10 U.S.C. § 836

Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not, except as provided in chapter 47A of this title, be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable, except insofar as applicable to military commissions established under chapter 47A of this title.

Military Rules of Evidence, Section VIII, HEARSAY

Rule 801. Definitions that apply to this section; exclusions from hearsay

(a) *Statement*. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) *Declarant*. "Declarant" means the person who made the statement.

(c) *Hearsay*. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) *Statements that Are Not Hearsay*. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness' Prior Statement*. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement*. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's co-conspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 802. The rule against hearsay

Hearsay is not admissible unless any of the following provides otherwise:

(a) a federal statute applicable in trial by courts-martial; or

(b) these rules.

Published Opinion of the United States Court of Appeals for the Armed Forces, Feb. 24, 2021

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Matthew D. NORWOOD,
Machinist's Mate Nuclear First Class Petty Officer
United States Navy, Appellant

No. 20-0006
Crim. App. No. 201800038

Argued October 27, 2020—Decided February 24,2021

Military Judge: Shane E. Johnson

For Appellant: *Lieutenant Commander Chris Riedel,* JAGC, USN (argued); *Captain Nicholas S. Mote,* USMC.

For Appellee: *Major Kerry E. Friedewald,* USMC (argued); *Lieutenant Commander Timothy C. Ceder,* JAGC, USN, *Lieutenant Colonel Nicholas L. Gannon,* USMC, and *Brian K. Keller,* Esq. (on brief).

Chief Judge STUCKY delivered the opinion of the Court, in which Judge MAGGS and Senior Judge EFFRON joined. Judge OHLSON filed a separate opinion concurring in the result.

Judge SPARKS filed a separate opinion concurring in part and dissenting in part and in the result.

Chief Judge STUCKY delivered the opinion of the Court.

Appellant claims that the military judge erred during his court-martial by admitting the majority of the videotaped forensic interview of the alleged victim as a prior consistent statement under Military Rule of Evidence (M.R.E.) 801(d)(1)(B)(ii) and mishandling supposed improper argument by the trial counsel. The United States Navy-Marine Corps Court of Criminal Appeals (CCA) found that some errors did occur, but that they nevertheless did not materially prejudice Appellant's substantial rights. We hold that while the interview was properly admitted as a prior consistent statement, the improper argument prejudiced Appellant as to sentencing, and reverse.

I. Procedural History

Appellant was investigated and prosecuted for sexually abusing his niece, EN. The panel of officers that sat as a general court-martial convicted Appellant, contrary to his plea, of one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b (2012). The panel then sentenced Appellant to a dishonorable discharge, confinement for eighteen months, and reduction to the grade of E-1. The convening authority approved the adjudged sentence. On appeal, the CCA affirmed the findings with exceptions and affirmed the sentence. *United States v.*

Norwood, 79 M.J. 644, 661–62, 666–67 (N-M. Ct. Crim. App. 2019).[1]

II. Prior Consistent Statement

A. Facts

The first issue is whether the military judge erred by admitting the substantive portions of EN's videotaped forensic interview as a prior consistent statement under M.R.E. 801(d)(1)(B)(ii) such that Appellant was prejudiced.

As the primary source of the Government's evidence during the court-martial, EN testified about the events as follows.

In late December 2015, EN and her brother, RJ, stayed with Appellant for a brief visit. At the time, EN was fifteen years old and RJ was twelve. One night, Appellant and EN watched a movie on the couch in the living room, while RJ played a video game on Appellant's computer in the bedroom. During the movie, Appellant asked EN if she wanted a massage. When EN replied yes, Appellant said, " 'I don't want

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[1] Although not relevant to the granted issues, we note that the lower court excepted certain words from the specification. 79 M.J. at 661. Appellant was charged and convicted of sexually abusing EN by touching her "breast, buttocks, groin, and inner thigh." The CCA, however, found that Appellant's conviction was legally and factually sufficient only as to Appellant's "touching EN's breast, buttocks, and thigh," and therefore excepted the words "groin" and "inner" from the specification. Id. Nevertheless, the court decided that those exceptions did not "change . . . the penalty landscape" and therefore affirmed the sentence as adjudged. Id. at 662.

youto get mad at me, but I need you to take your bra off.' " EN did so and Appellant proceeded with the massage. Initially, he simply massaged her back, but then he began to touch her around her stomach, breast, and pubic areas. Even though EN became tense and pushed his hand away, he continued touching her and moved her so that she was sitting on him such that she could feel his erect penis. Then, he asked her "how far [she] had been with someone and if there was a boy back [home]." When she said that she had only kissed one boy in fourth grade, he responded that " 'that didn't count' " and pushed her off of him. EN then left the room, eventually returning to watch another movie with Appellant and RJ. The next day, Appellant apologized to EN, saying " 'I'm sorry for being an asshole the other night.' "

EN believed that Appellant had "touched [her] inappropriately" and "for sexual purposes." Consequently, she tried to avoid Appellant as much as possible for the rest of the trip and felt that the remainder of the visit was "really awkward." When she returned home, she had trouble sleeping, spending time with her friends, and being physically close to anyone, especially boys in her class. Still, she did not tell anyone what had happened, because she thought that she was at fault and feared that Appellant would hurt her if she told. Additionally, she wanted her parents to know and help her, but did not tell them because she worried about disappointing them. However, a few weeks later, she talked about the incident with her best friend. The friend told her father, who informed EN's stepfather. Appellant subsequently was charged with sexually abusing EN.

After EN's direct testimony at the court-martial, the defense sought to undermine her credibility through cross-examination. In particular, the defense asked EN about how she had not spoken with the defense before the court-martial, her mother had not wanted her to talk to the defense, and she had met with the prosecution a number of times before the court-martial. Following up about the meetings with the prosecution, the defense asked if the prosecution had told her to " '[j]ust tell the truth' " and whether she had "had to practice to tell the truth" before. On redirect, the Government sought to rehabilitate EN's credibility by introducing her videotaped forensic interview as a prior consistent statement. The defense objected, arguing that the interview was inadmissible hearsay. The military judge then called an Article 39(a), UCMJ, 10 U.S.C. § 839(a) session to develop the record regarding the issue. After hearing arguments by both the Government and defense, the military judge agreed with the Government's assertion that the defense had attacked EN's credibility by suggesting that the prosecution had coached her testimony and that EN's statements from the interview were consistent with those that she made during her court-martial testimony. As a result, the military judge found that the interview, with the exception of the introductory rapport building discussion, was admissible as a prior consistent statement under M.R.E. 801(d)(1)(B)(ii). The Government then played that interview for the members.

On appeal, the CCA analyzed whether the interview was admissible as a prior consistent statement. *Norwood*, 79 M.J. at 654–57. The lower

court agreed with the military judge that the Government was permitted to introduce EN's interview as a prior consistent statement because the defense had implied that the trial counsel had coached EN's testimony and the statements from the interview were consistent with the statements from the testimony. *Id.* at 656. However, the court then found that the alleged coaching was a charge of recent fabrication or recent improper influence, rather than that of an attack on another ground, meaning the military judge should have admitted the interview under M.R.E. 801(d)(1)(B)(i) instead of M.R.E. 801(d)(1)(B)(ii). *Id.* But because the interview was still admissible, just pursuant to a different provision, it found that the military judge's error did not prejudice Appellant. *Id.*

B. Law

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020) (quoting *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019)). The military judge's decision constitutes an abuse of discretion if "his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or [his decision] is outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (internal quotation marks omitted) (citation omitted). If the military judge did improperly admit evidence, we evaluate whether the error prejudiced the appellant, weighing "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the

evidence in question." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (internal quotation marks omitted) (quoting *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015)).

Hearsay statements—out of court statements offered into evidence to prove the truth of the matter asserted—usually are inadmissible in courts-martial. M.R.E. 801(c); M.R.E. 802. However, a prior consistent statement made out of court may not constitute hearsay, and thus can be admitted as substantive evidence, if certain threshold requirements are first met: (1) the declarant of the statement testifies at the court-martial, (2) the declarant is subject to cross-examination, and (3) the statement is consistent with the declarant's testimony. *Finch*, 79 M.J. at 394–95 (citing M.R.E. 801(d)(1)(B)). The first prong of M.R.E. 801(d)(1)(B) requires the prior consistent statement to be offered " 'to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying.' " *Id.* at 394 (quoting M.R.E. 801(d)(1)(B)(i)). Under the second prong of the rule, the statement must be offered " 'to rehabilitate the declarant's credibility as a witness when attacked on another ground.' " *Id.* (quoting M.R.E. 801(d)(1)(B)(ii)). The party that attempts to admit the prior consistent statement into evidence bears the burden of proving that it is admissible. *Id.*

C. Analysis

The Government argues that it met the requirements laid out in M.R.E. 801(d)(1)(B) and *Finch* such that the substantive part of the interview

was admissible as a prior consistent statement. *See also Finch*, 79 M.J. at 394–95 (citing M.R.E. 801(d)(1)(B)). Appellant concedes that EN testified and was subject to cross-examination at the court-martial, the interview was offered to rehabilitate EN's credibility because the defense attacked it, and the interview was consistent with EN's statement at least in part. Nevertheless, Appellant continues to object to the admission of the interview on two pri mary bases. We agree with the Government and find Appellant's arguments opposing the admission of the interview unpersuasive.

First, Appellant contends that both the military judge and the CCA erred regarding the defense's attack of EN's credibility: according to Appellant, the accusation was not that the prosecution had coached her to provide incriminating testimony against Appellant, but instead that she had made up the allegations from the beginning. However, the military judge found as a fact that the ground on which the defense attacked EN's credibility was that her testimony as a witness was coached by the Government. The military judge's finding of fact is not clearly erroneous. Defense counsel asked EN "[h]ow many times" she spoke with the prosecutors and whether they told her to " '[j]ust tell the truth.' " They also questioned EN about whether she "ever before had to practice to tell the truth or is this like the first time?" Finally, they inquired as to whether EN only remembered an event when she was "practicing [her] testimony." Based on these statements, the military judge could infer that defense counsel was relying on the "suggestive force of questions . . . to carry the message" that EN's testimony was coached by the

Government. 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:39, at 341 (4th ed. 2013). Consequently, even if Appellant is correct that the defense also tried to undermine EN's credibility by contending that she had fabricated the allegations herself, the military judge's decision—to admit the interview as a response to the argument that she was coached—was within the range of choices reasonably arising from the facts and law. *See United States v. Campo Flores*, 945 F.3d 687, 705–06 (2d Cir. 2019).

The framing of the attack also leads to the issue of the prong of M.R.E. 801(d)(1)(B) under which the interview could be admitted. The CCA determined that the military judge erred when he concluded the interview was admissible under M.R.E. 801(d)(1)(B)(ii) because the impeachment constituted an attack on another ground, when he should have determined that the interview was admissible under M.R.E. 801(d)(1)(B)(i) because the attack amounted to a charge of a recent fabrication or recent improper influence. *Norwood*, 79 M.J. at 656. Even if it were true that the military judge erred, there could not be prejudice when the interview still was admissible. *See United States v. Bess*, 80 M.J. 1, 12 (C.A.A.F. 2020) (explaining that we affirm a military judge's ruling when " 'the military judge reached the correct result, albeit for the wrong reason' " (quoting *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003))).

Second, Appellant complains that the majority of the interview was irrelevant to the Government's goal of rehabilitating EN as a witness and inconsistent with EN's testimony, rendering the interview inadmissible. Neither of these arguments is

persuasive. As explained above, the Government offered the interview into evidence as a prior consistent statement in order to rebut the defense's attack that the Government had coached EN's testimony. The coaching claim was an attack on EN's entire testimony at trial regarding the alleged sexual assault, not to specific portions of her testimony. As a result, the entire substantive portion of EN's forensic interview, containing her full version of the events and given before she met with the Government (and thus prior to the point that any coaching would be possible), was admissible as a prior consistent account of the sexual assault. Additionally, the only inconsistencies that Appellant points to are two details from EN's testimony she did not mention during the interview: that Appellant apologized to her for the incident and the rest of the trip was awkward. The prior statement " 'need not be identical in every detail to the declarant's . . . testimony at trial' " for it to be " 'consistent' " under M.R.E. 801(d)(1)(B). *Finch*, 79 M.J. at 395 (alteration in original) (quoting *United States v. Vest*, 842 F.2d 1319, 1329 (1st Cir. 1988)). Accordingly, these two small additions do not change the fact that the interview was " 'for the most part consistent' and in particular, . . . 'consistent with respect to . . . fact[s] of central importance to the trial.' " *Id.* (alterations in original) (quoting *Vest*, 842 F.2d at 1329). Therefore, the interview was admissible as a prior consistent statement.

III. Improper Argument

A. Facts

The second issue is whether the trial counsel committed prosecutorial misconduct during the court-martial by making improper arguments that prejudiced Appellant.

The trial counsel and assistant trial counsel, Lieutenant C.B. and Lieutenant Commander B.K., made numerous arguments that were, at best, impassioned.

During the court-martial, Lieutenant C.B. and Lieutenant Commander B.K. seemed to personally vouch for EN's credibility in both the opening and closing arguments by referring to her as an "innocent" child who had no reason to lie, claiming that she was telling the truth, and asserting that her family believed her. The defense objected to the comments about EN's family, and while the military judge overruled the objection, he did issue a curative instruction explaining that it was up to the members to evaluate the witnesses' credibility and testimony. Later, in the rebuttal closing argument, Lieutenant Commander B.K. repeatedly called Appellant a "child molester," going so far as to assert that "by saying that there are reasonable doubts in this case, defense is asking you to give child molesters a license to commit these crimes, because if you can't find [Appellant] guilty . . . the only way . . . a child molester could ever be convicted [is] if he is literally caught in the act." The defense did not object to those remarks and the military judge took no action.

Finally, Lieutenant C.B. continued this style of argument in the sentencing proceedings. During the Government's sentencing argument, she asserted that

the defense would request a lenient sentence and, clearly opposing that notion, asked the members to consider what would happen "when you all return to your normal duties . . . . [A]nd someone asks you. . . . 'Wow, what did [Appellant] get for that?' Do you really want your answer to be 'nothing at all'?" Again, the defense did not object to this language and the military judge did not act upon it sua sponte.

Appellant raised numerous improper argument claims on appeal, but the CCA rejected most of them. *Norwood*, 79 M.J. at 662–67. However, the lower court did agree with Appellant that Lieutenant Commander B.K. made improper rebuttal arguments by accusing the defense of requesting that the members give child molesters a "license" to commit this kind of crime and claiming that EN's family only declined to cooperate with the defense because they believed EN was telling the truth. *Id.* at 663–64. While the court said these arguments were improper and the military judge should have sustained Appellant's objection to the latter and given a stronger curative instruction, it nonetheless concluded that the misconduct was "isolated and brief," the military judge's instruction that the members were to determine the witnesses' credibility themselves was at least somewhat curative, and the errors did not prejudice Appellant. *Id.* at 663–65.

B. Law

A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument " 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of

such an officer in the prosecution of a criminal offense.' " *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (alteration in original) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)).

When the accused objects to an improper argument during his court-martial, we review the issue de novo. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019). In that de novo review, we determine whether any error materially prejudiced the appellant's substantial rights under Article 59, UCMJ, 10 U.S.C. § 859; *Fletcher*, 62 M.J. at 179. "We weigh three factors to determine whether trial counsel's improper arguments were prejudicial: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Voorhees*, 79 M.J. at 12 (internal quotation marks omitted) (citation omitted). When a trial counsel makes an improper argument during findings, "reversal is warranted only when the trial counsel's comments taken as a whole were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *United States v. Andrews*, 77 M.J. 393, 401–02 (C.A.A.F. 2018) (internal quotation marks omitted) (citation omitted).

On the other hand, if the accused failed to object on this basis during the court-martial, we review the matter for plain error. *Id.* at 398. To prove plain error resulted from the trial counsel's improper argument during the sentencing proceeding, Appellant has the burden of establishing "(1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v.*

Marsh, 70 M.J. 101, 104 (C.A.A.F. 2011) (internal quotation marks omitted) (citations omitted).

> In this context, material prejudice to the substantial rights of the accused occurs when an error creates "an unfair prejudicial impact on the [court members'] deliberations." [*United States v.*] *Knapp*, 73 M.J. [33,] 37 [C.A.A.F. 2014] ([first] alteration in original) (internal quotation marks omitted) (citation omitted). In other words, the appellant "must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343, 194 L. Ed. 2d 444 (2016) (internal quotation marks omitted) (citation omitted).

United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017).

C. Analysis

As an initial matter, two of the alleged improper arguments clearly do not merit relief. First, we reject Appellant's claim that trial counsel personally attacked him by referring to him as a "child molester." A child molester is "[s]omeone who interferes with, pesters, or persecutes a child in a sexual way, esp. when touching is involved." *Black's Law Dictionary* 302 (11th ed. 2019) (entry for "child molester"). Given that Appellant was prosecuted for and convicted of a

sexual offense against a child, we agree with the Government that this language actually was a permissible characterization supported by the charge and the evidence. *See*, *e.g.*, *Voorhees*, 79 M.J. at 11 (noting that a trial counsel's "word choice" can be improper argument when it is a "personal attack on the defendant" but not when it is a "commentary on the evidence" (internal quotation marks omitted) (citation omitted)); *see also United States v. Bentley*, 561 F.3d 803, 811 (8th Cir. 2009) (deciding that when there was "strong" evidence that the appellant had "committed sexual offenses against young girls," then "[t]he government's description of [the appellant] as a sexual predator was not plain error"). Second, it is true that the military judge erred in overruling defense counsel's objection to the one supposedly improper argument to which Appellant objected during the court-martial: that EN's family believed that she was telling the truth about this matter. But while this claim was irrelevant and inappropriate, it did not amount to severe misconduct, particularly because no one would expect her family not to believe her and it only made up a few lines of rebuttal argument. *Cf. Voorhees*, 79 M.J. at 12 (noting that "trial counsel's improper argument was severe" when "[t]he misconduct was sustained throughout argument and rebuttal, occurring with alarming frequency"). Also, the defense immediately objected to the argument and, although the military judge overruled the objection, he issued a curative instruction explaining that the members alone are to judge witnesses' credibility. " 'We presume, absent contrary indications, that the panel followed the military judge's instructions. . . .' " *United States v. Short*, 77 M.J. 148, 151 (C.A.A.F. 2018) (quoting

United States v. Sewell, 76 M.J. 14, 19 (C.A.A.F. 2017)). Accordingly, Appellant was not prejudiced by these arguments.

Although Appellant did not object to the other improper arguments when the trial counsel made them, those arguments were more problematic.

Lieutenant C.B. and Lieutenant B.K. clearly committed misconduct during findings by repeatedly vouching for EN, a method of argument that we have explicitly prohibited. *Voorhees*, 79 M.J. at 11–12; *Fletcher*, 62 M.J. at 180. Trial counsel "are military officers and should conduct themselves accordingly," a standard that these trial counsel failed to meet under our precedent regarding improper argument. *Voorhees,* 79 M.J. at 14. However, while those improper arguments constituted obvious error, there was no material prejudice to Appellant during findings. EN testified credibly that Appellant sexually abused her and, despite strenuous efforts to undermine her credibility, the defense failed to offer a plausible reason as to why EN would have fabricated these allegations. Therefore, Appellant cannot show a reasonable probability that he would not have been convicted in the absence of these improper arguments. *See Molina-Martinez*, 136 S. Ct. at 143.

Instead, the prejudice arises from the sentencing proceeding. In the sentencing argument, Lieutenant C.B. pressured the members to consider how their fellow servicemembers would judge them and the sentence they adjudged instead of the evidence at hand. This Court has repeatedly held that "a court-martial must reach a decision based only on the facts

in evidence." *Fletcher*, 62 M.J. at 183 (citing *United States v. Bouie*, 9 C.M.A. 228, 233, 26 C.M.R. 8, 13 (1958)). Arguing an inflammatory hypothetical scenario with no basis in evidence amounts to improper argument that we have repeatedly, and quite recently, condemned. *See Voorhees*, 79 M.J. at 14–15. Furthermore, neither the defense counsel nor the military judge took action to address the issue themselves. The defense counsel could have done more to meet their "duty to the[ir] client[s] to object to improper arguments early and often," as could have the military judge to fulfill his "*sua sponte* duty to [e]nsure that an accused receives a fair trial" but because they did not, there was a total lack of curative measures to redress this misconduct. *Id.* at 14–15 (alterations in original) (internal quotation marks omitted) (citations omitted).[2]

In addition to meeting the first two prongs of the plain error test by showing that the improper argument amounted to error that was plain or obvious, Appellant also has met his burden to show a reasonable probability that there would have been a different outcome to the sentencing proceeding had this improper argument not occurred. *See Marsh*, 70 M.J. at 107. As our predecessor court said, "[t]rial counsel may properly ask for a severe sentence, but [they] cannot threaten the court members with the

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[2] We do note, however, that Appellant raised an ineffective assistance of counsel claim before the CCA based on the defense counsel's failure to object to the improper argument, but the court decided that relief was not warrented because it had determined that the "arguments were either not improper, or if they were, they were not prejudicial to [Appellant]." *Norwood*, 79 M.J. at 666.

specter of contempt or ostracism if they reject [their] request." *United States v. Wood*, 40 C.M.R. 3, 9 (C.M.A. 1969). Lieutenant C.B. demanded the members impose a sentence of a dishonorable discharge, confinement for four years, and reduction to E-1, while Appellant's counsel implored the members to limit the sentence to confinement for one year. Under the circumstances, we conclude that Appellant established that the trial counsel's egregious attempt to pressure the members resulted in a reasonable probability that the sentence adjudged was greater than it would have been otherwise. Because "we cannot be confident that [Appellant] was sentenced on the basis of the evidence alone," Lieutenant C.B.'s improper sentencing argument caused material prejudice to Appellant such that he is entitled to relief. *Marsh*, 70 M.J. at 107 (internal quotation marks omitted) (citation omitted).

Judgment

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed as to findings, but is reversed as to the sentence. The sentence is set aside and the record is returned to the Judge Advocate General of the Navy. A sentencing rehearing is authorized.

Judge OHLSON, concurring in the result.

I write separately in order to discuss certain important aspects of this case as they relate to the provisions of Military Rule of Evidence (M.R.E.) 801(d)(1)(B), and to sound a note of caution to the field about the applicability of this decision to future cases.

To begin with, I believe the majority is remiss in not squarely acknowledging that the military judge was wrong in applying the provisions of M.R.E. 801(d)(1)(B)(ii) to a key facet of this case. Specifically, the military judge ruled that because defense counsel had implied that the victim's in-court testimony was the product of improper prosecutorial coaching, M.R.E. 801(d)(1)(B)(ii) applied to the question of whether a videotape of the victim's prior statement to forensic investigators was admissible at trial. As demonstrated below, the military judge was clearly mistaken about the applicability of this particular provision, and the majority should affirmatively concede this point.

M.R.E. 801(d)(1)(B)(i) provides, in pertinent part, that a prior statement is not hearsay if it is consistent with the witness's in-court testimony and is offered "to rebut an express or implied charge that the declarant recently fabricated it *or acted from a recent improper influence*." (Emphasis added). On the other hand, M.R.E. 801(d)(1)(B)(ii), which was the subpart cited by the military judge, provides that a prior statement is not hearsay if it is consistent with the witness's in-court testimony and is offered to rehabilitate the declarant's credibility as a witness "when attacked *on another ground*." (Emphasis added).

Here, the military judge concluded that the defense counsel had implied that the victim's in-court testimony was the product of improper prosecutorial coaching but then stated that prosecutorial coaching is an attack on another "ground." However, as we emphasized in *United States v. Finch*, the reference in M.R.E. 801(d)(1)(B)(ii) to "another ground" means a ground *other than* a ground listed in M.R.E. 801(d)(1)(B)(i). 79 M.J. 389, 395–96 (C.A.A.F. 2020). A charge of prosecutorial coaching falls under the grounds listed in M.R.E. 801(d)(1)(B)(i). Thus, the proper basis for analyzing the admissibility of the victim's videotaped statement was M.R.E. 801(d)(1)(B)(i) rather than M.R.E. 801(d)(1)(B)(ii).

This is not an inconsequential point. As the United States Navy-Marine Corps Court of Criminal Appeals (CCA) astutely observed in this case:

> This distinction is important because rebutting a challenge of recent fabrication [under M.R.E. 801(d)(1)(B)(i)] logically permits a more expansive use of prior statements to show that nothing substantial has changed in the declarant's testimony. On the other hand, rehabilitating the credibility of the declarant [under M.R.E. 801(d)(1)(B)(ii)] may require something more precisely related to explaining or rebutting the specific manner of the attack on the witness'[s] credibility.

United States v. Norwood, 79 M.J. 644, 655 (N-M. Ct. Crim. App. 2019) (citations omitted).

Next, I diverge from the majority's apparent viewpoint that the military judge's admission of the *entire* substantive portion of the interview—rather than discrete sections of that interview—was an appropriate default position. Specifically, I believe it is a close question whether the military judge abused his discretion in deciding that, in the course of questioning the victim, the defense counsel had flung open the door so wide that the Government could walk through it with the entire substantive portion of the victim's videotaped statement. My concerns are as follows.

Consistent with our recent unanimous decision in *Finch*, when ruling on an M.R.E. 801(d)(1)(B) issue such as this one, a military judge may admit at trial only those *portions* of a prior statement that are *consistent* with a witness's in-court testimony and that are *relevant to the express purpose of rebutting the allegation of a recent improper influence*. *Finch*, 79 M.J. at 396. Thus, if just a segment of a prior statement can adequately rebut an allegation that a witness was affected by a recent improper influence, then *only* that segment may be admitted at trial.

In those instances where a defense counsel alludes to a purported *inconsistency* between a witness's in-court testimony and a prior statement, the task of identifying the admissible portion or portions of that prior statement is relatively easy. If a witness said "x" at trial, the military judge should admit only those

portions of the prior statement where the witness similarly said "x" in the prior statement.[1]

However, where, as here, a defense counsel alludes to a purported *omission* (i.e., the witness said "x" during in-court testimony but did not mention "x" in the prior statement), the situation is far more tricky. Simply stated, there is no specific "x" to be found in the proverbial haystack that would directly rebut the defense allegation that this omission was reflective of a recent improper influence. Therefore, in such a scenario it is incumbent upon this Court to grant a military judge considerable leeway in deciding just how much of the witness's prior consistent statement needs to be admitted to demonstrate to the panel members that the omission was the product of, say, a simple oversight on the part of the witness or the failure of an interviewer to ask the witness a question that was reasonably likely to elicit a relevant response. For these reasons, the military judge did not abuse his discretion in deciding to admit the entire substantive portion of the victim's prior statement—although it is near the tipping point. However, I am not as confident as the majority appears to be that the military judge handled this issue in an exemplary manner for the following four reasons.

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[1] For this reason, to the extent the Government argues that the prior videotaped statement was also admissible under the provisions of M.R.E. 801(d)(1)(B)(ii), because defense counsel additionally sought to impeach the victim based on a few alleged inconsistencies in her in-court testimony, this approach does not justify the military judge's decision to admit the *entire* substantive portion of the video.

First, the record suggests that the military judge did *not* adequately consider whether the videotaped segment played for the panel members could have been significantly pared back while still achieving the Government's legitimate goal of rebutting the defense counsel's contention that there had been improper prosecutorial coaching. Specifically, in addressing the victim's omission from her videotaped statement that after the sexual abuse incident the rest of her vacation stay with Appellant was "awkward," I believe the military judge erred by failing to admit at trial *only those portions* of the victim's prior statement that dealt with the victim and Appellant's interactions after the sexual abuse—and not the sexual abuse itself. However, I hesitantly conclude that this misstep did not rise to the level of an abuse of discretion.

Second, military judges must place the burden on the moving party—here, the Government—both to identify the consistent portions of the prior statement *and* to demonstrate the relevancy of those portions to the stated aim of rebutting the aspersions cast on a witness's credibility. *Finch*, 79 M.J. at 396. Here, by admitting the entire substantive portion of the videotape without adequately putting the prosecution through these required steps the military judge allowed into evidence some *in*consistent statements made by the victim and some other statements that were not directly relevant to rebutting the specific omissions raised by the defense counsel.

Third, the majority minimizes the harmful effect of admitting the entire substantive portion of the victim's videotaped statement by noting that the

inconsistent portions represented merely "two small additions" to the victim's testimony. Respectfully, this misses an important point. As the Drafters' Analysis of M.R.E. 801(d)(1)(B) makes clear, beyond preventing the introduction of evidence that was not adduced at trial, a fundamental evil to be avoided in situations such as this one is the "impermissible bolstering" of the witness. *Manual for Courts-Martial, United States*, Analysis of the Military Rules of Evidence app. 22 at A22-61 (2016 ed.); *Finch*, 79 M.J. at 396. In the minds of triers of fact, repetition can be confused with reliability. Therefore, the very act of admitting the entire substantive portion of the videotape carried the risk of prejudicing Appellant, and that is precisely why the strictures on hearsay, and the hurdles imposed by M.R.E. 801(d)(1)(B), must be strictly observed.

Fourth and finally, on redirect examination the trial counsel in this case had the following exchange with the victim:

> Q: . . . I just want to follow up on some of defense counsel's questions. Defense counsel asked you a lot of questions about meeting with us. What is the one thing, the only thing, that we told you you [sic] absolutely had to say in this courtroom?
>
> A: To tell the truth.
>
> Q: Defense counsel also said that you didn't— he implied that you hadn't told the forensic interviewer about the rest

> of the trip in Hawaii and how it was awkward. That's correct isn't it?
>
> A: Yes.
>
> Q: Isn't it also true that the forensic interviewer didn't ask you what the rest of the trip was like?
>
> A: Yes.

In my view, the military judge should have more fully considered whether this exchange between the trial counsel and the victim—standing alone—was sufficient to rebut the defense counsel's allegation that the witness's in-court testimony was the product of improper prosecutorial coaching. Indeed, I believe this point should have been factored into the military judge's M.R.E. 403 balancing test in deciding whether the probative value of introducing the entire prior consistent statement was substantially outweighed by the risk of creating unfair prejudice (through repetition of the allegations), causing undue delay, wasting time, and presenting cumulative evidence.

For these reasons, unlike the majority I believe that the issue presented in this case is a very close question. Even though we now hold that the military judge's decision to admit the entire substantive portion of the videotaped statement did not rise to the level of an abuse of discretion, I do not believe this case should be seen as an exemplar of how military judges should approach these types of issues in the future. Generally speaking, a military judge's decision to admit a prior consistent statement *in its entirety* is

fraught with peril. *See Finch*, 79 M.J. at 398. Indeed, such a step may result in prejudice to an accused of such a magnitude that it merits reversal of a conviction. Therefore, in regard to Issue I, although I ultimately agree with the majority that the military judge *did not abuse his discretion* in admitting the entire substantive portion of the videotape, I believe it is prudent to sound a note of caution to the field about the applicability of this decision to future cases with different facts.

In regard to Issue II, I agree with the majority that Appellant's sentence should be set aside with a sentence rehearing authorized.

Judge SPARKS, concurring in part and dissenting in part and in the result.

I concur with the majority's conclusion that the recorded interview was properly admissible as a prior consistent statement under Military Rule of Evidence (M.R.E.) 801(d)(1)(B)(i). However, I cannot join the majority's resolution of the improper argument on sentencing. In my view, Appellant has not carried his burden under the plain error standard to show that, based on trial counsel's argument regarding what the members' coworkers might think, a reasonable probability exists that the sentence adjudged was greater than it would have been otherwise.

The majority relies solely upon the sentences requested by the parties as evidence of prejudice. The Government argued for a sentence of four years of confinement, reduction to the grade of E-1, and a dishonorable discharge while the defense argued for no more than one year of confinement and no punitive discharge. However, this rationale ignores the sentence that the members actually adjudged. Appellant was sentenced to eighteen months of confinement, a reduction to the grade of E-1, and a dishonorable discharge. The term of adjudged confinement is closer to what the defense requested than what the Government requested of the members.

Further, it is unrealistic, under the facts and circumstances of this case, to conclude that Appellant would not have been adjudged a dishonorable discharge. The fifteen-year-old victim testified on the merits and gave an in-person unsworn statement at sentencing. During the Government's case on the

merits, the members heard, and apparently found credible, the victim's detailed description of Appellant's conduct against her. On sentencing, the victim described how Appellant's offense against her had left her severely emotionally and mentally affected.

Finally, we should take into account that defense counsel did not object to the trial counsel's sentencing argument. Defense counsel in this case was best situated to determine which parts of trial counsel's argument were worth objecting to and which were not. The majority has already pointed out that earlier in the court-martial defense counsel seemed skilled enough to recognize when and on what basis an objection should be lodged. In the absence of an ineffectiveness claim before this Court, defense counsel's failure to object here raises the possibility that, from defense counsel's perspective, trial counsel's inappropriate comments may have had less of an effect on the members than the majority believes.

My concern is that concluding under plain error that there was prejudice in a case such as this one suggests this Court's lack of confidence in the skills and abilities of military defense lawyers to try their own cases. I certainly agree with the majority that trial counsel's statements were otherwise plain and obvious error. I also agree with the majority's admonition to defense counsel and military judges generally. However, I am simply not convinced that Appellant met his burden to show material prejudice to his substantial rights. It might have been a different matter had counsel objected and been

overruled without a curative instruction to the members. Since that is not the case here, I must respectfully dissent.

Published Opinion of the United States Court Navy-Marine Corps Court of Criminal Appeals, Aug. 9, 2019

Before
CRISFIELD, HITESMAN, and GASTON,
Appellate Military Judges

UNITED STATES
Appellee

v.

Matthew D. NORWOOD
Machinist's Mate (Nuclear) First Class Petty Officer (E-6), U.S. Navy
Appellant

No. 201800038

Decided: 9 August 2019

Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Commander Shane E. Johnson, JAGC, USN. Sentence adjudged 12 October 2017 by a general court-martial convened at Joint Base Pearl Harbor-Hickam, Hawaii, consisting of officer members. Sentenced approved by the convening authority: Reduction to E-1, confinement for 18 months, and a dishonorable discharge.

For Appellant: William E. Cassara, Esq.; Lieutenant Commander Ja-cob E. Meusch, JAGC, USN.

For Appellee: Captain Brian L. Farrell, USMC; Lieutenant Kurt W. Siegal, JAGC, USN.

Senior Judge HITESMAN delivered the opinion of the Court, in which Chief Judge CRISFIELD and Judge GASTON joined.

HITESMAN, Senior Judge:

Appellant was convicted of a single specification of sexual abuse of child, his 15 year-old niece, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b (2012). This case presents an issue of first impression for this court regarding the use of prior consistent statements under MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 801(d)(1)(B), MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2016 ed.), as amended in 2016.

The appellant raises six assignments of error (AOE): (1) that the military judge abused his discretion when he admitted a videotaped forensic interview of the victim and allowed witnesses to recount her prior statements to them, (2) that the military judge abused his discretion when he allowed lay and ex-pert witness "human lie detector" testimony, (3) that the appellant's conviction is legally and factually insufficient, (4) that the trial counsel's improper arguments constitute prosecutorial misconduct, (5) that the military judge abused his discretion when he allowed the victim to speculate as to appellant's intent in touching her, and (6) that

civilian defense counsel was constitutionally ineffective.

We consolidated the appellant's abuse of discretion claims and reordered the remaining AOE's. We find that certain language in the Specification is factually insufficient, except it out, and reassess the sentence. We also find several other errors but none that prejudiced the substantial rights of the appellant.

I. BACKGROUND

EN and her younger brother, RJ, visited the appellant during December of 2015 and stayed with him in his small basement apartment in Honolulu, Hawaii. EN was fifteen at the time and RJ was twelve years old. At the time, they both lived with their mother and stepfather in Idaho. The appellant is their uncle—their father's brother. On 30 December 2015, the appellant and EN were watching a movie and both were lying on the couch. RJ was in the appellant's nearby bedroom playing video games on the appellant's computer. EN's back was sore from sleeping on the couch and the appellant offered to give her a back massage. EN was wearing a bra under a tank top, which the appellant recommended she take off. After she had removed her bra leaving her tank top on, the appellant began to massage EN. In addition to rubbing her back, the massage included the appellant putting his hands under the waistband of her shorts and underwear where he touched the top of her pubic hair area above her vagina. He then worked one hand up under EN's shirt and massaged her right breast while his other hand rubbed the top of her thigh and moved up towards her private areas. EN pushed the appellant's hand away when it got

about half way up her shorts as it moved towards her vagina. Appellant then pulled EN onto his lap where EN could feel his semi-erect penis with her buttocks. Appellant asked EN about her sexual experience and whether she had a boyfriend back home. EN responded that she "hadn't done anything but kissing," after which the appellant pushed her off of him. EN then changed into her pajamas and lay down on the couch with the appellant and RJ joined them to watch another movie.

EN disclosed the abuse to her friend, MP, over the phone about a month and a half later. MP told her father, who informed EN's stepfather. EN then told her mother, GB, and her stepfather about what had happened. GB in-formed the police and, in the presence of GB, EN told a police officer what had happened. Several days later, during a videotaped forensic interview, EN again described what had happened with the appellant.

Within two weeks of the abuse, the appellant called his brother, the father of EN and RJ. He told him that he had done something terrible and he would kill or disown him if he knew. The appellant did not disclose what he had done to deserve such treatment, but he denied that it had anything to do with EN. Approximately a year before trial, RJ moved in with his father and was never interviewed by law enforcement.

Additional facts necessary to resolve the AOEs raised are discussed be-low.

II. DISCUSSION

A. Abuse of Discretion

The appellant claims that the military judge abused his discretion when he admitted EN's videotaped forensic interview and her accounts to other witnesses as prior consistent statements; allowed "human lie detector" testimony from lay and expert witnesses; and allowed the victim to speculate as to the appellant's intent in touching her.

We review a military judge's admission or exclusion of evidence for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (citation omitted). "The abuse of discretion standard is a strict one, call-ing for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citations and internal quotation marks omitted).

Relevant evidence, as defined by MIL. R. EVID. 401, may be excluded by the military judge "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." MIL. R. EVID. 403. So long as the military judge con-ducts a proper balancing test the ruling will not be overturned unless there is a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citation and internal quotation marks omitted). We owe less deference to the military judge who fails to articulate a MIL. R. EVID. 403 balancing analysis on the record,

and no deference will be afforded to a ruling in which the MIL. R. EVID. 403 analysis is altogether absent. *Id*.

1. Prior consistent statements

After EN testified under oath during the government's case-in-chief, appellant's trial defense counsel cross-examined her about information in her testimony that had not been previously recorded, about inconsistencies with her prior accounts, and about practicing her testimony with the assistance of trial counsel. On redirect, the government offered, over defense objection, a videotape of EN's forensic interview recorded shortly after she reported the abuse. The military judge admitted a portion of the videotape as a prior consistent statement. Subsequently, the military judge also allowed several other witnesses to testify about previous statements by EN as prior consistent statements.

In 2016, the President amended MIL. R. EVID. 801(d)(1)(B), addressing prior consistent statements, to mirror the federal rule. *See* Exec. Order No. 13730, 81 Fed. Reg. 33,331 (May 20, 2016); FEDERAL RULE OF EVIDENCE (FED. R. EVID.) 801(d)(1)(B). This change split the previous rule into two parts to determine when a prior consistent statement may be admitted into evidence. The first part permits the use of a prior consistent statement to re-but a "charge that the declarant recently fabricated . . . or acted from a recent improper influence or motive in . . . testifying." MIL. R. EVID. 801(d)(1)(B)(i). The second part permits the use of a prior consistent statement to rehabilitate the credibility of a witness "attacked on

another ground." MIL. R. EVID. 801(d)(1)(B)(ii). The interplay of these two parts presents an issue of first impression for this court.

Only the second part of the amended rule is new and it does not change the admissibility of prior consistent statements used only to rehabilitate a witness' credibility. It does, however, change what the statement can be used for once it is admitted into evidence. A prior consistent statement, not otherwise admissible under MIL. R. EVID. 801(d)(1)(B)(i), can now be used as substantive evidence as well as to rehabilitate the witness' credibility. *United States v. Ledbetter*, 184 F. Supp. 3d 594, 600 (S.D. Ohio 2016) (citing *Berry v. Beauvais*, No. 13-cv-2647-WJM-CBS, 2015 U.S. Dist. LEXIS 119974 (D. Colo. Sept. 9, 2015)); *see* FED. R. EVID. 801(d)(1)(B)(ii) advisory committee notes to 2014 amendments (stating "that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well"); *United States v. Coleman*, 72 M.J. 184, 188 (C.A.A.F. 2013) (stating that a prior consistent statement that is not admissible under MIL. R. EVID. 801(d)(1)(B) might be admissible to "rehabilitate the in-court testimony of a witness").

The plain language of the rule is clear that "another ground" under part (ii) means a ground other than to rebut a charge of recent fabrication, influence, or motive found in part (i). *Cf. United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2017) (finding that "asleep," "unconscious," or "otherwise unaware" are separate and distinguishable theories of criminal liability because of the meaning of "otherwise"). Thus, while part (i) requires the fabrication, influence, or

motive to be recent with respect to the in-court testimony, there is no such temporal requirement attached to part (ii).

This distinction is important because rebutting a challenge of recent fabrication logically permits a more expansive use of prior statements to show that nothing substantial has changed in the declarant's testimony. On the other hand, rehabilitating the credibility of the declarant may require some-thing more precisely related to explaining or rebutting the specific manner of the attack on the witness' credibility. *United States v. Cotton*, 823 F.3d 430, 437 (8th Cir. 2016); *see United States v. Finch*, 78 M.J. 781, 787 (A. Ct. Crim. App. 2019); *see also* MIL. R. EVID. 801(d)(1)(B)(ii) analysis, MCM App. 22 at A22-61 (reciting almost verbatim the same analysis for FED. R. EVID. 801(d)(1)(B)(ii) advisory committee notes to 2014 amendments). For example, if the declarant's credibility is attacked on another ground such as impeachment by omission because she testified to new information not previously mentioned in other statements, admitting a prior statement that is devoid of the fact now at issue, is not actually consistent with the testimony attacked and does little to rehabilitate the declarant's credibility based on the specific type of attack. *See United States v. Pierre*, 781 F.2d 329 (2d Cir. 1986) (where a witness was impeached for omitting key facts in his notes, a subsequent re-port containing the key facts was admitted as a prior consistent statement and rehabilitated his credibility). *But see United States v. J.A.S.*, 862 F.3d 543, 545 (6th Cir. 2017). Conversely, when the witness' credibility is attacked on another ground such as faulty memory, less precise prior

statements to rehabilitate the witness' credibility may be admitted. *See United States v. Cox*, 871 F.3d 479 (6th Cir. 2017) (holding where witness' credibility was at-tacked for a faulty memory, an entire prior report of abuse was admitted as a prior consistent statement and was allowed to rehabilitate her credibility and for the truth of the matter asserted).

Whether a witness' credibility can be properly rehabilitated is left to the discretion of the military judge. A military judge must use the MIL. R. EVID. 403 balancing test to assess the prior consistent statement to ensure that its probative value in rehabilitating the witness' credibility is not substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." MIL. R. EVID. 403. Otherwise, part (ii) of the rule would consume part (i) by eliminating the significance of the temporal requirement and would allow any prior ostensibly consistent statement to be admitted into evidence and used substantively. *See* FED. R. EVID. 801(d)(1)(B)(ii) advisory committee notes to 2014 amendments (discussing the intent that a FED. R. EVID. 403 balancing test would ensure that the prior statement can properly rehabilitate the witness' credibility).

Here, the appellant argues that (1) the trial defense counsel did not allege the EN's testimony was coached by the trial counsel or that any part of her testimony was recently fabricated, (2) that the military judge applied the wrong subpart of MIL. R. EVID. 801(d)(1)(B), and (3) that the military judge erred by admitting the prior consistent statements in

their entirety and without a MIL. R. EVID. 403 analysis.

After closely examining the record, we disagree with the appellant and find that the assistant civilian defense counsel clearly implied that EN's testimony was coached. On cross-examination, EN confirmed that she knew that the assistant civilian defense counsel wanted to speak to her but refused to talk to him. EN also confirmed that she spoke with the trial counsel team, met them in the courtroom where she sat in the witness chair and answered likely questions, and was told to tell the truth. The assistant civilian defense counsel then asked "[h]ave you ever before had to practice telling the truth or is this like the first time?" EN replied that this was the first time. Later when EN was being impeached for omitting certain facts in her prior videotaped forensic interview, she responded that she was not sure if she had told the interviewer that the "rest of the trip [after the abuse] was awkward." The assistant civilian defense counsel stated: "When did you remember that? Yesterday when you were practicing your testimony?" Defense counsel clearly implied that some parts of EN's testimony changed after practicing her testimony with the trial counsel.

The military judge relied on MIL. R. EVID. 801(d)(1)(B)(ii) to admit the videotaped forensic interview of EN as a prior consistent statement and ruled: "I do find that the defense did attack this witness' credibility on another ground. That other ground is the government has somehow coached the

witness."[1] The military judge went on to add: "I'm going to admit it for that purpose, to rebut—excuse me, to rehabilitate this declarant's credibility, as she's been attacked on another ground, that ground, she has been coached by the government counsel."[2]

We find error in the military judge's reliance on part (ii) of the rule, be-cause the defense implication that EN was coached in preparation for testifying is an implied charge of recent fabrication or recent improper influence that squarely falls under part (i) of the rule. MIL. R. EVID. 801(d)(1)(B)(i). Simply referring to the impeachment as a charge of coaching does not create a different ground for purposes of MIL. R. EVID. 801(d)(1)(B).

The government argues that the prior consistent statements were other-wise admissible under MIL. R. EVID. 801(d)(1)(B)(ii) to rehabilitate EN's credibility because she was impeached through inconsistent and omitted statements. While we agree that some of the prior statements could have been admitted under that reasoning, we find such analysis unnecessary because the prior consistent statements are clearly admissible under MIL. R. EVID. 801(d)(1)(B)(i) to rebut the implied charge that EN's testimony was coached. Accordingly, we find that the statements were properly admissible under MIL. R. EVID. 801(d)(1)(B)(i) and appellant was not prejudiced by the military judge's erroneous application of part (ii) of the rule. *See United States v. Miller*, 46 M.J. 80, 84 (C.A.A.F. 1997) (finding the error harmless because a

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[1] Record at 344.
[2] *Id.* at 345.

stronger case could be made for admission of evidence on a different basis).

Having determined that prior consistent statements were admissible un-der MIL. R. EVID. 801(d)(1)(B)(i), we next analyze whether each of the four admitted statements were actually prior consistent statements and whether they were properly admitted under MIL. R. EVID. 403. Four prior consistent statements were admitted into evidence: (1) EN's initial disclosure to her friend MP, (2) EN's disclosure to her mother, GB, (3) EN's statements to po-lice, as overheard by and described by GB, and (4) a substantial portion of the video recording of EN's forensic interview, which took place less than two weeks after EN first disclosed abuse. The video was admitted in its entirety, omitting only some introductory rapport-building. The military judge con-ducted a MIL. R. EVID. 403 balancing test with respect to the videotaped forensic interview of EN, although, as we noted above, he incorrectly assessed the probative value of the evidence as rehabilitating EN's credibility instead of rebutting a charge of recent fabrication or improper influence. The military judge did not conduct a MIL. R. EVID. 403 analysis when admitting the testimony of GB and MP as prior consistent statements. Accordingly, we afford these rulings little deference and examine the record for ourselves.

EN's statements to MP were very brief and consisted of just a few sentences. Likewise EN's disclosures to her mother and the police officer were also brief and contained just a few additional details. Although the statements to her mother and the police

officer contained at least one inconsistency identified by the assistant civilian defense counsel regarding what EN was wearing, the statements were generally consistent with her testimony. In light of the defense implication that EN was coached by the trial counsel, the probative weight of the video and the three statements was significant to show that EN's account of the abuse had been generally consistent from her first disclosure until her testimony at trial. The four prior consistent statements were not needlessly cumulative. The video was compelling and of high quality, and the members could see and hear EN for themselves. In contrast, the additional statements to MP, GB, and the police officer were brief but given to separate people at different times. Although a military judge has the discretion to exclude some parts or all of a prior consistent statement that are "cumulative accounts of an event," we do not find that the additional statements to MP, GB, and the police officer required exclusion. *See* MIL. R. EVID. 801(d)(1)(B)(i) analysis, MCM App. 22 at A22-61. We find the probative weight of the videotaped forensic interview and the three additional prior consistent statements was not substantially outweighed by the danger of un-fair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. MIL. R. EVID. 403.

Because the prior consistent statements were admissible under MIL. R. EVID. 801(d)(1)(B)(i) and MIL. R. EVID. 403, we find that the appellant's substantial rights have not been prejudiced.

2. Lay and expert witness human lie detector testimony

The appellant claims the military judge abused his discretion by allowing "human lie detector" testimony from Dr. F, the government's expert in clinical, forensic, and child psychology; EN's friend, MP; and EN's mother, GB, all indicating they believed the victim was telling the truth. We disagree with respect to Dr. F and MP, but agree that GB gave human lie detector testimony.

"Human lie detector testimony" has been defined as "an opinion as to whether [a] person was truthful in making a specific statement regarding a fact at issue in the case." *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003). The Court of Appeals for the Armed Forces (CAAF) has been "resolute in rejecting the admissibility of so-called human lie detector testimony . . . ." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (quoting *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)). This class of testimony is inadmissible because it exceeds the limits of permissible character evidence governed by MIL. R. EVID. 608 (evidence of character, conduct, and bias of wit-ness), exceeds the scope of the witness' knowledge, in violation of MIL. R. EVID. 701 (opinion testimony by lay witnesses), and usurps the fact-finder's exclusive function to weigh evidence and determine credibility. *See Kasper*, 58 M.J. at 315. "The prohibition applies not only to expert testimony, but also to conclusions as to truthfulness offered by a nonexpert." *Id.*; *see also United States v. Petersen*, 24 M.J. 283, 284 (C.M.A. 1987) ("We are skeptical about whether any witness could be qualified to opine as to

the credibility of another."). The admission of "human lie detector" testimony is error, regardless of which party offers it.

a. Testimony of Dr. F

Prior to the government calling Dr. F as an expert witness, the civilian defense counsel objected, arguing that Dr. F's testimony would not be helpful and would constitute human lie detector testimony. The military judge over-ruled the objection and found that the testimony would be helpful. The military judge invited the civilian defense counsel to object during Dr. F's testimony if it became human lie detector testimony. The government's witness, Dr. F, testified about the symptoms typically observed in child sexual abuse victims such as accommodation, delayed reporting, and other counterintuitive behaviors. Dr. F recognized that EN had testified that her own behavior changed after she returned from Hawaii. Trial counsel then asked Dr. F with respect to such behaviors described by EN: "Could these changes that [EN] observed in herself be a consequence of the sexual abuse that she experienced in Hawaii?"[3] Dr. F replied: "Yes."[4] The civilian defense counsel did not object to the question. On cross-examination, Dr. F stated several times that observed behaviors and symptoms do not "in any way bear on the credibility of the underlying allegation"[5] and conceded that there were "any number of rea-sons"[6] a person might exhibit

[3] *Id.* at 449.
[4] *Id.*
[5] *Id.* at 461-2.
[6] *Id.* at 457.

the behaviors that EN exhibited, including not having been abused at all.[7] The appellant contends that Dr. F, by responding to the trial counsel's presumptive and leading question, improperly commented on the veracity of EN's testimony.

In a trial involving sexual abuse of a child, "an expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms." *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010). This includes testimony regarding "counterintuitive behaviors" exhibited by victims of sexual abuse. *United States v. Flesher*, 73 M.J. 303, 313, 316 (C.A.A.F. 2014). During cross-examination, the opposing party may explore the basis for the expert's opinion, including the assumptions and information upon which the expert relied. MIL. R. EVID. 703. Here, the fact that Dr. F considered EN's testimony does not turn her otherwise admissible expert opinion into human lie detector testimony. *See United States v. Hill-Dunning*, 26 M.J. 260, 262 (C.M.A. 1988) (stating there is "a distinction between the expert who has an opinion based upon a belief in the truthfulness of what another person has told him and the expert whose opinion is that the other person is truthful").

Dr. F did not provide human lie detector testimony because she never opined or implied that EN was truthful in alleging that the appellant sexually abused her, nor did Dr. F express an opinion that the

[7] *Id*. at 456.

appellant was guilty. We find no error in permitting the testimony of Dr. F.

b. Testimony of MP and GB

EN's best friend, MP, testified regarding the telephone call during which EN first disclosed that the appellant had "put his hands up her shirt and down her pants."[8] MP was asked by trial counsel to describe EN's demeanor as she was telling MP what happened in Hawaii. MP stated that EN was very upset, shaken, and crying and that MP "could tell [EN] was very, very affected."[9] Lay opinion testimony is admissible if the opinion is based on the witness' perception and the opinion is helpful to the members in understanding the witness' testimony. *United States v. Byrd*, 60 M.J. 4, 7 (C.A.A.F. 2004). MP was asked for and offered permissible testimony of EN's demeanor. She did not provide any testimony regarding her opinion of EN's veracity or the appellant's guilt. We find no error in admitting MP's testimony.

The assistant civilian defense counsel cross-examined EN's mother, GB, regarding her family's refusal to speak to the defense team prior to trial, and implied that the family was "hiding [ ]witnesses."[10] GB stated: "I didn't want defense talking to anyone about this case."[11] On redirect examination, the trial counsel asked GB: "[W]hy did you choose to not

[8] *Id*. at 360.
[9] *Id*. at 360.
[10] *Id*. at 385.
[11] *Id*. at 483.

answer defense counsel's phone calls or allow your children to speak with defense counsel?"[12] GB responded: "Because they're working for the person that molested my daughter."[13] The assistant civilian defense counsel objected but the military judge overruled the objection and allowed the question and answer to stand. We find that human lie detector testimony was implicit in GB's response.

The government argues that the defense cross-examination invited the human lie detector testimony. We disagree. The assistant civilian defense counsel's cross-examination of GB regarding her family's refusal to speak with the defense did not create an error and then attempt to take advantage of it. *United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016). This did not leave the members with a "skewed view of the evidence" that only the government's subsequent error could rectify. *Id.* GB could have answered in a number of ways without giving her opinion that EN was telling the truth and the appellant was guilty. Allowing GB to give human lie detector testimony was error and an abuse of discretion. The military judge should have sustained the objection and issued an immediate curative instruction.

c. No prejudice to the appellant

Having found error in allowing GB to testify that the appellant molested her daughter, implying that the appellant is guilty and that EN is telling the truth,

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[12] *Id*. at 403.
[13] *Id*. at 404.

we now consider whether the appellant's substantial rights were prejudiced. Four factors determine when a non-constitutional error substantially influenced the member's verdict: (1) the strength of the government's case, (2) the strength of the defense's case, (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). Both the government's case and the appellant's case hinged on EN's credibility. EN's prior consistent statements had already been admitted into evidence. GB's human lie detector testimony was material because it bolstered EN's testimony and credibility. However, the quality and impact of this evidence was low because the members would naturally expect GB to believe her young daughter. The evidence added very little to the weight of the evidence already against the appellant, and moreover, the military judge eventually gave a curative instruction with regard to this testimony. Although the military judge overruled the defense objection at the time, he revisited the issue two hours later after the government's next two witnesses and issued the members a limiting instruction that they could not consider GB's opinion as "evidence that a crime [has] occurred or that the witness is credible."[14] The military judge issued the instruction again during argument when the assistant trial counsel commented that the other witnesses believed EN."[15] While an immediate curative instruction would have been ideal, we find that the delayed instructions were sufficient to cure the error. Without evidence to the contrary, we assume the

[14] *Id*. at 425.
[15] *Id*. at 558.

members followed the instructions of the military judge. *United States v. Short*, 77 M.J. 148, 151 (C.A.A.F. 2018). Accordingly, we find that no substantial right of the appellant was prejudiced by the erroneous admission of GB's testimony regarding her opinion of EN's veracity or the appellant's guilt.

3. Allowing the victim to speculate as to the appellant's intent

As an element of the charged offense under Article 120b, UCMJ, the government had to prove beyond a reasonable doubt that the appellant touched EN with the specific intent to gratify his sexual desires. Trial counsel asked EN: "Why do you think he was touching your breast and trying to put his hand into your shorts?"[16] The immediate defense objection was overruled by the military judge without discussion. EN responded: "Probably for sexual purposes."[17]

The government argues that EN was providing a lay opinion based on her perception as permitted by MIL. R. EVID. 701. We disagree. The question clearly called for EN to impermissibly speculate on what the appellant was thinking or intending. The military judge erred by allowing the question and answer to stand, and by not providing an immediate curative instruction to the members.

Having found error, we now consider whether the appellant's substantial rights have been prejudiced under the *Kerr* factors outlined above. EN's credibility

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[16] *Id*. at 293.
[17] *Id*.

was the linchpin for both the government's case and the appellant's case. EN was the victim and only substantive witness for the government. However, EN's opinion of the appellant's intent added very little weight to prove the appellant touched her with the specific intent of gratifying his sexual desires, which the members could reasonably and readily infer from the facts already before them. Her testimony that a 30-year-old man, lying on a couch with her, a 15-year-old girl, (1) put his hands in her shorts just above her pubic region, (2) fondled one of her breasts with one hand while his other hand moved up her thigh towards her vagina, and (3) placed her buttocks on his lap where she could feel his semi-erect penis is strong circumstantial evidence that the accused's actions were committed with the necessary specific intent. Moreover, the improper opinion testimony is material in that it attempts to prove the intent element of the charged offense. However, the quality of the evidence is relatively low when the rest of EN's testimony is considered. As the trial counsel's direct examination continued, EN said she was "confused," and "did not know why the appellant was touching her."[18] Given the strong circumstantial inferences that can be made from EN's other testimony, her speculation would have had little impact on the members. In addition, the trial counsel team did not refer to EN's speculation of the appellant's intent in closing or rebuttal arguments. Accordingly, we find that the appellant's substantial rights were not prejudiced.

B. Legal and Factual Sufficiency of the Conviction

[18] *Id.*

The appellant contends that his conviction for sexually abusing EN is legally and factually insufficient. We review questions of legal and factual sufficiency de novo. Art. 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). To determine legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015). In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. In conducting this unique appellate function, we take "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. Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict." *United States v. Rankin,* 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

The appellant was convicted of touching the breast, buttocks, groin, and inner thigh of EN, the appellant's 15-year-old niece, in violation of Article 120b, UCMJ. To support this conviction, the

government needed to prove be-yond a reasonable doubt that: (1) the appellant committed a lewd act upon EN by intentionally touching, directly and through the clothing, the breast, buttocks, groin, and inner thigh of EN; (2) that EN had not attained sixteen years of age; and (3) that the appellant did so with the intent to gratify his sexual desire. *Id.*

Here, it is uncontroverted that EN was fifteen at the time of the inappropriate touching. EN provided the only evidence of the manner in which the appellant touched her to include how he touched her back, stomach, upper pubic area, right breast, leg, and thigh with his hands directly and over her clothes. EN also testified that the appellant pulled her onto his lap and that she could feel his semi-erect penis on her buttocks through their clothes. Both trial and defense counsel recognized that the case hinged on EN's credibility. The members saw and heard EN's testimony as well as observed her during a videotaped forensic interview. The members heard testimony that recounted three additional statements made by EN describing the sexual abuse she suffered at the hands of the appellant. EN also testified that the appellant "apologized for being an asshole"[19] the day after the abuse. Finally, the appellant's brother, EN's father, testified and described the appellant's distraught and drunken call in which he claimed to have done something horrible for which he would disown the appellant if he found out.

After carefully reviewing the record of trial and considering the evidence in the light most favorable to

[19] *Id.* at 296.

the prosecution, we are convinced that a reasonable fact-finder could have found that the appellant touched EN with the intent to gratify his sexual desire. Furthermore, after weighing the evidence served the witnesses, we too are convinced beyond a reasonable doubt that the appellant sexually abused EN.

However, based on the record before us, we are only convinced that he did so by touching EN's breast, buttocks, and thigh. EN's forensic interview and testimony support the finding that the appellant only touched the top of her pubic region where her pubic hair starts and the top of her thigh. According-ly, we find that the evidence is legally and factually sufficient to sustain a finding of guilty to the Charge but only to a modified finding of guilty to the Specification. We will except the words "groin" and "inner" from the Specification in our decretal paragraph and reassess the sentence below.

C. Sentence Reassessment

Having set aside the finding of guilty to some of the language alleged in the specification, we must now determine if we are able to reassess the appellant's sentence. We have "broad discretion" when reassessing sentences. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). However, we can only reassess a sentence if we are confident "that, absent any error, the sentence adjudged would have been of at least a certain severity . . . ." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986).

In determining whether to reassess a sentence or to order a sentencing rehearing, we consider the five factors espoused in our superior court's holding in *Winckelmann*: (1) whether there has been a dramatic change in the penalty landscape and exposure; (2) the forum of the court-martial; (3) whether the remaining offenses capture the gravamen of the criminal conduct; (4) whether significant aggravating circumstances remain admissible and relevant; and (5) whether the remaining offenses are the type with which we as appellate judges have experience and familiarity to reasonably determine what sentence would have been imposed at trial. *Winckelmann*, 73 M.J. at 15-16.

Because our findings do not effect significant changes to the language of the offense and do not completely set aside the findings of guilty, there is no change in the penalty landscape. The remaining language captures the gravamen of the criminal conduct for which the members convicted and sentenced the appellant, and the modification does not render any evidence presented at trial inadmissible or irrelevant. Furthermore, this is an offense with which we, as appellate judges, have in-depth experience and familiarity. The evidence of the appellant's culpability for sexually abusing his 15-year-old niece remains the same. We conclude that sentence reassessment is appropriate. We are confident that, absent the excepted language, the court-martial would have imposed no less of a sentence than the members adjudged—dishonorable discharge, reduction to pay grade E-1, and 18 months' confinement.

D. Improper Argument

The appellant contends that the trial counsel and assistant trial counsel committed prosecutorial misconduct during closing and sentencing arguments when they interjected their personal opinions of the evidence, vouched for government witnesses, and used inflammatory language.

Prosecutorial misconduct occurs when a prosecutor "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). In general, it is "defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger*, 295 U.S. at 88). The conduct of the "trial counsel must be viewed within the context of the entire court-martial . . . not [just] on words in isolation." *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)).

Improper argument is a type of prosecutorial misconduct that involves a question of law that we review de novo. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). When objected to at trial, we review improper argument for prejudicial error. *Id.* "[When] no objection is made, we hold the appellant has forfeited his right to appeal and review for plain error." *Id.* Plain error "requires that: (1) an error was

committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *United States v. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017) (citation and quotation marks omitted).

We find error in the argument of the assistant trial counsel as objected to by the defense counsel. We also find plain or obvious error in some, but not all, of the challenged parts of the trial counsel's and assistant trial counsel's arguments to which the defense did not object.

1. Interjection of personal beliefs and opinions

"It is improper for a trial counsel to interject herself into the proceedings by expressing a personal belief or opinion as to the truth or falsity of any testimony or evidence." *Fletcher*, 62 M.J. at 179 (citation and internal quotation marks omitted). Personal beliefs and opinions may be in the form of improper vouching for the government's case or by offering personal views of the evidence and appellant's guilt. *See id.* at 180. Improper expression of the trial counsel's views of the evidence can include "offering substantive comments on the truth or falsity of the testimony and evidence." *Id.* at 180.

Appellant argues that the trial counsel improperly vouched for EN's credibility. We disagree. A fair reading of the arguments of counsel show that the trial counsel did not offer substantive comments or interject her personal opinion, view, or beliefs regarding the truth of EN's testimony. Rather, she merely argued that EN's testimony was credible based

on the evidence, the circumstances surrounding her allegations and disclosures, and the absence of any discernable motive to lie.

2. Inflaming the prejudices and passions of the members

It is a basic rule of our profession that a "prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty." CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION STANDARD 3-6.8(C) (AM. BAR ASS'N 2015). As courts have of-ten stated, "the trial counsel is at liberty to strike hard, but not foul, blows." *Baer*, 53 M.J. at 237. To that end, the R.C.M. and our case law provide that it is error for trial counsel to make arguments that "unduly . . . inflame the passions or prejudices of the court members." *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983); R.C.M. 919(b), discussion. An accused is supposed to be tried and sentenced as an individual based on the offense(s) charged and the legally and logically relevant evidence presented. It is generally impermissible to ask members to perform a role beyond evaluating the evidence. *See, e.g., Young*, 470 U.S. at 18 (finding error in imploring the jury to "do its job"); *Brown v. State*, 680 S.E.2d. 909, 912-15 (S.C. 2009) (finding error in asking the jury to "speak up" for the child victim). Several of trial counsel's remarks run counter to these basic principles.

Trial counsel are allowed to "forcefully assert reasonable inferences from the evidence." *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008). One factor to consider is whether the appellant was charged with a corresponding offense that would justify the negative characterization and whether the characterization is an inference fairly drawn from the evidence.

The assistant trial counsel, in closing argument referred to the appellant as a child molester numerous times. The appellant avers that the assistant trial counsel was attempting to inflame the members to convict the appellant based on the general nature of the crime. We disagree. Here, the appellant was charged with the sexual abuse of a minor. Referring to the appellant as a child molester is a reasonable inference based on the evidence supporting the allegation that he sexually abused a minor.

However, during the rebuttal argument, the assistant trial counsel argued:

> [T]he defense is asking you to give child molesters a license to commit these crimes, because if you can't find the accused guilty in this case, the only way—the only way a child molester could ever be convicted [is] if he is literally caught in the act.[20]

Of course, defense counsel did not make such a direct request, and even if it could be implied, it bears

[20] *Id*. at 553.

no relevance on the appellant's guilt and could only have served to inflame the passions or prejudices of the members. We find no legal basis that supports the trial counsel's invocation to the members to perform an impermissible role and convict the appellant, not on the evaluation of the evidence before them, but based on the fear that not convicting would be somehow encouraging other child molesters.

Finally, the appellant claims that during sentencing argument, the trial counsel's "justification to a co-worker" argument was improper and prejudiced the members against the appellant. We disagree. The argument, while of questionable effect, is an attempt to help the members give weight to the government evidence by having them consider justifying their adjudged sentence to their co-workers. The members were properly instructed by the military judge to determine an appropriate sentence based on the evidence. Seeing no evidence to the contrary, we presume that the members followed the instruction of the military judge. *Short*, 77 M.J. at 151.

3. Objections raised

The assistant trial counsel argued that EN's family members refused to cooperate with the defense because they believed EN. The military judge overruled the defense counsel's objection but still issued a curative instruction to the members stating that: "It is your exclusive province, the court members, to determine the credibility of the witnesses . . . ."[21] While the argument was improper and the

[21] *Id*. at 559

objection was erroneously overruled, we find the instruction was adequate to cure the error and we will evaluate the prejudice incurred below.

4. Prejudice to the appellant

Finding error in some of the assistant trial counsel's arguments, we now turn to the third element of our plain error analysis and examine the record for prejudice. *Pabelona*, 76 M.J. at 12. In cases of prosecutorial misconduct, we evaluate potential prejudice by examining the severity of the misconduct, the measures adopted to cure the misconduct, and the weight of the evidence supporting the conviction. *Fletcher*, 62 M.J. at 184. "[P]rosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id.*

We first look at the severity of the misconduct. In *United States v. Pabelona*, this court found that despite prosecutorial misconduct, the severity of that misconduct was low because it was limited to the arguments of a "lengthy four day trial" and consisted of "relatively isolated comments" and "cover[ed] a small fraction of the trial." No. 201400244, 2015 CCA LEXIS 424, at *9 (N-M. Ct. Crim. App. 15 Oct. 2015), *aff'd*, 76 M.J. 9 (C.A.A.F. 2017). The appellant's trial lasted for three days and the assistant trial counsel used improper arguments and remarks just two times during approximately an hour of combined closing, rebuttal, and sentencing argument. Taken as a whole and in the context of an emotionally charged trial, the

assistant trial counsel's improper arguments and comments amounted to only a very small fraction of the trial. Even though EN's credibility was critical to both sides, each comment was made only one time. Although some of the assistant trial counsel's remarks were improper, we find that the misconduct taken in proper context was not unduly severe.

Next, we look at whether there were any curative measures taken. The military judge issued a curative instruction only after overruling the defense counsel's objection to the argument that EN's family believed her. The military judge should have sustained the objection and given the members a stronger instruction to remind them that argument of counsel is not evidence and to disregard the assistant trial counsel's statement that EN's family believed her. The military judge instructed the members that "[i]t is [their] exclusive province, the court members, to determine the credibility of the wit-nesses."[22] We find that this instruction, given immediately after the objection, was sufficient to cure the error of not sustaining the objection. Seeing no evidence to the contrary, we find that the members followed the military judge's instructions. *United States v. Short*, 77 M.J. 148, 151 (C.A.A.F. 2018).

Finally, we consider the strength of the evidence against the accused. In *United States v. Halpin*, the CAAF found that the weight of the evidence supporting the appellant's conviction alone was strong enough to establish a lack of prejudice. 71 M.J. 477, 480 (C.A.A.F. 2013). Here, the government's case,

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[22] *Id.*

although primarily based on the testimony of EN, was reasonably strong. Both the government's and the appellant's cases hinged on the credibility of EN, who appeared before the members, was extensively cross-examined, and was ultimately believed by the members. Appellant exhibited consciousness of guilt both when he apologized to EN the day after the abuse for being an "asshole" and when he subsequently called his brother and ex-pressed remorse and guilt even though he never explained why.

Considering the isolated and brief nature of the government's improper arguments and the strength of the government's case compared to the appellant's case, we find that the appellant was not prejudiced. In addition, as to the objections made by defense counsel and the military judge's curative instructions in response, we are confident in the members' ability to adhere to the military judge's instructions and put the trial counsel's comments in proper context. We have no cause to question the fairness or integrity of the trial and are convinced that the members convicted the appellant on the evidence alone.

E. Ineffective Assistance of Counsel

Appellant claims the trial defense counsel was ineffective for failing to move the court to depose critical witnesses, produce certain evidence, and for failing to object to trial counsel's improper argument. This court reviews claims of ineffective assistance of counsel de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (citations omitted). When reviewing such claims, we follow the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668,

687 (1984). "In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687; *Mazza*, 67 M.J. at 474).

1. Failure to request depositions of witnesses

Appellant argues that his defense counsel was ineffective because he failed to request that the convening authority or the military judge order a deposition of the victim's mother and brother. EN's mother, GB, refused to speak with anyone on the appellant's defense team. EN's brother, RJ, was 12 years old at the time of the Hawaii visit and was the only other possible wit-ness to the abuse. RJ's stepmother had stated that RJ generally refuted EN's allegations. RJ was never interviewed by law enforcement and his mother, GB, refused to allow RJ to speak to defense counsel. The defense theory on this issue was that EN's family members refused to speak with defense counsel because they were trying to protect the victim's stepfather, the current husband of GB, because he and RJ had a physical altercation and the police were involved.

We need not determine "whether counsel's performance was deficient . . . [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice." *Strickland*, 466 U.S. at 697. When a claim for ineffective assistance of counsel is premised on trial defense counsel's failure to move the court to take some action, "an appellant must show

that there is a reasonable probability that such a motion would have been meritorious." *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strick-land*, 466 U.S. at 694. "Failure to raise a meritless argument does not constitute ineffective assistance." *United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997).

After charges are preferred, a deposition may be ordered whenever "due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a . . . court-martial." R.C.M. 702(a). Witnesses do not have an obligation to submit to pretrial interviews. There was no need to preserve the testimony of either GB or RJ for trial because they were both present for and testified at trial. GB refused to speak with defense counsel, but this does not rise to the level of the "exceptional circumstances" required by R.C.M. 702(a). *See United States v. Cabrera-Frattini*, 65 M.J. 950, 953 (N-M. Ct. Crim. App. 2008) (the purpose of depositions is to "preserve testimony for future use at trial" and not as a discovery vehicle). RJ testified as a defense witness and the effective sum of his testimony was that he did not see anything unusual during the trip to Hawaii. Accordingly, the appellant failed to establish that there was a reasonable probability that his motion to depose GB and RJ would have been meritorious. Moreover, the appellant fails to persuade us that if his counsel had been permitted to depose the witnesses, there would have been a different result. The appellant merely speculates that his counsel would have discovered

additional information leading to further investigation. The appellant failed to show that a motion to depose RJ or GB would have been meritorious or that the motion, if granted, would have produced a different result. Therefore, the appellant failed to show prejudice.

2. Failure to request the production of evidence

Appellant argues that his civilian defense counsel was ineffective because he failed to move the court to order production of EN's disposable camera. EN's mother, GB, told investigators that EN had brought a disposable cam-era home from Hawaii but that she had not had the film developed. GB testified that she did not know where the camera was or if anyone in the family still possessed it.

We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The presumption of competence is overcome when the appellant's allegations are true and there is no reasonable explanation for the counsel's actions, counsel's level of advocacy falls "measurably below the performance . . . [ordinarily expected] of fallible lawyers," and "there is a reasonable probability that, absent the errors, there would have been a different result." *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (internal quotation marks omitted). We will not second-guess strategic or tactical decisions made by the trial defense counsel unless the appellant can show specific defects in counsel's performance that

were unreasonable under prevailing professional norms. *Mazza*, 67 M.J. at 475.

Here, the defense did not know what pictures were on the disposable camera. The pictures may have been exculpatory or they may have further implicated the appellant by supporting EN's testimony that the trip became awkward after the abuse. Neither party suggested the camera contained photographs of the appellant abusing EN. It was a reasonable tactical decision to not request production of the camera, and instead argue the absence of the camera casts doubt on the witnesses' testimony and showed bias. .

Moreover, the appellant is not entitled to the production of unavailable evidence that is "destroyed, lost, or otherwise not subject to compulsory process." R.C.M. 703(f)(2). A motion to compel discovery would likely have failed first because the appellant could not establish that the disposable camera even existed and second because the camera was not in the possession of the United States. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). Accordingly, the appellant cannot show that the motion would have been meritorious and therefore cannot show prejudice. *McConnell*, 55 M.J. at 481.

3. Failure to object to improper argument

Appellant argues that his trial defense counsel was ineffective for not objecting to the trial counsel's improper argument referring to the appellant as a child molester, vouching for the veracity of EN, and imploring the members to convict the appellant in

order to avoid giving all child molesters "a license to commit these crimes."[23]

"Failure to raise a meritless argument does not constitute ineffective assistance." *Napoleon,* 46 M.J. at 284 (internal quotations omitted). We need not determine "whether counsel's performance was deficient [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice." *Strickland*, 466 U.S. at 697. Here, we have already determined that the assistant trial counsel's arguments were either not improper, or if they were, they were not prejudicial to the appellant. Accordingly, trial defense counsel's failure to object was not prejudicial and therefore cannot constitute ineffective assistance.

III.CONCLUSION

The supplemental Court-Martial Order shall reflect an accurate summary of the Charge and Specification including the language "groin" and "inner," the appellant's plea of not guilty to the specification, and the correct findings—of the Specification, guilty, except the words "groin" and "inner"; of the excepted words, not guilty; of the Charge, guilty.

After careful consideration of the record and briefs of appellate counsel, we have determined that the approved findings, as modified by this court, and the sentence, as reassessed, are correct in law and fact and that no error materially prejudicial to Appellant's

[23] Appellant's Brief at 39.

substantial rights occurred. Articles 59and 66, UCMJ, 10 U.S.C. §§859, 866. Accordingly, the findings as modified and sentence as reassessed are **AFFIRMED**.

Chief Judge CRISFIELD and Judge GASTON concur.

FOR THE COURT:

RODGER A. DREW, JR.
Clerk of Court