

The appellant argues he should have received the additional portions of the mental health records, pursuant to R.C.M. 701, because he could have used the evidence to impeach ANN. R.C.M. 701(a)(2)(B) entitles the defense, upon request, "to inspect . . . [a]ny results or reports of physical or mental examinations . . . which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense. . . ." R.C.M. 701(g) places responsibility for regulating discovery on the military judge. R.C.M. 703(a) gives the prosecution and the defense "equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process."

Mil. R. Evid. 513(a) protects the records covered under R.C.M. 701(f), and none of the exceptions under Mil. R. Evid. 513(d)(1)-(8) justify disclosure in the case sub judice. The only arguable exception is that found in Mil. R. Evid. 513(d)(2), which states that there is no privilege when the communication is evidence of abuse or in a proceeding in which one spouse is charged with a crime against the other spouse or child of either spouse. This exception does not appear to apply when the "evidence of abuse" is an alleged act of a third party, not the accused. *See e.g.*, *United States v. Klemick*, 65 M.J. 576, 580-81 (N.M. Ct. Crim. App. 2006) (wife-witness' psychotherapist records regarding potential inculpatory statements by the accused to his wife were not admitted into evidence, but were made available to the parties for their possible use in cross-examining wife-witness).

To the extent the requested information was not privileged under Mil. R. Evid. 513(d)(2), the appellant's discovery-based argument nevertheless fails because the withheld information was not material to the preparation of the defense. *United States v. Morris*, 52 M.J. 193 (C.A.A.F. 1999). "Impeachment 'evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different' . . . The determination of materiality 'calls for assessment of the omission in light of the evidence in the entire record.' . . . In applying 'the materiality test, we give the benefit of any reasonable doubt to the military accused.'" *Morris*, 52 M.J. at 197 (citations omitted). In cases "[w]here the defense has submitted 'a general request for exculpatory evidence or information' but no request for

any 'particular item' of evidence or information, [the prosecution's] failure to disclose evidence 'is reversible error only if the omitted evidence creates a reasonable doubt that did not otherwise exist.'" *Id*. at 197-98 (citations omitted).

The appellant categorizes the withheld evidence as *Brady* evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Giglio v. United States*, 405 U.S. 150, 154 (1972). We disagree. First, the affected information barely qualifies as exculpatory evidence material to the appellant's guilt or punishment under *Brady*. Second, *Brady* does not "require the trial court to make an *in camera* search of the government files for evidence favorable to the accused." *United States v. Michaels*, 796 F.2d 1112, 1116 (9th Cir. 1986) (quoting *United States v. Harris*, 409 F.2d 77, 80-81 (4th Cir. 1969)). Moreover, disclosure of the additional evidence from the mental health records regarding possible "untruthfulness" by ANN, and regarding sexual abuse of STN by someone else not the appellant, would not have created reasonable doubt that did not otherwise exist. The undisclosed information might have weakened the reliability of STN's testimony insofar as her memory was concerned, and it may have indicated some tendency or motivation by ANN to be untruthful about her sexual activities. However, in light of the overwhelming evidence of the appellant's guilt, any argument the appellant could have made would have been minimally effective, at best.

Finally, even if the appellant was entitled to discover this information, Mil. R. Evid. 412 barred its admission, and none of the exceptions under Mil. R. Evid. 412(b) apply. The information was irrelevant to show consent, and there is no indication that withholding the information violated the appellant's constitutional rights. Moreover, the assertion that STN could have confused her father for her brother as the perpetrator of the rape is highly speculative. The source of the statement is STN's mother, and not STN herself. The information is contained in a single sentence and describes an event when STN's 10-year-old brother possibly "tried to sexually touch" her. We find it unlikely that a young girl would mistake her 10-year-old brother for her adult father.

*Post-Trial Processing Delays (AOE VII)*

We review an appellant's due process rights to a speedy post-trial review de novo. *Moreno*, 63 M.J. at 135. In *Moreno*, our superior court established guidelines that trigger a presumption of unreasonable delay in certain circumstances: (1) when the action of the Convening Authority is not taken within 120 days of the completion of trial, (2) when the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of action, and (3) when appellate review is not completed with a decision rendered within eighteen months of docketing the case before the court of criminal appeals. *Id*. at 142.

The appellant argues that he was deprived of his right to a speedy post-trial review because 163 days elapsed between the date of sentencing and the date the convening authority took action. We will also review de novo whether the appellant was deprived

of a speedy post trial review because more than 18 months have elapsed since this case was docketed before this Court.[9]

In this case, the total period of time from trial to action was greater than 120 days, and the total period from the date this case was docketed with the Court and completion of review exceeds 18 months. Because the delays are facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record shows no evidence that either delay had any negative impact on the appellant. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

*Remaining Assignments of Error (AOE VIII, IX, X, XI, XIII, XIV, and XV)*

We have considered the appellant's remaining assignments of error and find them to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). The military judge did not abuse her discretion by failing to declare a mistrial in light of the testimony offered by witness Harry Johnson.[10] *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). The military judge did not abuse her discretion by excluding from evidence a telephone recording between the appellant and witness Harry Johnson. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). The military judge did not abuse her discretion by denying a request from the members to have witness testimony transcripts provided to them. Instead, the military judge gave the members the option of recalling witnesses. The appellant agreed with this course of action. *See United States v. Carter*, 40 M.J. 102, 104 (C.M.A. 1994). The military judge did not err in failing to instruct the members on lesser included offenses. *See United States v. Jones*, 68 M.J.

[9] The appellant filed a supplemental assignment of errors on 4 October 2012, amended on 18 October 2012, alleging that the delay in appellate review violated his due process rights, citing as support *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

[10] Sometime in 2008, SSN told a family friend, HJ, that the appellant had molested their daughters. HJ suggested that each girl write down what happened, and he would have a lawyer-relative review the statements. Additionally, HJ agreed to talk with the appellant about the pending divorce. Through a series of e-mails and telephone calls, HJ told the appellant he should give SSN control over the divorce and finances, and cease having any contact with his minor children or face having the molestation information turned over to authorities. The appellant stated that he was willing to go to jail to "make things right" with his children and would not give them up "without a fight." During the court-martial, trial counsel was concerned that HJ would expose himself to criminal liability as part of an extortion conspiracy under Utah law with SSN to coerce the appellant to accede to their demands. After hearing a proffer of HJ's testimony, the military judge stated that she did not hear anything that would rise to the level of criminal misconduct. The military judge did state she would advise HJ of his rights if he said anything incriminating. Both sides agreed to this course of action.

465, 467 (C.A.A.F. 2010). The military judge properly instructed the members on the concepts of divers occasions, spillover, exceptions and substitutions, and the proper use of Mil. R. Evid. 414 evidence. *United States v. Lewis*, 65 M.J. 85, 86 (C.A.A.F. 2007). Finally, we find that the cumulative error doctrine inapplicable to this case. There was overwhelming evidence of the appellant's guilt and there were no errors that materially prejudiced a substantial right. Under these circumstances, the appellant was not denied a fair trial. *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011); *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996).

*Conclusion*

We have reviewed the record in accordance with Article 66, UCMJ, 10 U.S.C. § 866(c). The findings, as modified in accordance with the appellant's guilty plea to Specification 3 of Charge III, and the approved sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence are

AFFIRMED.

ORR, Chief Judge participated prior to his retirement on 31 October 2012.

OFFICIAL


STEVEN LUCAS
Clerk of the Court

## APPENDIX

Assignments of Error

I. Whether the military judge erred in admitting evidence of previous uncharged acts of alleged sexual molestation acts by appellant towards ANS and ANN without necessary findings of logical and legal relevance and failed to adequately instruct the panel on the limited use of such evidence.

II. Whether the military judge abused her discretion by denying appellant's challenge for cause against Lieutenant Colonel [EP].

III. Whether the military judge abused her discretion by admitting poster-sized pictures of ANS, ANN, and STN, taken when they were children, in findings and in sentencing.

IV. Whether the appellant's conviction for Charge III Specification 3 as modified by the court members in findings must be set aside because the resulting conviction amounted to a fatal variance and failed to state an offense.

V. Whether trial counsel's findings argument improperly commented on appellant's exercise of his constitutional right to plead not guilty.

VI. Whether the military judge abused her discretion by failing to permit defense counsel to review major portions of appellate exhibit I, which consisted of mental health records of ANN, S.N.N., and STN.

VII. Whether appellant was deprived of his right to speedy post-trial review when over 163 days elapsed between the date of sentencing and the date the convening authority took action.[11]

VIII. Whether the military judge committed plain error and condoned a federal crime by not declaring a mistrial after the defense presented evidence at the Article 32 hearing and at trial that appellant's then-wife and Harry Johnson committed blackmail against appellant.

IX. Whether the military judge abused her discretion by failing to admit in its entirety the recording between appellant and Harry Johnson where trial counsel reviewed the recording and argued its content.

[11] Assignments of Error VII-XV are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

X. Whether the military judge committed plain error when she failed to give an instruction that the members could remove divers occasion from Charge I and its Specification.

XI. Whether the military judge erred by failing to instruct the members on the lesser included offenses to rape and assault with intent to commit rape.

XII. Whether appellant's conviction should be set aside where trial counsel's improper courtroom tactics included injecting his personal opinions on the evidence.

XIII. Whether the military judge erred by not playing back the transcript for the members after they requested her to do so.

XIV. Whether the military judge committed plain error when she failed to give a limiting instruction after ANN, ANS, and STN's testimonies that the prior acts they testified to could not be used as evidence that appellant committed rape and assault with intent to commit rape against STN, and whether she further erred when she failed to give a proper instruction on spillover as prescribed in the Military Judge's Benchbook.

XV. Whether the contested findings and sentence in the present case should be set aside under the cumulative error doctrine.

XVI. Whether the specifications for indecent acts and assault with intent to commit rape fail to state an offense because the specifications allege a violation of article 134 but fail to allege any of article 134's terminal elements.[12]

[12] The appellant raised this issue as a Supplemental Assignment of Error for our consideration in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).