UNITED STATES

Appellee

v.

Nicholas S. BAAS, Corporal, United States Marine Corps

Appellant

United States Court of Appeals for the Armed Forces

March 17, 2020, Argued;

May 29, 2020, Decided

No. 19-0377

Reporter

80 M.J. 114 *; 2020 CAAF LEXIS 297 **

Prior History: [**1] Crim. App. No. 201700318. Military Judges: Forrest W. Hoover and Peter S. Rubin.

United States v. Baas, 2019 CCA LEXIS 173 (N-M.C.C.A., Apr. 15, 2019)

Counsel: For Appellant: Lieutenant Daniel E. Rosinski, JAGC, USN (argued).

For Appellee: Lieutenant Joshua C. Fiveson, JAGC, USN (argued); Lieutenant Colonel Nicholas L. Gannon, USMC, Lieutenant Commander Timothy C. Ceder, JAGC, USN, and Brian K. Keller, Esq. (on brief); Colonel Mark K. Jamison, USMC.

Judges: Judge RYAN delivered the opinion of the Court, in which Chief Judge STUCKY and Judges OHLSON, SPARKS, and MAGGS (except as to Part II.B), joined. Judge MAGGS filed a separate opinion, concurring in part and concurring in the judgment.

Opinion by: RYAN

Opinion

[*116] Judge RYAN delivered the opinion of the Court.

A general court-martial convicted Appellant, contrary to his pleas, of two specifications of conspiracy,[1] one specification of false official statement, two specifications of raping a child, two specifications of producing child pornography with intent to distribute, and two specifications of distribution of child pornography in violation of Articles 81, 107, 120b, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 907, 920b, 934 (2012). In accordance with his pleas, he was acquitted of one specification of raping a child, one specification of producing **[**2]** child pornography, and one specification of distributing child pornography. Appellant was sentenced to forfeiture of all pay and allowances, reduction to grade E-1, confinement for fifteen years, and a dishonorable discharge. The convening

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[1] Following findings, the military judge consolidated the two conspiracy specifications into one. *United States v. Baas*, No. NMCCA 201700318, 2019 CCA LEXIS 173, at *1 n.1, 2019 WL 1601912, at *1 n.1 (N-M. Ct. Crim. App. Apr. 15, 2019) (unpublished).

authority approved the sentence as adjudged and the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence. *Baas*, 2019 CCA LEXIS 173, at *55, 2019 WL 1601912, at *19.

We granted review of two issues:

> I. Did admission of an allegedly positive Diatherix Laboratories test for gonorrhea, without testimony at trial of any witness from Diatherix,[2] violate the Sixth Amendment Confrontation Clause?
>
> II. Did the lower court abuse its discretion in admitting an alleged positive Diatherix test result for gonorrhea in a child's rectal swab—where Diatherix failed to follow its own procedures and the result was of near zero probative value?

The first question we answer in the negative. As to the second question, even assuming error, we find no prejudice. We therefore affirm the lower court.

I. Background

The charges arose out of Appellant's abuse of his son, GB. In June 2016, Appellant's girlfriend, KM, searched through his cellphone for evidence of infidelity and discovered messages in the Skype

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[2] Although the executive vice president of Diatherix was a witness at an Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2012), session, neither he nor any Diatherix employee who administered the test at issue testified at trial.

application **[**3]** between him and "Hailey Burtnett"[3] from [***117]** August 2015 to June 2016. In these messages—exchanged simultaneously but with a one-way video in which Hailey could view Appellant though he could not view her—Hailey directed Appellant to perform sexual acts on his infant son. The messages indicated that Appellant complied.

KM gave Appellant's phone to his chain of command, who then alerted the Naval Criminal Investigative Service (NCIS). NCIS apprehended and interrogated Appellant. During his NCIS interview, Appellant admitted performing the acts Hailey directed him to do but insisted that the object of those acts was a green teddy bear belonging to his son, and not GB himself. When the NCIS agents expressed disbelief at this defense given the obscene specifics and the inability to commit the acts described with a teddy bear, Appellant explained that all the graphic descriptions and directions were the stuff of imagination. Then, attempting to demonstrate his innocence, Appellant admitted that he had chlamydia and gonorrhea, and insisted that should NCIS test GB for the infections, the tests would come back negative.

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[3] Hailey Burtnett was never located or identified. While Appellant claimed to have known her from his high school in Alabama, he never saw her since the Skype feed was one-way, and law enforcement was unable to find any record of such a person at the school or in that town. "Hailey's" internet protocol (IP) address did not originate from Florida—where she told Appellant she lived—but resolved back to Spain, France, Iceland, and Germany. Though we do not know who Appellant skyped with, or if it was even a woman, for purposes of the opinion we will use the name and sex of the person Appellant believed he was communicating with.

The day after Appellant's NCIS interview, GB's mother, who had separated from **[**4]** Appellant in 2015, took the child to Coastal Children's Clinic for an appointment with Dr. Lisa Kafer, who performed a physical examination on GB. Finding no visible signs of abuse, Dr. Kafer obtained a rectal swab of GB and ordered a test from Diatherix—a diagnostic service—to check for chlamydia and gonorrhea. Diatherix ran a nucleic acid amplification test (NAAT), which came back positive for gonorrhea. Dr. Kafer then referred GB to another medical center for a confirmatory culture test and treatment. That facility ran the wrong test, contaminated the sample by refrigerating it, and treated GB with an antibiotic, which foreclosed the possibility of further confirmatory testing.

Before trial, defense counsel moved to exclude the Diatherix test result under both the Confrontation Clause and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The military judge admitted the test result, finding no Confrontation Clause violation because the result was not testimonial: It was "not made with an eye toward litigation" but was part of GB's medical treatment.

As to the *Daubert* challenge, both parties submitted voluminous documentary evidence, and the military judge heard expert testimony from each party in a lengthy Article 39(a), UCMJ, hearing. The defense called Dr. Hammerschlag, **[**5]** a pediatrician and certified expert in the field of sexually transmitted infection (STI) diagnostics, who testified that the particular NAAT Diatherix used had not been reviewed by the Food and Drug Administration (FDA), and the Centers for Disease Control and

Prevention (CDC) does not recommend the use of NAATs generally on prepubescent boys because the low prevalence of gonorrhea in that population creates a high probability of false positives. This probability, the expert claimed, made it unlikely that GB's test result was a true positive.

The Government proffered two experts: Drs. Stalons and Hobbs. Dr. Stalons, Diatherix's executive vice president and clinical director, explained the company is accredited by the American College of Pathologists (CAP) and certified for testing bacteria like gonorrhea. He added that portions of the NAAT Diatherix uses are proprietary, which meant that the test had not been reviewed by the FDA. Nevertheless, the test has a 99% accuracy rate when testing blind samples as part of its accreditation and a 100% accuracy rate for the particular gonorrhea tested in this case. Dr. Hobbs, an expert in microbiology, agreed with the defense expert that the low **[**6]** prevalence of gonorrhea among boys increased the likelihood of false positives, but disagreed with her on what the likelihood of a false positive was. Dr. Hobbs also testified that a culture is typically preferred to an NAAT in cases of suspected child abuse. She nevertheless determined that because Diatherix's NAAT is highly accurate, precise, sensitive, and specific,[4] the test produces valid results.

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[4] A test is accurate if it can produce "a true indication of the nature and quantity of the substance or object being measured." S. W. Martin, *The Evaluation of Tests*, 41 Can. J. Comp. Med. 19, 23 (1977). A test is precise if it is able "to give consistent results in repeated determinations in the same sample or [subject]." *Id.* A test's sensitivity refers to its ability "to correctly identify those

[*118] Based on the expert testimony and the parties' submissions, the military judge issued a written ruling applying the *Daubert* factors to conclude that the test was "a reliable test based upon scientific principles." The military judge found that the defense expert's concern that the test had a low positive predictive value when used for samples from prepubescent boys did not "undermine the scientific principles upon which the test is based."[5] He cited *United States v. Sanchez*, 65 M.J. 145, 151 (C.A.A.F. 2007), for the proposition that "existence of an error rate or disagreement over what that rate may be does not render the test inadmissible," and denied defense counsel's motion to exclude the test result.

At trial, the Government introduced Appellant's statements **[**7]** to NCIS, the testimony of several expert and lay witnesses, both Appellant's and GB's positive test results for gonorrhea, and Appellant's Skype conversations with Hailey.

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patients *with* the disease," whereas its specificity refers to its ability "to correctly identify those patients *without* the disease." Abdul Ghaaliq Lalkhen & Anthony McCluskey, *Clinical Tests: Sensitivity and Specificity*, 8 Continuing Educ. in Anaesthesia, Critical Care & Pain 221, 221 (2008) (emphasis added). Diatherix's test accuracy was 94.6%, its precision 99.7%, its sensitivity comparable to other NAATs, and its specificity perfect.

[5] Positive predictive value (PPV) refers to the likelihood that the specific test result at issue is a true positive. *See* Lalkhen & McCluskey, *supra* note 4, at 221 ("The PPV of a test is a proportion that is useful to clinicians since it answers the question: 'How likely is it that this patient has the disease given that the test result is positive?' ").

The conversations reveal a course of conduct that involved Hailey orchestrating and directing sexual conduct for Appellant to perform upon himself, *see, e.g.*, Joint Appendix at 911-15, *United States v. Baas*, No. 19-0377 (C.A.A.F. Dec. 27, 2020) (penetrating his own anus with a cucumber and a bottle of lubricant on August 22, 2015), and giving Appellant more insidious instructions to perform sexual acts on his son. While Appellant was sometimes hesitant to carry out Hailey's instructions, he participated in her "game."

For example, in a conversation on March 29, 2016, accompanied by a one-way live-streamed video call, Hailey directed Appellant to sodomize GB:

> [Hailey:] lick his balls
>
> his little balls
>
> put him all in your mouth
>
> balls and dick
>
> . . . .
>
> lick his butt a little
>
> yes
>
> yes
>
> lay on you[r] back lay hi[m] on u
>
> so u can lick his ass
>
> and suck his dick a little
>
> yes
>
> . . . .
>
> use yo[ur] finge[r a lit]tle
>
> does he like that

show me

closer

. . . .

[put] lotion on yo[ur] dick

rub h[i]s dick too

with the l[o]tion

yes

on his ass a little

he li[k]es **[**8]** it

. . . .

slide your finge[r in] a [lit]tle

. . . .

use the tip of yo[ur] dick a little

just a little

u got him hard

. . . .

[App.:] Oh my god lol

. . . .

i kinda came

[Hailey:] I know

But not al[l the] way

The conduct continued for nearly ten more minutes, with Hailey directing Appellant to [***119]** put lotion on his son and rub himself in various ways against his son, and "go in him a little." These messages and the

accompanying video stream lasted over forty-five minutes, including a brief interruption where the call ended and was restarted.

Appellant and Hailey engaged in another conversation spanning from late the night of May 2, 2016, to the early hours of May 3, 2016:

> [May 2, 2016]
>
> [Hailey:] u in a dirty mood tonight
>
> after u eat
>
> [App.:] Lol ain't I always?
>
> [Hailey:] yes
>
> [App.:] Tell me what you're thinking
>
> [Hailey:] a little of [GB] then u cumming so good
>
> [App.:] Tell me all about it babe
>
> . . . .
>
> [May 3, 2016; approximately three hours later]
>
> [Hailey:] do u have the lotion
>
> [App.:] Yeah
>
> [Hailey:] get in your shorts
>
> . . . .
>
> take off the diaper
>
> kiss down him
>
> down his chest
>
> more
>
> he loves it
>
> his dick a little

. . . .

show all of him

get him very hard

show how hard he is

just the tip of it

After eleven minutes, the call was interrupted **[**9]** when Appellant's fellow marine came to his apartment and Appellant had to put GB to bed. Hailey repeatedly asked Appellant to wake GB, but Appellant declined:

[Hailey:] take [GB] with u

to your room

ok

[App.:] [GB] is asleep now

[Hailey:] I know put him in yo[ur] room

. . . .

check on him then move him

[App.:] He is asleep but if I pick him up

he will wake up

[Hailey:] move him slowly

try to ok

[App.:] No woman I'm not moving my sleeping child.

On May 8, 2016, Hailey texted Appellant to remind him that they "never did get to finish up from the other night." Appellant replied that they would have to proceed without GB because he was sleeping. Once

again Hailey requested that Appellant wake GB, but Appellant declined. The two exchanged similar texts the following day, with Hailey explaining she had just wanted Appellant to put his "mouth on him a little but don't wake him up," and Appellant responding that GB "sleeps on his belly and if I try to roll him over he will wake."

But on May 15, 2016, GB was awake when Hailey texted Appellant. The two then began a one-way video call that lasted around thirty minutes, with a brief interruption when the call stopped and was restarted. During this call, Hailey **[**10]** again directed Appellant to sexually abuse his son. For example:

> [Hailey:] try to get [your penis] in his mouth some
>
> tel[l] him to open his mouth up wider
>
> say open it big
>
> put him on your chest
>
> so you can suck him a little
>
> . . . .
>
> rub his dick
>
> then use your finger in his ass very tlly
>
> slowly
>
> suck him w[h]ile u do it
>
> go slowly
>
> not to[o] much
>
> use yo[ur] mouth on him
>
> . . . .
>
> put lotion on yo[ur]dick

yes

[p]ut his ass on yo[ur] dick

yes

go back and forth

[*120] yes

like t[ha]t

. . . .

hold him on u

[App.:] Have to hurry

[Hailey:] tight

. . . .

[App.:] Have to go

The conversation and video stream then ended abruptly. Judging from the chat history, this was the last time Appellant sexually abused GB at Hailey's direction.

On June 6, Appellant stated that he would no longer carry out Hailey's instructions on GB:

[Hailey:] do u want to cum . . . today

. . . .

and then with [GB] 2mrow

[App.:] No [GB] for a few weeks

[Hailey:] come on

just one more time

[App.:] No when I say something it's for a reason

Appellant's defense focused on two points: (1) that the Diatherix test was grossly unreliable and therefore GB's test result was a false positive, and (2) that even if Appellant carried out the acts described in these chats, he did so not **[**11]** to GB, but to GB's green teddy bear.

At closing, the parties focused mainly on the second point. The defense offered varying theories, each of which trial counsel disputed, to demonstrate that Appellant had not abused GB: the conversations were simply sexual fantasies, the acts were performed not on GB but on a teddy bear, the whole thing was a set up perpetrated by Hailey. Defense counsel also dedicated a large share of his closing to the Diatherix test result, emphasizing its unreliable nature. Trial counsel asserted that the test was reliable and that the positive result "corroborates the overwhelming digital forensic evidence that the government has presented in this case." But he clarified that GB's test result was neither dispositive of the gonorrhea diagnosis, nor necessary to establish Appellant's guilt on the rape charges: "This test is nothing more than a screening test. It's some evidence—some additional evidence for you to consider. And the case does not rise or fall on gonorrhea."

The members found Appellant guilty on the charges related to the conduct on March 29, 2016, and May 15, 2016, but found him not guilty of the specifications related to the conduct on May 2, 2016. **[**12]**

The NMCCA affirmed the lower court, ruling that the Diatherix lab report was not testimonial and that Appellant therefore was not denied his Sixth

Amendment right to confrontation. *Baas*, 2019 CCA LEXIS 173, at *34, 2019 WL 1601912, at *10-11. The NMCCA also determined that the military judge correctly applied the *Daubert* factors in deciding whether to admit the Diatherix test and the related expert testimony. 2019 CCA LEXIS 173, at *19, 2019 WL 1601912, at *5-7.

II. Discussion

A. The Confrontation Clause

Appellant argues that the Diatherix test result was testimonial because (1) Dr. Kafer, the requesting physician, acted on behalf of law enforcement to obtain the test since social services—a part of law enforcement—had referred GB's mother to her for testing; and (2) Diatherix must have known the testing of a rectal swab from a one-year-old for gonorrhea was part of a criminal investigation and was therefore intended for use at trial. We disagree.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This clause permits the admission of "testimonial statements of a witness absent from trial . . . only where the declarant is unavailable, and . . . the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *see United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011). This Court reviews de novo whether statements are **[**13]** testimonial for

purposes of the Sixth Amendment. *United States v. Squire*, 72 M.J. 285, 288 (C.A.A.F. 2013).

[*121] In determining whether a statement is testimonial, this Court asks "whether it would 'be reasonably foreseeable to an objective person that the purpose of any individual statement . . . is evidentiary,' considering the formality of the statement as well as the knowledge of the declarant." *United States v. Katso*, 74 M.J. 273, 279 (C.A.A.F. 2015) (quoting *United States v. Tearman*, 72 M.J. 54, 58 (C.A.A.F. 2013)) (collecting cases). "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the [statement] was to 'creat[e] an out-of-court substitute for trial testimony.' " *Ohio v. Clark*, 576 U.S. 237, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015) (second alteration in original) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)). The "statement" at issue is the lab report from Diatherix, and the declarant therefore is Diatherix and its employees who conducted the test. Thus, our focus in this inquiry here is on the purpose of the statement in the Diatherix test result, and not on the purpose others—such as the treating physician—may have had in facilitating that statement.[6] *See Sweeney*,

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[6] We recognize that we may consider the purpose non-declarants had in facilitating a statement when the declarant knows of that purpose. After all, "[f]ine distinctions based on the impetus behind the testing and the knowledge of those conducting laboratory tests" can be relevant in determining whether the declarant's purpose in making a statement is evidentiary. *United States v. Blazier* (*Blazier I*), 68 M.J. 439, 442 (C.A.A.F. 2010) (quoted in *Sweeney*, 70 M.J. at 302). The declarant had no such knowledge in this case.

70 M.J. at 302 ("[T]he focus has to be on the purpose of the statements in the drug testing report itself, rather than the initial purpose for the urine being collected and sent to the laboratory for testing.").

Here, the totality of the circumstances shows that **[**14]** the primary purpose of the test was diagnostic and not evidentiary. Although it is true that law enforcement's involvement in the process could change the analysis, *see United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007), there was no such involvement here. While Appellant seeks to cast Dr. Kafer as an agent of law enforcement, the evidence is to the contrary. Dr. Kafer assessed GB for child sexual abuse, but the sample was submitted to Diatherix to assess whether he had contracted a sexually transmitted infection in order to treat it. Tellingly, when Dr. Kafer received the lab results back from Diatherix on June 18, she arranged for a confirmatory test and treatment.

Although NCIS received the test results shortly after the test was run, SA Morgan testified at trial that NCIS had no interaction with Dr. Kafer at all.[7] As in *Squire*, while Dr. Kafer was aware of the possible law enforcement related consequences of the exam and test results, she was acting as a medical provider, not as an arm of law enforcement. 72 M.J. at 290-91 (doctor's "medical specialty and experience, his status

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[7] There is some dispute as to whether GB's mother brought him to Dr. Kafer at social services' direction. Even if social services had directed GB's mother to take him to Dr. Kafer, the doctor's actions—discussed below—show that her primary concern was GB's medical treatment, and not whatever interest may have motivated social services.

as a mandatory reporter, and his completion of state mandated forms while conducting the examination" did not result in de facto law enforcement involvement).

Thus, any alleged **[**15]** law enforcement involvement in directing GB's mother to Dr. Kafer had no effect on her primary purpose in ordering the test. Rather, the test was ordered from a private lab by a private physician who, upon receiving the results, prescribed a confirmatory test and treatment by another private facility. This is a far cry from the facts in *United States v. Gardinier*, 65 M.J. 60, 66 (C.A.A.F. 2007), where we found the victim's statements to a sexual assault nurse examiner (SANE) testimonial because the SANE examined the victim several days after her initial medical examination and the sheriff's office had arranged and paid for the SANE's examination.

Further, in an apparent attempt to demonstrate that NCIS had not followed the proper procedure to get a trustworthy test result for GB, during its cross-examination of the NCIS agent, defense counsel made much of [***122]** the fact that Dr. Kafer's examination was medical and not forensic:

> [DC:] There was no forensic examination?
>
> [NCIS:] There was an examination by a licensed medical practitioner.
>
> [DC:] Right. That would be a medical examination, correct?
>
> [NCIS:] That was an examination. Yes.

In light of the record, defense counsel's characterization of Dr. Kafer's examination as medical—not forensic—seems apt.

[16]** Appellant also argues that because the gonorrhea swab came from an infant, the people who ordered and administered the test must have been aware that the results would likely be used in a subsequent criminal prosecution and their primary purpose was therefore to create an "out-of-court substitute for trial testimony." *Clark*, 135 S. Ct. at 2180. First, Diatherix expressly refuted that assertion through the Article 39(a), UCMJ, testimony of Dr. Stalons. Second, even if Diatherix knew that the test result might be used in court, "that knowledge alone does not transform what would otherwise be a statement for the purpose of medical treatment into a testimonial statement," *Squire*, 72 M.J. at 290, one created as an "out-of-court substitute for trial testimony." *Clark*, 135 S. Ct. at 2180.

Finally, as the CCA noted, the test result itself lacks any indicia of the formality or solemnity characteristic of testimonial statements:

> [T]here is no sworn attestation on the Diatherix lab report. Nor is there a statement on the lab report indicating the tests results were intended for evidentiary purposes. In fact, the Diatherix lab report contains no signatures, was not accompanied by any chain of custody documentation, and merely consists of a single page identifying the patient's name, the "ordering physician," the date the specimen was collected, received, and reported, the organisms tested for, and an "X" in either a column labeled

> "DETECTED" or "NOT DETECTED," for each organism.

Baas, 2019 CCA LEXIS 173, at *33, 2019 WL 1601912, at *11; *cf. Tearman*, 72 M.J. at 61 (internal documents "lack[ed] any indicia of formality or solemnity that, if present, would suggest an evidentiary purpose"); *see contra Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (affidavit-like "certificates of analysis" **[**17]** created to serve as evidence at trial were testimonial). This lack of formality is likely due, in part, to the fact that Diatherix does not typically do forensic testing and did not know the test would be used in court.

The surrounding circumstances indicate that Diatherix's primary purpose in testing the sample was diagnostic and not evidentiary. Therefore, the Diatherix test result was not testimonial and its admission did not violate Appellant's Sixth Amendment right to confrontation.

B. *Daubert*

Appellant argues that the military judge abused his discretion in admitting the Diatherix test result, based on an erroneous application of the factors in *Daubert*, 509 U.S. at 593-94. We do not reach the question whether the military judge misapplied these factors because, even assuming that he did, Appellant was not prejudiced by the test's admission.

The parties agree that the claimed *Daubert* error is nonconstitutional in nature. Under Article 59(a), UCMJ, the "finding or sentence of a court-martial may

not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a) (2012). "For nonconstitutional evidentiary errors, the test for prejudice 'is whether the error **[**18]** had a substantial influence on the findings.' " *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (quoting *United States v. Fetrow*, 76 M.J. 181, 187 (C.A.A.F. 2017)). The Government bears the burden of demonstrating that the admitted evidence was not prejudicial. *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014). "In conducting the prejudice analysis, this Court weighs: (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." *Kohlbek*, 78 M.J. at 334 (citations omitted) (internal quotation marks omitted). [***123]** Based on the entire record, *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001), we conclude that the admission of the Diatherix test result did not have a "substantial influence on the findings."

1. The Strength of the Government's Case

The Government's case was strong. Hailey's instructions to Appellant during the Skype chat served for members as a contemporaneous narration of the live-streamed Skype video she viewed. *See supra* pp. 6-9. Nor did Appellant claim, in his interviews with NCIS or otherwise, that the messages were either altered or otherwise not representative of his conversations with Hailey. Appellant and Hailey clearly coordinated the Skype chats involving GB at times he would have access to GB, and on several

occasions Appellant explained to her that he could not include GB because the **[**19]** child was with his mother. The lurid and specific directions, the descriptive details, the remarks regarding the effects of the actions upon Appellant's and GB's anatomy, Appellant's expression of sexual release, and the length of time over which the admitted chats occurred alone provided sufficient evidence for the members to find Appellant guilty.

Further, Appellant himself admitted to NCIS that he performed the actions described in the messages, albeit that he did so not on his son, but on GB's teddy bear—whom he claimed the two referred to using GB's name, though everyone else knew the bear as "Scout." Appellant gave this same implausible explanation to social services and his roommate's boyfriend. But the Government's witnesses and admitted evidence were strong proof that the victim of Appellant's actions was GB and not his teddy bear.

For example, Appellant sent pictures of GB in conjunction with the exchanges to show Hailey that GB would be present for a video call. When Hailey repeatedly demanded that Appellant wake GB to perform sexual acts on him, Appellant responded: "No woman I'm not moving my sleeping child." Days later, when Hailey requested that Appellant wake GB "to finish **[**20]** up from the other night," Appellant declined because GB "will be mad because he is hungry." Taking these statements at face value, it is doubtful that Appellant made them out of concern for a teddy bear's sleep, hunger, or anger. In addition, there are several points during the calls when Hailey described GB's physical reactions to Appellant's

abuse, and instructed Appellant to adjust the camera so that she could see GB better and not miss Appellant carrying out her direction, for example: "move the cam[era] over so I can see"; "move the cam[era] down some on his hole"; "lower[ ]the cam[era] a [lit]tle . . . show between his legs."

Nor could the Government find any physical evidence to corroborate Appellant's explanation. NCIS sent the toy to the U.S. Army Criminal Investigative Laboratory (USACIL) for testing because some of the messages indicated that Appellant had ejaculated on his son's stomach. Forensic testing revealed no semen on the teddy bear, and no evidence that it had been washed. Moreover, as the NCIS agent noted during Appellant's interview: "Teddy bear's [sic] mouths can't fit a penis or a ball or a testicle, okay? Teddy bear's [sic] don't have penises that you can put **[**21]** your mouth on, or a penis that you can stroke, or, you know, they don't have any of that."

Finally, one Government witness testified that Appellant was "frantic" when he learned his phone was in others' hands. Appellant's roommate testified that Appellant went to his girlfriend's house and "bang[ed] on the door asking where his phone was. . . . The tone of his voice sounded very frantic, concerned." The members could very well have attributed this reaction to a concern that the missing phone contained evidence of wrongdoing.

In all, the comprehensive digital forensic evidence, the testimony of the Government's witnesses, and Appellant's own statements to NCIS and others—which together rendered Appellant's "teddy bear"

explanation improbable—made the Government's case strong even without GB's test result.

2. The Strength of the Defense Case

Conversely, the Appellant's case at trial was weak. His principal defense was that he had performed the described acts on GB's green teddy bear and that any reference to [***124]** GB in the messages was in fact to that teddy bear—a bear whose actual name was Scout, the name emblazoned on its chest. As discussed above, *supra* pp. 16-17, this defense was improbable. Appellant's **[**22]** explanation of Hailey's instructions strains credulity: descriptions of the victim's concerns of sleep and hunger, together with a lack of any physical evidence that a teddy bear was the object of Hailey's instructions, belie his defense. As a result, the defense's case was weak. *Cf. United States v. Hall*, 66 M.J. 53, 55 (C.A.A.F. 2008) (describing the appellant's defense as weak because the alternative theories advanced at trial were implausible).

3. The Materiality and Quality of the Evidence in Question

"When assessing the materiality and quality of the evidence, this Court considers the particular factual circumstances of each case." *United States v. Washington*, __ M.J. __ (8) (C.A.A.F. 2020) (listing considerations this Court has used in evaluating these factors). On the one hand, the Diatherix test result, offered in conjunction with Appellant's positive test result for gonorrhea, was physical evidence corroborating the rape specifications. "Standing alone,

such [evidence] might well have been determinative." *Hall*, 66 M.J. at 56.

The vast majority of the Government's case-in-chief, though, focused not on gonorrhea, but on Appellant's statements to NCIS and others regarding the green teddy bear defense, the USACIL tests for semen on the green teddy bear, and the digital forensic analysis that yielded the texts **[**23]** that revealed the conduct Appellant engaged in at Hailey's direction. Further, the materiality of the Diatherix test was significantly diminished at trial. The defense expert testified that Diatherix's failure to follow its own laboratory procedures, the clinic's inability to confirm the positive result with a culture and properly preserve the specimen, and the unreliable nature of the Diatherix test when used for samples from prepubescent boys made this "one of the worst managed cases that [she had] dealt with." She added that because of this low prevalence of gonorrhea among prepubescent boys, the test's "positive predictive value was essentially zero," meaning that "the test was useless in [GB's] situation." The members sought clarification on this point through two different questions to the defense expert. The first asked "At what prevalence level is the [positive predictive value] considered too low for the results of a test on an individual to be considered reliable?" In response, Dr. Hammerschlag opined, inter alia, that the NAAT "in this situation—especially since it's not FDA cleared, and we have no idea about its performance—should not be used." Another member then asked: **[**24]** "Is it your opinion that the results of a NAAT for rectal swabs in young males are invalid due to a lack of data when used for identification of

STIs?" Dr. Hammerschlag answered: "I wouldn't exactly use the word 'invalid.' I think it's more interpreted with caution. That they more likely frequently may be invalid; and that's why we have to do confirmation." Both members responded in the affirmative when the military judge asked whether these responses answered their questions. Based on these questions and answers, it is likely that the defense's attack on the reliability of the test influenced the weight the members gave that piece of evidence in their deliberations.[8]

The Government's own expert, Dr. Hobbs, readily agreed that the test sample was mismanaged, that the test result was not reliable in children, that it "was not appropriate to use this test without confirmatory testing," and, damning with faint praise only that she "found a reasonable chance that the positive test in this case might represent a true positive." Dr. Hobbs's testimony on cross-examination revealed a host of concerns she harbored as to the test result in this case. First, Diatherix failed to follow its own protocols **[**25]** when it accepted the rectal sample without prior authorization, conducted a test on an alleged sexual abuse victim, and utilized the test with a child. Second, she was concerned that none of the CDC guidelines were followed and appeared unaware of the fact that the test had not been subject to peer review. And, finally, she testified that the potential **[*125]** for cross-reactivity—that the test could identify other bacteria as gonorrhea—was "a

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[8] None of this is to say that the military judge erred when he admitted the test result, however. As noted above, *supra* p. 14, we are agnostic on that issue.

significant limitation for all NAATs," especially for rectal samples from children. Thus, the Government's own expert expressed serious reservations about the reliability of the Diatherix test result.

Further, although the Government at closing argued that the test result corroborated the digital forensic evidence, it clearly also argued that the test result was not dispositive of any issue—whether GB in fact had gonorrhea, whether Appellant raped GB, or whether Appellant transmitted gonorrhea to GB. In fact, the Government emphasized that the test result itself was only a presumptive positive—one that required confirmatory testing, which did not take place. The Government's sparing use of the test result in its opening and closing statements shows that **[**26]** trial counsel understood that evidence was not as probative of Appellant's guilt as were the messages with Hailey or his admission to NCIS. *Cf. United States v. Brooks*, 26 M.J. 28, 29 (C.M.A. 1988) (finding harmless error in part because the "trial counsel did not refer to the objectionable evidence in his argument"). We are persuaded that the non-conclusive test result, whose reliability was questioned by expert witnesses for both parties, was not qualitatively significant to the members' findings of guilt.

Appellant nonetheless suggests that the members' mixed verdict shows the admission of the test result was prejudicial. In his view, acquittal of the specifications alleged as on or about May 2, 2016, show that the members viewed the positive test result—determined from a rectal sample—as the key piece of evidence because this was the only

conversation in which Appellant and Hailey did not discuss anal penetration of GB by Appellant. We disagree.

As an initial matter, the specification charged conduct on or about May 2. No "conduct" occurred until May 3, and neither counsel requested, nor did the military judge offer, an instruction that as a matter of law "on or about" could include May 3. More importantly, even if the members considered **[**27]** the May 3 conduct, that conduct was quantitatively and qualitatively different than that on March 29 and May 15. First, the portion of the Skype video call describing conduct on May 3 lasted eleven minutes, as compared to forty-five minutes on March 29, and twenty-five minutes on May 15. Second, qualitatively, the conduct on May 3 did not clearly and unequivocally describe *rape* of a child, while the conduct on March 29 and May 15 did.

The military judge instructed the members that in order to find Appellant guilty of rape of a child, they had to be convinced beyond a reasonable doubt that Appellant "committed a sexual act upon GB." "Sexual act" was defined as "the *penetration*, however slight, of the . . . anus or mouth by the penis," or by any other body part or object if done with the intent to "arouse or gratify the sexual desire of any person." (Emphasis added). In order to find Appellant guilty of the pornography specifications, the members had to find that Appellant produced and distributed "a video of a minor engaging in sexually explicit conduct." The military judge defined "sexually explicit conduct" as, inter alia, "actual or simulated . . . sexual intercourse or sodomy, including **[**28]** genital-genital, oral-genital, anal-genital, or oral-anal" sodomy.

The trial counsel in his closing argued that "on May 2, 2016 [Appellant] suck[ed] his son's penis." Although Hailey directed Appellant to "kiss down him . . . his dick a little," she did not clearly direct him in that conversation to penetrate GB's mouth with his penis—in stark contrast to the clear directions on March 29, 2016, and May 15, 2016, *see supra* pp. 6-7, 9, to sodomize his son both orally and anally. Similarly, a close reading of that conversation could lead the members to conclude that Appellant did not produce or distribute child pornography, as defined in the military judge's instructions, because it did not unequivocally describe penetration of any kind.

In sum, the members were directed to find Appellant guilty only if they were convinced of guilt beyond a reasonable doubt. For all the reasons stated above, we disagree that the test result, obtained from GB's rectal sample, was the substantial reason the members found Appellant guilty of the specifications related to March 29 and May 15, and not guilty of the specifications for conduct on [***126]** May 2. We find it far more likely that the members listened carefully to the military **[**29]** judge's instructions on these charges, weighed the evidence, and applied the definitions precisely in their deliberations.

Although the admission of the test result may have had some influence on the findings, we are persuaded that, based on the entire record, it did not have a "substantial influence on the findings." *Kohlbek*, 78 M.J. at 334. Even if the military judge erred in admitting the test result, therefore, Appellant suffered no prejudice.

III. Conclusion

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Concur by: MAGGS (In Part)

Concur

Judge MAGGS, concurring in part and concurring in the judgment.

I concur with the Court's opinion except part II.B., and I concur in the Court's judgment. Appellant asserts before this Court, as he did before the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA), that the military judge abused his discretion in admitting a laboratory test showing that Appellant's infant son had gonorrhea. He contends that the military judge either misapplied or failed to consider six factors identified in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-95, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), for determining whether expert testimony and scientific evidence are sufficiently reliable and relevant to be admitted.[1] The

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[1] We have described the *Daubert* factors in slightly different ways in our cases. *Compare United States v. Henning*, 75 M.J. 187, 191 n.15 (C.A.A.F. 2016), *with United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007). The *Daubert* factors challenged in this case are: (1) whether the theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential error rate; (4) the existence and maintenance of standards controlling the technique's operation; (5) the degree of acceptance within the relevant scientific community; and (6) whether the probative value of the evidence is substantially outweighed by the danger

NMCCA disagreed, rejecting **[**30]** Appellant's contentions point by point. I agree with the NMCCA's analysis. I would affirm its judgment on the basis that the evidence was properly admitted under *Daubert*, rather than on the alternative grounds now adopted by the Court.[2]

I. The *Daubert* Factors

The Supreme Court held in *Daubert* that a trial judge has a "gatekeeping role," requiring the judge to

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of unfair prejudice, confusion of the issues, or misleading the jury. *See Daubert*, 509 U.S. at 593-95 (discussing these subjects). Military judges also must consider additional factors identified in *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993). In this case, however, Appellant has generally limited his arguments to the *Daubert* factors listed above.

[2] The Court assumes (without deciding) that the military judge abused his discretion by admitting the evidence in question but concludes that any error was harmless. I do not join the Court on this point because if admission of the evidence was in error, I do not believe that the Government could meet its burden of showing that the error did not have a substantial influence on the findings or the sentence. *See United States v. Young*, 55 M.J. 193, 197 (C.A.A.F. 2001) (considering whether erroneously admitted evidence had a substantial influence on the findings and sentence). The laboratory test was the only physical evidence to corroborate the Government's argument, based on the Skype messages, that Appellant penetrated his infant son's anus with his penis. These messages consisted almost entirely of instructions from "Hailey Burtnett" rather than descriptions of what she saw or admissions by Appellant regarding what he did, and were ambiguous regarding the specific issue of whether Appellant penetrated his son's anus with his penis on the dates in question. In addition, the evidence that Appellant transmitted gonorrhea to his infant son while raping him likely had a substantial influence on Appellant's sentence.

"ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589, 597. The Supreme Court recognized that "[m]any factors will bear on the inquiry" of whether scientific evidence is reliable. *Id.* at 593. The Supreme Court discussed several of these factors without "presum[ing] to set out a definitive checklist or test." *Id.* When an appellant challenges admission of scientific evidence, this Court first determines de novo whether a military judge fulfilled this gatekeeping function. *United States v. Flesher*, 73 M.J. 303, 311 (C.A.A.F. 2014). If "the *Daubert* framework is properly followed, this court 'will not overturn the ruling unless it is manifestly **[*127]** erroneous.' " *Henning*, 75 M.J. at 191 (quoting *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999)).

In this case, the military judge conducted a *Daubert* hearing and issued written findings of fact and conclusions of law. In his ruling, the military **[**31]** judge properly identified the relevant rules of evidence, the *Houser* factors, and the *Daubert* factors, and discussed the application of these rules and factors to the facts of the case. Appellant argues that the military judge did not specifically discuss all of the *Daubert* factors, but the Supreme Court and this Court have made clear that the inquiry is flexible, not mandating consideration of each factor. *Daubert*, 509 U.S. at 594; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); *Sanchez*, 65 M.J. at 149. Accordingly, I agree with the NMCCA that the military judge understood and fulfilled his gatekeeping role.

The issue then becomes whether the military judge's ruling was "manifestly erroneous." *Henning*, 75 M.J. at 191 (internal quotation marks omitted) (quoting *Griffin*, 50 M.J. at 284). Appellant makes six challenges to the military judge's application of the *Daubert* factors. Considering each of these challenges in turn, I agree with the NMCCA's conclusion that the military judge's rulings were not manifestly erroneous.

Appellant's first challenge concerns the *Daubert* factor requiring trial judges to consider "whether the theory or technique . . . can be (and has been) tested." 509 U.S. at 593. The military judge concluded that this factor favored admission because the laboratory test had been confirmed by both a validation study and **[**32]** by the results of blind samples sent to the laboratory. Appellant does not dispute these facts but contends that the laboratory test had never been confirmed using child rectal samples. The military judge recognized this distinction but reasoned that the validation study and the results of the blind samples confirmed "the general scientific principles behind the test" even if the data were not exactly the same. The NMCCA agreed with the military judge on this point, and so do I. Discussing the *Daubert* factors in *General Electric Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), the Supreme Court recognized that experts "commonly extrapolate from existing data" and that this practice is acceptable unless "there is simply too great an analytical gap between the data and the opinion proffered." Appellant has not convincingly explained why any gap is too great in this case. His principal arguments are only that one expert "noted rectal gonorrhea creates

unique issues for gonorrhea tests" and that the Centers for Disease Control and Prevention (CDC) require confirmatory testing by culture for child rectal samples.

The second *Daubert* factor challenged by Appellant is "whether the theory or technique has been subjected to peer review and publication." 509 U.S. at 593 **[**33]** . The military judge concluded that this factor favored admission. Even though the specific test used in this case has not been subjected to peer review, the military judge found that other tests using similar science have been. Appellant, however, argues that peer review of similar tests is not sufficient. He asserts that "peer review must be specific to the particular test used by the laboratory." Like the NMCCA, I disagree with Appellant. Such exactness is not required. The Supreme Court has explained that *Daubert's* "list of factors was meant to be helpful, not definitive" and that it "might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist." *Kumho Tire Co.*, 526 U.S. at 151. Given that peer review is not required at all, the military judge did not commit manifest error in concluding that peer review of tests that rely on similar science weighed in favor of admission.

The third *Daubert* factor challenged by Appellant is the "known or potential error rate." 509 U.S. at 594. As this factor was perhaps the most disputed at trial, it is worth quoting the relevant portion of the military judge's written findings of fact and conclusions of law.

The military judge assessed what three expert witnesses said [***128]** about the laboratory test, which had been conducted by Diatherix Laboratories Inc., asserting:

> [T]he error rate . . . is acceptable. Dr. Stalons testified Diatherix **[**34]** had a 100% accuracy rate in testing for gonorrhea. Dr. Hobbs testified that Diatherix's test produced scientifically valid results. However, according to both Dr. Hobbs and Dr. Hammerschlag, test results in the pediatric population are considered less reliable. Dr. Hammerschlag testified that the PPV for this test as used was either 50% or lower, or 30%.[3] The court finds that the likelihood of a false positive associated with the testing population does not undermine the scientific principles upon which the test is based. It was clear from Dr. Hobbs and Hammerschlag that there is a potential for a false positive. However, it was not clear what the actual likelihood might be. Especially considering that Dr. Hobbs did not attach any quantitative value to the possibility and Dr. Hammerschlag's inconsistent testimony regarding the PPV.

In challenging the military judge's conclusions, Appellant asserts that to be reliable, a test "must at least establish that a test result is at least more likely than not to be correct." He argues that in assessing the reliability of the laboratory test, the military judge

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[3] PPV stands for positive predictive value. In a footnote on this point, the military judge explained: "A PPV of 30% means there is a 30% chance the test is correct (i.e. 70% chance it is incorrect)."

erred because he relied on the accuracy of the test rather than the positive predictive **[**35]** value (PPV) of the test. He asserts that the test's PPV was so low in this case that the test did not meet the minimum requirement for reliability. He explains that "Dr. Hammerschlag testified that the 'positive predictive value' was under 50%, meaning that any positive result was no more accurate than a coin flip."

Appellant's argument ignores the military judge's contrary findings and conclusions. As the quotation above shows, the military judge considered both the test's accuracy and its PPV. Although Appellant draws on Dr. Hammerschlag's testimony, the military judge found this expert witness was inconsistent and was contradicted by another expert witness. I assume that a test with a known error rate greater than 50% is not reliable. But the military judge did not find that this test had a known error rate that was greater than 50%. Instead, the military judge found that the actual rate of false positives "was not clear." This finding of fact was not clearly erroneous. And we have repeatedly held that an unknown error rate does not automatically make a scientific test inadmissible. *See Sanchez*, 65 M.J. at 151 ("Nothing in the precedents of the Supreme Court or this Court requires that a military judge **[**36]** either exclude or admit expert testimony because it is based in part on an interpretation of facts for which there is no known error rate or where experts in the field differ in whether to give, and if so how much, weight to a particular fact in deriving an opinion."); *United States v. Youngberg*, 43 M.J. 379, 386 (C.A.A.F. 1995) (finding that military judge did not commit plain error in admitting scientific evidence, despite the

appellant's complaint that there was no evidence of error rates); *United States v. Bush*, 47 M.J. 305, 312 (C.A.A.F. 1997) (finding that military judge did not abuse his discretion in admitting hair evidence even where there was no evidence showing error rate for hair-analysis procedure). Based on all the testimony considered, the military judge's conclusion that the error rate was acceptable was not manifestly erroneous.

The fourth *Daubert* factor challenged by Appellant is "the existence and maintenance of standards controlling the technique's operation." 509 U.S. at 594. The military judge cited this factor but did not discuss it. Appellant now argues that the testing laboratory failed to follow two of its own policies. One policy was that users generally must obtain preapproval before submitting anything other than an "endocervical swab, vaginal swab, ThinPrep Pap solution, urethral **[**37]** swab and urine" to be tested. Under this policy, the physician who submitted the rectal sample to the laboratory should have obtained preapproval but he apparently did not. Another policy was that the laboratory [**129]** generally did not conduct tests for the evaluation of suspected sexual abuse.

The NMCCA rejected Appellant's concerns about these policies, asserting that the military judge was not required to decide whether every *Daubert* factor was satisfied. I agree with this point, especially because it is not clear that Appellant challenged the fourth *Daubert* factor before the military judge. Appellant also has not satisfactorily explained why a violation of the first policy would undermine the

reliability of the laboratory test. Nor has Appellant established a violation of the second policy. The test in fact was done for diagnostic purposes, not for the evaluation of suspected sexual abuse.

The fifth *Daubert* factor challenged by Appellant is the "degree of acceptance within [the relevant scientific community]." 509 U.S. at 594 (internal quotation marks omitted) (citation omitted). The military judge found that this factor favored admission of the evidence because the CDC generally allow tests based on **[**38]** similar science to be used for detecting sexually transmitted infections. Appellant, however, argues that using this kind of test "on prepubescent child swabs and without confirmatory testing is not accepted in the scientific community." The distinction that Appellant identifies is correct but Appellant has offered no persuasive reasons that this distinction makes the test unreliable. In addition, Appellant is again insisting on more than what the Supreme Court has required. The Supreme Court made clear in *Daubert* that a " 'reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.' " *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

The sixth *Daubert* factor challenged by Appellant is whether the "probative value [of the evidence] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id.* at 595 (internal quotation marks omitted) (citation omitted). This factor comes from Federal Rule of Evidence 403, which corresponds to Military

Rule of Evidence 403. *Id.* The military judge considered this issue carefully. He explained on the record his conclusion that "the test results serve **[**39]** to corroborate the allegations that the accused sexually assaulted his son." He concluded that this probative value substantially outweighed any unfair prejudicial effect, explaining that Appellant could use his expert witnesses and cross-examination to ensure that the members gave proper weight to the test results. Although Appellant disagrees, this is the kind of decision for which military judges are entitled to considerable deference when they explain their reasoning. I agree with the NMCCA that the military judge did not commit manifest error on this point.

II. Conclusion

The Supreme Court has explained that the objective of *Daubert* is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co.*, 526 U.S. at 152. That is what happened in this case. The Government sought to introduce nothing more than the results of a laboratory test that were actually used and relied on by medical professionals to diagnose a child so that he could receive appropriate treatment.

The Supreme Court in *Daubert* did not describe an admissibility **[**40]** test that is so precise and technical that any gap, conflict, or ambiguity that arises when considering the various factors requires

exclusion of the evidence. The Supreme Court also did not describe a test requiring every decision by a trial judge to be scrutinized in all its minutiae. On the contrary, the Supreme Court has emphasized that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* And while the military judge has this flexibility in performing his gatekeeping function, if the judge decides to admit scientific evidence, counsel remain free to challenge its weight—as Appellant's attorneys ably did in this case. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful [***130]** instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

In this case, the military judge responsibly considered the *Daubert* factors before determining that the test results that the victim's physician had actually relied on were reliable. For all the reasons above, the military judge performed his gatekeeping function **[**41]** and did not make any manifest error.

UNITED STATES OF AMERICA
Appellee

v.

NICHOLAS S. BAAS,
CORPORAL (E-4), U.S. MARINE CORPS
Appellant

United States Navy-Marine Corps Court of Criminal Appeals

March 4, 2019, Argued; April 15, 2019, Decided

NMCCA 201700318

Reporter

2019 CCA LEXIS 173 *; 2019 WL 1601912

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: [***1]** Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Lieutenant Colonel Forrest W. Hoover, USMC. Sentence adjudged on 22 June 2017 by a general court-martial panel consisting of officer and enlisted members. Sentence approved by the convening authority: reduction to E-1, total forfeiture of pay and allowances, confinement for 15 years, and a dishonorable discharge.

Counsel: For Appellant: Lieutenant Daniel E. Rosinski, JAGC, USN (argued).

For Appellee: Lieutenant Kurt W. Siegal, JAGC, USN (argued); Captain Brain L. Farrell, USMC (on brief).

Judges: Before HUTCHISON, TANG, and LAWRENCE, Appellate Military Judges. Senior Judge HUTCHISON delivered the opinion of the Court, in which Judge TANG and Judge LAWRENCE joined.

OPINION OF THE COURT

HUTCHISON, Senior Judge:

A general court-martial convicted the appellant, contrary to his pleas, of conspiracy,[1] making a false official statement, two specifications of rape of a child, two specifications of producing child pornography with the intent to distribute, and two specifications of distributing child pornography, in violation of Articles 81, 107, 120b, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 907, 920b, and 934 (2016).[2] The members convicted the **[*2]** appellant of raping his two-year-old son on two separate occasions and live-streaming the sexual acts on his cell phone to

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[1] The appellant was charged with two specifications of conspiracy—one alleging that he conspired to commit rape of a child and the other alleging that he conspired to produce and distribute child pornography. After the members returned guilty verdicts for both conspiracy specifications, the military judge consolidated the specifications into a single specification. *See* Record at 893-94.

[2] The members acquitted the appellant of an additional specification each of rape of a child, production of child pornography, and distribution of child pornography.

an unknown co-conspirator via the video chatting application, Skype.[3]

On appeal, the appellant raises eight assignments of error: (1) The military judge abused his discretion by admitting a laboratory test indicating the appellant's son tested positive for gonorrhea; (2) the military judge abused his discretion by failing to either suppress the positive gonorrhea test or to abate the proceedings after the laboratory and the hospital that treated the appellant's son destroyed the specimens, preventing a confirmatory test; (3) admission of the laboratory test results and related expert testimony violated the appellant's Sixth Amendment right to confrontation; (4) admission of the Skype text messages from the appellant's alleged co-conspirator violated the appellant's Sixth Amendment right to confrontation;[4] (5) the Article 120b, UCMJ, specifications fail to state an offense because the government failed to allege a specific sexual act, depriving the appellant of his constitutional rights to notice and protection against double jeopardy; (6) the trial defense counsel were ineffective for failing **[*3]** to challenge the government's failure to expressly allege a specific sexual act in each of the Article 120b, UCMJ, specifications; (7) the appellant's convictions for rape

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[3] Skype is a telecommunications application that provides video chat, instant messaging, and voice calls between computers, tablets, and mobile devices via the Internet. *See* Record at 716 ("Skype is a communication package that allows you to do . . . voice, audio, and chat messaging. The video is streaming, so you can't . . . save it . . . from within the Skype program.").

[4] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

of a child, conspiracy, and false official statement are factually insufficient; and (8) the appellant's convictions for producing and distributing child pornography and conspiracy are legally and factually insufficient.[5] We find no prejudicial error and affirm.

I. BACKGROUND

The appellant married TB in December 2013, and their son, GB, was born the following August. In October 2015, the appellant and TB separated and agreed to share custody of GB, with the child splitting time between his parents' homes. In June 2016, the appellant's new girlfriend, KM, suspected the appellant was cheating on her and looked through the appellant's cell phone while he was sleeping. After scrolling through various applications, KM opened the Skype application and found several instant messages between the appellant and a user named "Hailey Burtnett." In these messages, "Hailey Burtnett" directed the appellant, in graphic detail, to perform various sexual acts on GB, and, from the context of the messages, the appellant appeared **[*4]** to comply. Disgusted with what she read, KM took the appellant's phone, woke his roommate, AF, showed her the messages, and the two hastily left the appellant's apartment. KM and AF took the phone to

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[5] The appellant contends his conviction for conspiring to produce and distribute child pornography is both legally and factually insufficient, while his conviction for conspiracy to commit rape of a child is only factually insufficient. *See* Appellant's Brief of 21 May 2018 at 3. Although the military judge consolidated the conspiracy specifications into a single specification, *see supra* note 1, we will analyze each specification separately.

AF's boyfriend, a fellow Marine, who advised KM to turn the phone in to the appellant's chain of command.

After the appellant's chain of command was notified, they contacted the Naval Criminal Investigative Service (NCIS), and the appellant was apprehended and subsequently interrogated by Special Agent CM. During the interrogation, the appellant denied ever inappropriately touching his son and claimed that "Hailey Burtnett" was a friend he met when he was a sophomore in high school in Alabama and that she now lived in Clearwater, Florida. The appellant explained that the sex acts described in their messages were simply fantasy and that, in fact, he performed the sex acts detailed in Hailey's messages on GB's green teddy bear:

> Anyways, this girl, she's weird, kinky, and she liked to talk like that. Well, [GB] had this little, green, teddy bear, and there was one point where she looked at it and she said, "Can you dress him up?" So this little, green, like, teddy bear—it talks. And I can tell **[*5]** you where it's at right now. But, I would dress him up, put a diaper on it and all that good stuff. And then she would, like, ask me to remove his clothing items and all that good stuff. And do weird stuff to it.[6]

The appellant admitted to Special Agent CM that the video chatting was only one-way; he would live-stream from his end, but he never saw "Hailey Burtnett" on

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[6] Prosecution Exhibit (PE) 10; Appellate Exhibit (AE) LXXV at 3-4. PE 10 is the video recording of two separate NCIS interrogations of the appellant—conducted on 16 and 21 June, respectively. AE LXXV is the transcript of those interrogations.

video. Rather, she would only communicate with him via instant message during their Skype sessions. A subsequent forensic analysis of the appellant's phones and the Skype application confirmed that only the appellant's cell phone camera was activated during the Skype conversations with "Hailey Burtnett." No record of the streamed video was stored either on the cell phone or on the Skype application. Special Agent CM attempted to identify and contact "Hailey Burtnett." He contacted the school the appellant said Hailey attended and worked with local law enforcement officers in Alabama and Florida, but he was unable to find any record of "Hailey Burtnett." Forensic analysis of the Skype application and the call logs on the appellant's cell phone revealed that "Hailey Burtnett's" internet protocol (IP) address "resolved back **[*6]** to Spain, France, Iceland, and Germany," not Clearwater, Florida.[7] In addition, a review of the Skype search warrant return records provided by Microsoft Corporation indicated that the IP addresses associated with "Hailey Burtnett" had been used in Skype conversations with hundreds of other individuals around the world.

The appellant also told Special Agent CM during the interrogation that he recently tested positive for chlamydia and gonorrhea and insisted a physical exam on GB would reveal no signs of sexual abuse or sexually transmitted infections (STIs). Upon learning of the alleged abuse and the fact that the appellant had STIs, TB took GB to his normal pediatricians at Coastal Children's Clinic. Coastal Children's Clinic

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[7] Record at 733.

does not perform sexual assault forensic exams, but it is listed on the North Carolina roster as an approved facility for evaluating child sexual abuse allegations.

Dr. LK was the pediatrician who examined GB. She found no physical indications of sexual abuse, but she swabbed GB's rectum and ordered a test for gonorrhea and chlamydia from Diatherix Laboratories, a medical testing laboratory. Diatherix conducted a nucleic acid amplification test (NAAT) on the sample, **[*7]** which showed the sample tested positive for gonorrhea. Diatherix maintained the sample for ten days, then disposed of it pursuant to their standard operating procedure. After she received GB's positive test result, Dr. LK directed TB to take him to Carolina East Medical Center for additional confirmatory testing and treatment. Dr. LK explained that the NAAT completed by Diatherix Laboratories was a screening test that should be followed up with a culture test because the culture test was "the gold standard" for testing prepubescent children for gonorrhea.[8] Dr. LK called Carolina East, spoke with a triage nurse, and ordered urethral and rectal culture tests. However, Dr. LK's orders were improperly relayed to the treating physicians at Carolina East, who did not take urethral or rectal samples, nor did they order any confirmatory tests. Rather, the treating physicians merely took a urine sample, which they erroneously refrigerated, thus rendering the sample useless for a culture test. That urine sample was eventually destroyed. Carolina East physicians treated GB with antibiotics, which would rid GB's body of gonorrhea

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[8] *Id.* at 622.

bacteria and render any further testing for gonorrhea "not useful." **[*8]** [9]

Before trial, the trial defense counsel moved to exclude the Diatherix test results, arguing that the test was unreliable. In a lengthy Article 39(a), UCMJ, motions hearing held pursuant to *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the parties presented voluminous documentary evidence, including various scientific articles and Center for Disease Control (CDC) guidelines. In addition, the military judge heard the testimony of three expert witnesses. In support of his motion to exclude evidence of GB's positive gonorrhea test result, the appellant presented the testimony of Dr. MH, a pediatrician and expert in the field of STI diagnostics in children. She explained that the CDC does not recommend using NAATs for prepubescent boys because of concerns with validation testing and the fact that NAATs have a cross-reaction with other types of bacteria, resulting in a higher probability of false positives. Moreover, Diatherix's NAAT had not been peer reviewed or approved by the Food and Drug Administration (FDA). Dr. MH also explained that the positive predictive value of GB's test was too low to be reliable. The positive predictive value is the confidence that any one specimen's positive test result is, in fact, a true positive **[*9]** given the prevalence of the disease in the relevant

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[9] *Id.* at 623.

population.[10] Dr. MH expressed her concern that because there is such a low prevalence rate for gonorrhea in prepubescent boys, the probability that GB's sample was a true positive—regardless of how accurate or specific the test was—was only around 30%, "less than flipping a coin."[11] She concluded that the Diatherix NAAT was not a scientifically reliable test that could produce reliable results.

The government presented the testimony of Diatherix's executive vice-president and clinical director, Dr. DS. He explained that Diatherix was fully accredited by the American College of Pathologists (CAP) and certified in compliance with the federal Clinical Laboratory Improvement Amendments(CLIA) for testing bacteria like gonorrhea. Dr. DS testified that the specific NAAT used by Diatherix is called Target Enriched Multiplex Polymerase Chain Reaction (TEM-PCR). Portions of the TEM-PCR are proprietary and had not, therefore, been submitted for approval by the FDA, but the science behind it is the same as other commercially available NAATs. Dr. DS also explained Diatherix's certification requirements. CAP periodically sent Diatherix "blind" samples to test. Dr. DS noted that Diatherix **[*10]** has a 99% accuracy rate when testing the blind samples and a 100% accuracy rate for the particular gonorrhea target tested in this case. Finally, Dr. DS acknowledged that Diatherix

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[10] *See Id.* at 278 ("So a positive predictive value is your confidence in this one sample in front of me and its result. How confident am I that it is a true positive and not a false positive.").

[11] *Id.* at 305.

normally does not conduct testing for forensic purposes, but he stated that if the TEM-PCR were to be used forensically, the same testing and procedure would have been used.

In addition to Dr. DS, the government presented the testimony of Dr. CH, an expert microbiologist. The government presented a report Dr. DS completed after reviewing the Diatherix testing procedures and the results of a validation study conducted to demonstrate the reliability of their TEM-PCR test.[12] Dr. CH echoed Dr. MH's concern about the low prevalence rate for gonorrhea in prepubescent boys and its effect on the positive predictive value, but testified that there was no way to quantify a precise prevalence rate. She also conceded that a NAAT is not the ideal test to run for pediatric STI detection due to the relatively low positive predictive value and the likelihood for a false positive when testing prepubescent children. As a result, like Dr. MH, she was less confident in a test result from a low-prevalence population, noting that **[*11]** "the resulting uncertainty about the likelihood of false positive results in a rectal swab from a young child represent a significant concern."[13]

Nonetheless, Dr. CH concluded that the Diatherix TEM-PCR produced scientifically valid results. Dr. CH reported that Diatherix's test accuracy—whether the test results agreed with a reference standard—was 94.6%. The precision standard, or the ability of

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[12] *See* AE L.

[13] *Id.* at 7.

the test to get the "correct results among 618 tests performed on spiked samples," was 99.7%.[14] Likewise, the sensitivity of the test, or the ability of the test to detect gonorrhea at different concentrations, was comparable to the sensitivity of other commercially available tests. And finally, the test's specificity, or its ability to differentiate between organisms, revealed a perfect result—returning only positive results for gonorrhea from a panel that included 35 different organisms. Ultimately, Dr. CH concluded that the rectal swab sample taken from GB was "substantially more likely" to identify gonorrhea than anything else.[15]

The military judge made extensive findings of fact and concluded that the "Diatherix test [was] a reliable test based upon scientific principles and the members are **[*12]** best situated to determine the appropriate weight it should be given."[16] At trial, the government offered GB's positive gonorrhea test as a prosecution exhibit, and Drs. LK and CH testified consistent with their testimony at the *Daubert* hearing.[17] The trial defense counsel conducted an extensive cross-examination of each witness and pointed out the various flaws both with the testing procedures done in this case and with the use of NAATs in general to test for STIs in prepubescent children. In addition, Dr. MH

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[14] *Id.* at 6. The TEM-PCR reported the correct result in 616 out of 618 samples.

[15] Record at 284, 285.

[16] AE LXV at 10.

[17] Dr. CH testified in rebuttal after Dr. MH testified in the appellant's case-in-chief.

testified in the defense case-in-chief and provided the members, in significant detail, her expert opinion that the test performed on GB was unreliable. Additional facts necessary to resolve the assigned errors are included below.

II. DISCUSSION

A. Admission of the Diatherix Laboratory Test

The appellant contends that the military judge abused his discretion in admitting GB's positive gonorrhea test and the expert testimony of Drs. LK and CH, after he conducted an incomplete *Daubert* analysis.

In *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993), our superior court analyzed the Military Rules of Evidence and gleaned six factors that must be established by the proponent of expert testimony: (1) the qualifications of the expert; (2) the **[*13]** subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) whether the probative value outweighs other considerations. *Id.* at 397. Shortly after *Houser* was decided, the Supreme Court decided *Daubert*, in which the Court focused on the reliability and relevance of the evidence. The Court identified six factors to consider in determining whether scientific evidence meets the requirements for reliability and relevance:

(1) whether the theory or technique can be (and has been) tested;

(2) whether the theory or technique has been subjected to peer review and publication;

(3) the known or potential error rate;

(4) the existence and maintenance of standards controlling the technique's operation;

(5) the degree of acceptance within the relevant scientific community; and

(6) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Daubert, 509 U.S. at 593-95. *Daubert* and *Houser* are consistent, with *Daubert* "providing more detailed guidance on the fourth and fifth *Houser* prongs." *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999). Thus, "[b]oth the *Houser* and *Daubert* decisions provide **[*14]** . . . factors to consider in admitting expert testimony and evidence." *United States v. Henning*, 75 M.J. 187, 191 (C.A.A.F. 2016). The military judge considers these factors, in his role as "gatekeeper," to ensure that scientific evidence "both rests on a reliable foundation and is relevant." *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007) (citing *Daubert*, 509 U.S. at 597; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)).

We review a military judge's rulings to admit expert testimony and scientific evidence for an abuse of discretion. *See United States v. Thomas*, 49 M.J. 200, 202 (C.A.A.F. 1998). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were

used; or, (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010). Therefore, a military judge has a "range of choices and will not be reversed so long as the decision remains within that range." *Sanchez*, 65 M.J. at 148-49 (citations and internal quotation marks omitted).

We review *de novo*, however, the question of whether the military judge properly followed the *Daubert* framework and performed his role as gatekeeper. *United States v. Flesher*, 73 M.J. 303, 311 (C.A.A.F. 2014). If the military judge properly performs his gatekeeping function and follows the *Daubert* framework, we "will not overturn the ruling unless it is manifestly erroneous." *Griffin*, 50 M.J. at 284. Indeed, the military judge "enjoys **[*15]** a great deal of flexibility in his or her gatekeeping role: 'the law grants a [trial judge] the same broad latitude when [he] decides *how* to determine reliability as [he] enjoys in respect to [his] ultimate reliability determination.'" *United States v. Billings*, 61 M.J. 163, 167 (C.A.A.F. 2005) (quoting *Kumho Tire Co.*, 526 U.S. at 142 (1999)) (emphasis in original).

On appeal, the appellant contends that the military judge misapplied *Daubert* and failed to reconcile his findings of fact with several issues raised by the defense expert, Dr. MH, that tend to undermine the conclusion that the Diatherix test was scientifically valid and, therefore, reliable. The appellant does not attack the military judge's findings of fact, but argues that he failed to consider additional evidence in reaching his conclusions. In his brief before this court, the appellant identifies the evidence of record

supporting his arguments on each individual *Daubert* factor and argues that the military judge erred in finding the Diatherix test reliable. In particular, the appellant rehashes the arguments made at trial, supported by the testimony of Dr. MH: the Diatherix test was not tested for accuracy in identifying gonorrhea *in prepubescent children*, until *after* GB's positive result, and then, only in anticipation **[*16]** of litigation, thereby violating scientific testing principles; the test was not subject to publication and other NAATs that were peer-reviewed were not a satisfactory proxy because Dr. DS testified that the Diatherix test was unique; the potential for a false positive, given the low positive predictive value and the low prevalence of gonorrhea in prepubescent children, was extremely high; Diatherix failed to follow its own standards for testing rectal samples; and using a NAAT as a forensic test on prepubescent children without a confirmatory culture test is not widely accepted in the scientific community.

Having conducted our *de novo* review, we disagree and conclude that the military judge properly performed his gatekeeping function and applied the *Daubert* framework. The military judge made extensive findings of fact, which were supported by the voluminous record, articulated the correct legal principles under *Houser* and *Daubert*, and applied the law to the facts. "[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted." *Flesher*, 73 M.J. at 312. Applying the *Daubert* factors, the military judge found that the Diatherix test had **[*17]** been tested through both a validation study and from blind samples sent to the lab as part of Diatherix's lab

certification through CAP and CLIA. The military judge acknowledged the defense expert's opinion that the validation data was not specific to pediatric rectal samples, and thus undermined its reliability, but concluded that the "exact validation data used does not invalidate the general scientific principles behind the test itself."[18] The military judge also found that although the Diatherix test had not been subjected to peer review or publication, other NAATs with similar characteristics had been cleared by the FDA and subjected to peer review. Additionally, the military judge found that the CDC generally allows for the use of NAATs for STI testing and, thus, NAATs have been accepted within the laboratory testing community.

The military judge also examined the error rate and noted the concerns regarding the low positive predictive value, but concluded that the "likelihood of a false positive associated with the testing population does not undermine the scientific principles upon which the test is based."[19] In reaching this conclusion, the military judge specifically noted the **[*18]** conflicting testimony of Dr. MH—who testified alternately that the positive predictive value was "either 50% or lower, or 30%"—and Dr. CH who was unable to give a quantitative measure of the positive predictive value because there was no way to precisely determine the prevalence rate in the relevant population, or to even define the relevant population.[20] Citing *Sanchez*, the military judge

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[18] AE LXV at 9.

[19] *Id.* at 10.

[20] *Id.*

specifically concluded that "[t]he existence of an error rate or disagreement over what that rate may be does not render the test inadmissible."[21] The military judge also concluded that the probative value of GB's positive gonorrhea test—as corroborating evidence that the appellant raped GB—was not substantially outweighed by its prejudicial effect.

There is also no merit to the appellant's assertion that the military judge failed to adequately address each of the *Daubert* factors. Specifically, the appellant argued that the military judge did not make any legal conclusion concerning Diatherix's adherence to any standards controlling operation of their test. "It is not necessary to satisfy every *Daubert* or *Houser* factor as the inquiry is a flexible one, and the factors do not constitute a definitive **[*19]** checklist or test." *United States v. Patrick*, 78 M.J. 687, 700 (N-M. Ct. Crim. App. 2018) (citation and internal quotation marks omitted).

Finally, we are also mindful that an appellate court is not the appropriate place to re-litigate a *Daubert* motion. *See United States v. Bush*, 47 M.J. 305, 311 (C.A.A.F. 1997). The military judge heard testimony from competing experts, acknowledged the flaws and potential problems with the Diatherix test, but nevertheless concluded that it was a scientifically valid test whose result was reliable. We cannot say, given the record before us, that the military judge's conclusion was "manifestly erroneous." *Griffin*, 50 M.J. at 284. In short, the military judge understood and applied the correct law in deciding whether to

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[21] *Id.* (citing *Sanchez*, 65 M.J. at 151).

admit GB's positive gonorrhea test results and the related expert testimony, and did not abuse his discretion.

B. Preservation of Evidence

The appellant next argues that the military judge erred in failing to abate the proceedings or suppress the results of GB's gonorrhea test after Diatherix destroyed the tested rectal swab and Carolina East Medical Center destroyed a urine sample, thereby preventing a confirmatory test. The military judge made extensive findings of fact and conclusions of law and ruled that the rectal swab tested by Diatherix and the urine **[*20]** sample drawn at Carolina East were "not of such central importance that they are essential to a fair trial."[22]

We review a military judge's denial of a defense motion to abate proceedings for an abuse of discretion. *United States v. Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015) (citing *United States v. Ivey*, 55 M.J. 251, 256 (C.A.A.F. 2001)). "An abuse of discretion occurs when a court's findings of fact are clearly erroneous or the decision is influenced by an erroneous view of the law." *Id.* (citing *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013)).

Rule for Courts-Martial (R.C.M.) 703(f)(2), MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2016 ed.), provides, in pertinent part:

> a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject

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[22] AE LXXII at 4.

> to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

In *Simmermacher*, the Court of Appeals for the Armed Forces (CAAF) reviewed R.C.M. 703(f)(2) and held that a military judge abused his discretion when he failed to abate proceedings related to a charge **[*21]** of wrongful use of cocaine after the Naval Drug Screening Laboratory destroyed Simmermacher's urine sample. 74 M.J. at 202. The Court held that "R.C.M. 703(f)(2) is an additional protection the President granted to servicemembers whose lost or destroyed evidence fall within the rule's criteria" and goes beyond constitutional due process standards, which require a showing of bad faith on the part of the government. *Id.* at 201. Thus, when seeking abatement because relevant, material evidence was destroyed or lost, the defense must show that: (1) the evidence is of such central importance to an issue that it is essential to a fair trial; (2) there is no adequate substitute for the evidence; and (3) the defense was not at fault for the evidence being destroyed. *Id.* at 201-203; R.C.M. 703(f)(2).

The appellant argues that the rectal swab taken from GB was used by the government to prove that GB did, in fact, have gonorrhea. Since gonorrhea can only be transmitted through sexual activity, the rectal swab

and urine sample taken at Carolina East were, according to the appellant, of central importance to whether he committed a sexual act upon GB. With no ability to retest the rectal swab or to test the urine sample taken at Carolina East, the appellant argues the **[*22]** samples were essential to a fair trial.

First, we note that the appellant does not identify any erroneous findings of fact from the military judge's ruling, nor does he identify any rule or binding law that the military judge failed to consider. Rather, the appellant attacks the military judge's conclusion that the samples were not of such central importance to an issue that they were essential to a fair trial. Therefore, we examine whether the military judge's decision was influenced by an erroneous view of the law.

In *United States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995), a case that pre-dates *Simmermacher* by 20 years, the CAAF upheld a lower court decision excluding the results of a positive urinalysis after the sample tested had been lost or destroyed. *Id.* at 289. Citing R.C.M. 703(f)(2), the court concluded that since "the urinalysis result was the *only evidence* of the accused's wrongful use of cocaine, the urine sample was of central importance to the defense." *Id.* at 288 (emphasis added). In *Simmermacher*, the CAAF found "no meaningful distinction between the situation in *Manuel* and [Simmermacher's] situation." *Simmermacher*, 74 M.J. at 201. Reasoning that "[i]n both cases . . . the samples were the sole evidence of drug use," the court held that Simmermacher's urine sample was of such central **[*23]** importance that it was essential to a fair trial. *Id.*

The appellant's case is easily distinguished from both *Manuel* and *Simmermacher*. First, neither the rectal sample taken from GB by Dr. LK nor the urine sample taken at Carolina East were the "sole evidence" of the charges. *Id.* Rather, the Skype messages with "Hailey Burtnett" and the appellant's admissions to performing the sexual acts—although claiming he performed them on GB's green teddy bear—were proof of the sexual acts. Moreover, unlike the appellants in *Manuel* and *Simmermacher*, whose positive test results revealed the presumptive presence of a contraband substance, the appellant could not be convicted of any crime based *solely* on GB's positive gonorrhea test. Instead, GB's rectal swab simply provided corroboration that the appellant—who also tested positive for gonorrhea—committed a sexual act upon GB. While relevant and material, this evidence was not of such central importance to whether or not the appellant committed a sexual act on GB that it was essential to a fair trial.

The appellant argues that "[e]vidence can still be of central importance to determination of an issue even if it is neither the only evidence on an issue, **[*24]** nor dispositive."[23] He points to *United States v. Seton*, No. 2013-27, 2014 CCA LEXIS 103 (A.F. Ct. Crim. App. 24 Feb 2014) (unpub. op.), in support of this proposition. In *Seton*, the Air Force Court of Criminal Appeals upheld a military judge's dismissal of the sole charge and specification alleging sexual assault after the government lost the surveillance video from the barracks where the alleged assault took place. *Id.* at

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[23] Appellant's Brief of 21 May 2018 at 65.

*5-6, 18. Although the video was lost, a witness who had seen it confirmed that the video showed flirtatious behavior between the accused and his alleged victim that contradicted the alleged victim's testimony. *Id.* at *5-6. The Air Force Court agreed with the military judge that the video was of such central importance to an issue that was essential to a fair trial—the alleged victim's credibility—and that no adequate substitute existed because it had been over a year since the witness had seen the video and he only remembered some of the details. *Id.* at *16.

Again, the appellant misapprehends the nature of the rectal swab evidence. In *Seton*, the lost evidence was clearly exculpatory and called into question the veracity of the alleged victim's claims. *See Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (finding exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' **[*25]** "reliability" is likely "determinative of guilt or innocence"). Military courts have long recognized that evidence that is "clearly exculpatory" is of central importance to an issue that is essential to a fair trial.[24] But here, neither the rectal

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[24] *See United States v. Alston*, 33 M.J. 370, 374 (C.M.A. 1991) (affirming military judge's failure to abate the proceeding after concluding a potential witness's testimony was not "clearly exculpatory" and comparing the "clearly exculpatory" standard from military case law with then-existing R.C.M. 704(e), which authorized military judges to abate the proceedings against an accused if the convening authority failed to grant testimonial immunity to a witness and that witness' "testimony would be of such *central importance to the defense case that it is essential to a fair trial*") (quoting R.C.M. 704(e), MCM (1984 ed.) (emphasis in original)).

swab nor the urine sample was clearly exculpatory. Another case by our sister court illustrates this point. In *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008), the Air Force Court held that the military judge abused his discretion in dismissing a rape specification after the government lost still photographs taken from a surveillance camera located outside a hospital examination room where the alleged rape occurred. *Id.* at 518, 520. Although the accused argued that the missing photos might prove useful at trial, unlike the missing surveillance video in *Seton*, there was no indication of what the missing photos captured. The court held that "[t]he possibility that potentially exculpatory images could have been found on the surveillance photos is simply too speculative to conclude that the missing photos were 'of central importance to an issue that is essential to a fair trial.'" *Id.* at 518. The appellant's claims here are similar. The appellant's assertion that a confirmation test would prove exculpatory or could **[*26]** potentially rebut the findings of the Diatherix test is purely speculative. Indeed, based on the substantial validation data from Diatherix, a confirmation test could have very well have further incriminated the appellant.

Because the samples taken from GB were not the only evidence related to the charges and were not otherwise clearly exculpatory, we agree with the military judge and conclude that the evidence was not of such central importance to an issue that was essential to a fair trial. As a result, the military judge was not influenced by an erroneous view of the law and did not, therefore, abuse his discretion in failing to abate the proceedings.

C. Confrontation Clause

The Sixth Amendment's Confrontation Clause confers upon a criminal accused "the right . . . to be confronted with the witnesses against him." The Sixth Amendment, therefore, "prohibits the introduction of testimonial statements by a non-testifying witness unless the witness is 'unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Ohio v. Clark*, 135 S. Ct. 2173, 2179, 192 L. Ed. 2d 306 (2015) (quoting *Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). Testimonial statements are those statements that are "[a] solemn declaration or affirmation made for the purpose of establishing **[*27]** or proving some fact." *Crawford*, 541 U.S. at 51 (alteration in original) (citation and internal quotation marks omitted). Testimonial statements include affidavits, custodial examinations, certifications, and lab reports that are "prepared in connection with a criminal investigation or prosecution." *Bullcoming v. New Mexico*, 564 U.S. 647, 658, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011).

"Whether admitted evidence constitutes testimonial hearsay is a question of law reviewed *de novo*." *United States v. Tearman*, 72 M.J. 54, 58 (C.A.A.F. 2013) (citation omitted). The appellant argues that his Sixth Amendment right to confrontation was violated in two ways. First, he contends that the Diatherix lab report contained testimonial hearsay and was admitted into evidence through the testimony of Drs. LK and MH, neither of whom worked at Diatherix and neither of whom had independent knowledge of the testing procedures. Second, the appellant avers that the

Skype messages from "Hailey Burtnett" were testimonial. We address each allegation in turn.

1. Diatherix lab report

The appellant argues that the Diatherix lab technicians who performed the testing on GB's rectal swab knew they were testing a rectal swab from a young child for gonorrhea. The Diatherix lab report indicated GB's age.[25] The appellant argues that "an *objective* witness in the position of the Diatherix analyst(s)' **[*28]** [sic] would reasonably believe that the NAAT results would be available for use at a later trial" because they knew a child of GB's age could not legally consent to sexual activity, and sexual activity is the only way he could have contracted gonorrhea.[26]

The appellant relies on the Supreme Court's decision in *Melendez-Diaz v. Mass.*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), for his argument that the Diatherix lab report contained testimonial hearsay. Melendez-Diaz was convicted of distributing and trafficking in cocaine after the State presented "certificates of analysis" from laboratory analysts showing the results of a forensic test on the substance seized from him. *Id.* at 308. The forensic tests were completed by "a state laboratory required by law to conduct chemical analysis upon police request." *Id.* The Court held that the "certificates of analysis," which were sworn to before a notary public, were "quite plainly affidavits" that were "made under

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[25] *See* PE 4 at 7.

[26] Appellant's Brief at 77 (emphasis in original).

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 310-311 (citation and internal quotation marks omitted). Because the analysts were aware of the affidavits' evidentiary purpose—which was stated plainly on the face of the "certificate"—the **[*29]** affidavits were testimonial statements. The Court, therefore held, that "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that [Melendez-Diaz] had a prior opportunity to cross-examine them, [he] was entitled to be confronted with the analysts at trial." *Id.* at 311(emphasis in original) (citation omitted).

The Supreme Court of Virginia rejected a claim similar to the one the appellant advances here. In *Sanders v. Commonwealth*, 282 Va. 154, 711 S.E.2d 213 (Va. 2011), the court ruled that a lab report indicating that Sanders' minor daughter tested positive for chlamydia was nontestimonial because the report was a "medical report[] created for treatment purposes," which is a class of documents the Supreme Court explicitly excluded from the definition of testimonial hearsay. *Id.* at 218 (quoting *Melendez-Diaz*, 557 U.S. at 312 n.2). Distinguishing *Melendez-Diaz*, the Virginia court noted that the private laboratory in question was not a crime lab "testing for narcotics or DNA" and that the lab tested a sample submitted by a medical clinic, rather than from the police. *Id.* at 220. As a result, the court held that a laboratory technician would not have reason to believe that the results of his or her testing would be used in a later trial. *Id.* The appellant's case is similar

to *Sanders* and **[*30]** easily distinguishable from *Melendez-Diaz*.

While the Supreme Court has not articulated a comprehensive definition of testimonial statements, the CAAF has recognized that the analysis must be fact specific, "meaning that it is contextual, rather than subject to mathematical application of bright line thresholds." *United States v. Squire*, 72 M.J. 285, 288 (C.A.A.F. 2013) (citation and internal quotation marks omitted). We, therefore, take "an objective look at the totality of the circumstances surrounding the statement." *United States v. Gardinier*, 65 M.J. 60, 65 (C.A.A.F. 2007). The CAAF has developed "a set of factors" to guide this objective, but contextual, analysis:

> (1) the statement was elicited by or made in response to a law enforcement or prosecutorial inquiry;
>
> (2) the statement involved more than a routine and objective cataloging of unambiguous factual matters; and
>
> (3) the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial.

Squire, 72 M.J. at 288 (citing *Gardinier*, 65 M.J. at 65; *United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007)).

Our application of these factors reveals the similarities between the appellant's case and *Sanders*, and its differences with *Melendez-Diaz*. First, we observe that the Diatherix lab report was not made in

response to a law enforcement or prosecutorial inquiry. Rather, TB took GB to his normal pediatrician **[*31]** after learning that the appellant had contracted gonorrhea and may have sexually assaulted GB. Dr. LK examined GB and, based on the allegations relayed to her by TB, took a rectal swab from GB and sent it to Diatherix to be tested. Dr. LK was a physician in private practice and was not employed by any municipal, county, state, or federal government. Likewise, Diatherix is a private, for-profit laboratory that conducts medical testing for hospitals and clinics, just like the private lab in *Sanders*. In contrast, the evidence tested in *Melendez-Diaz* was sent by police to a state-run laboratory which was required by law to forensically test the substance. The analysts' certificates identified the substance tested as cocaine, and those certificates were admitted into evidence pursuant to state law as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed." *Melendez-Diaz*, 557 U.S. at 309 (citation and internal quotation marks omitted).

Second, the Diatherix lab technicians who tested GB's rectal swab and completed the Diatherix lab report simply cataloged unambiguous factual matters. That a statement contains "unambiguous factual matters" does not necessarily make it nontestimonial. **[*32]** *See United States v. Sweeney*, 70 M.J. 296, 302 (C.A.A.F. 2011). It is merely one "relevant consideration in determining whether statements are testimonial." *Squire*, 72 M.J. at 289. But since the Diatherix lab technicians were not engaged in a law enforcement function and were instead working in a "nonadversarial environment, where they conduct

routine series of tests requiring virtually no discretionary judgments," their data entry on the Diatherix lab report merely cataloged the results of the tests performed. *United States v. Magyari*, 63 M.J. 123, 126-27 (C.A.A.F. 2006).

Finally, the primary purpose for making, or eliciting, the statement was not for evidence at trial, but to treat GB. Dr. LK is a pediatrician and GB was her patient. Dr. LK requested the lab report from Diatherix, a private medical laboratory, and Diatherix returned the report not to the police, but to Dr. LK, who then included it in GB's medical records. *See Clark*, 135 S. Ct. at 2182 ("Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."). Thus, unlike *Melendez-Diaz*, in which case the forensic analysts understood that the primary purpose for their reports was for use as "prima facie evidence" at a future trial, there is nothing **[*33]** to suggest that the Diatherix laboratory technicians who tested GB's rectal swab understood that their report would be used for a non-medical purpose.

Rather, the record suggests that Diatherix, like the lab in *Sanders*, tested the rectal swab sample just as they would test any sample received from any medical clinic or practitioner. Moreover, unlike the certificates in *Melendez-Diaz*, there is no sworn attestation on the Diatherix lab report. Nor is there a statement on the lab report indicating the tests results were intended for evidentiary purposes. In fact, the Diatherix lab report contains no signatures, was not accompanied

by any chain of custody documentation, and merely consists of a single page identifying the patient's name, the "ordering physician," the date the specimen was collected, received, and reported, the organisms tested for, and an "X" in either a column labeled "DETECTED" or "NOT DETECTED," for each organism.[27] In short, the Diatherix lab report "lack[s] any indicia of formality or solemnity that, if present, would suggest an evidentiary purpose." *Tearman*, 72 M.J. at 61. In *Tearman*, the CAAF found the lack of formality in various chain of custody documents and internal review worksheets **[*34]** integral to their ultimate holding that the documents were not testimonial. *Id.* The court concluded that the documents, like the Diatherix lab report, "utterly lacked attendant formalities, a characteristic that stands in stark contrast to the formal, affidavit-like certificates and memoranda at issue in . . . *Melendez-Diaz*." *Id.*

Having completed our contextual, objective analysis, we conclude that the Diatherix lab report was not testimonial and that the appellant was not denied his Sixth Amendment right to confrontation.

2. Hailey Burtnett Skype messages

The appellant argues that the admission of "Hailey Burtnett's" Skype messages violated the Confrontation Clause. We review the military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006). When reviewing a

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[27] PE 4 at 7.

mixed question of fact and law, such as the military judge's ruling on the admissibility of "Hailey Burtnett's" Skype messages, we apply a clearly-erroneous standard to the military judge's findings of fact, and a *de novo* standard to his conclusions of law. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

But, because the appellant raises his Confrontation Clause claims for the first time on appeal,[28] we review for plain error. *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018). "Plain error occurs where (1) there was error, (2) the error was plain **[*35]** and obvious, and (3) the error materially prejudiced a substantial right of the accused." *Id.* (citation and internal quotation marks omitted).

The Skype messages with "Hailey Burtnett" contain statements concurrently discussing the rape of GB. In response to the appellant's hearsay and relevancy objections, the military judge noted that the "overwhelming majority of the [Skype] messages from Hailey Burtnett are questions, requests, and instructions directed at the accused" and "do not have an underlying factual assertion that is being offered for the truth."[29] Additionally, to the extent the messages contained assertions being offered for the truth, the military judge found the messages to be

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[28] The appellant moved the court-martial to exclude "Hailey Burtnett's" Skype message on hearsay and relevancy grounds, but did not cite the Sixth Amendment or argue that admission of the messages violated his rights under the Confrontation Clause. *See* AE XXXIV; AE LXI.

[29] Record at 397.

non-hearsay as statements of a co-conspirator in furtherance of the conspiracy. *See* MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 801(d)(2)(E), MCM (excluding from the definition of hearsay a statement "made by the party's co-conspirator during and in furtherance of the conspiracy"). The military judge found by a preponderance of the evidence that such a conspiracy existed; that "Hailey Burtnett" and the appellant were "members of the conspiracy"; "that the conspiracy was ongoing during the date range **[*36]** of the offered [Skype] messages"; and that "the statements were made in the furtherance of the conspiracy."[30] In finding that a conspiracy existed, the military judge relied on the content of the messages, the STI diagnoses of both the appellant and GB, and the appellant's statements to NCIS.

We find support in the record for the military judge's findings and conclude that they are not clearly erroneous. We also agree with the military judge's conclusions that a conspiracy existed between the appellant and "Hailey Burtnett"; that it existed during the timeframe the messages were sent; and that the admitted messages were in furtherance of the conspiracy. Consequently, we conclude that the military judge did not abuse his discretion in admitting the Skype messages as non-hearsay statements of a co-conspirator, pursuant to MIL. R. EVID. 801(d)(2)(E).

Since the messages are non-hearsay statements of co-conspirators, they are not testimonial and their admission does not violate the appellant's Sixth

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[30] *Id.* at 398.

Amendment right to confrontation. *See Crawford*, 541 U.S. at 56 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example . . . statements in furtherance of a conspiracy."); *Giles v. California*, 554 U.S. 353, 374 n.6, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (discussing how the co-conspirator exception **[*37]** to hearsay "did not violate the Confrontation Clause" even before *Crawford* was decided because "an incriminating statement in furtherance of the conspiracy would probably never be . . . testimonial."). Thus, it was not error, much less plain error, for the military judge to admit the Skype messages.

D. Failure to State an Offense

1. Failure to allege a specific sexual act

Next, the appellant avers that the specifications alleging that he raped GB fail to state an offense because neither allege an *actus reus*.[31] Specifications 1 and 3 of Charge II state, in pertinent part that the appellant:

> did, at or near New Bern, NC, . . . commit a sexual act upon a child, [GB], who had not attained the age of 12 years.[32]

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[31] The appellant argues in his brief that Specifications 1-3 of Charge II each fail to state an offense. *See* Appellant's Brief at 88. Because the appellant was acquitted of Specification 2, our review considers only Specifications 1 and 3 of Charge II.

[32] Charge Sheet.

Specifically, the appellant argues that because the specifications fail to allege the type of sexual act he committed upon GB, they therefore fail to allege an essential element of the offense, and fail to provide him notice and protection against double jeopardy. We disagree.

We review *de novo* the question of whether the specification states an offense. *United States v. Crafter*, 64 M.J. 209, 210 (C.A.A.F. 2006). Since the appellant did not raise this issue at trial, we review for plain error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012); *see also United States v. Sorrells*, No. 201700324, 2019 CCA LEXIS 112, at *6 (N-M. Ct. Crim. App. 13 Mar. 2019) (unpub. op.). The appellant **[*38]** has the "burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right," specifically his right to notice. *United States v. Humphries*, 71 M.J. 209, 214-15 (C.A.A.F. 2012) (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)) (internal quotation marks omitted).

The military is a notice pleading jurisdiction. *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011). R.C.M. 307(c)(3) states that a specification must "allege[ ] every element of the charged offense expressly or by necessary implication." A charge is sufficient if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend" and "enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d

590 (1974). Therefore, a specification must: (1) allege every element of the charged offense expressly or by necessary implication; and (2) protect the accused from double jeopardy. *Fosler*, 70 M.J. at 229.

The specifications under Charge II alleged violations of Article 120b(a). The text of Article 120b(a) states:

> Any person subject to this chapter who commits a sexual act upon a child who has not attained the age of 12 years . . . is guilty of rape of a child and shall be punished as a court-martial may direct.[33]

For Article 120b, the term "sexual act" is defined by reference **[*39]** to Article 120(g)(1) as either:

> (A) contact between the penis and the vulva or anus or mouth, and for the purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or
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> (B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.[34]

We are satisfied that the specifications allege, either expressly or by implication, every element of rape of a child, and therefore state offenses. By alleging that the appellant committed "a sexual act upon" his son, Specifications 1 and 3 of Charge II necessarily imported the definition of "sexual act" from Article

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[33] 10 U.S.C. § 920b(a).

[34] *Id.* at § 920(g)(1).

120(g), UCMJ, and put the appellant on notice that the government was required to prove that the appellant's conduct comported with the statutory definition. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 105-07, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007) (reversing lower court ruling which dismissed an indictment for attempting to enter the country illegally because it failed to allege a specific "overt act" and explaining that an "overt act" is and has been necessary to and part of the definition of an "attempt"). **[*40]** By alleging that the appellant did "commit a sexual act upon" GB, the government placed the appellant on notice that they had merely to prove one of the several different types of sexual acts defined in Article 120(g), UCMJ, and that the appellant, therefore, needed to defend against all the various theories of liability—which is precisely what he did at trial. Finally, under any theory of liability or method of committing the crime, each specification remains but a single offense and provides ample protection against double jeopardy. *See United States v. Shermot*, 77 M.J. 742, at *9 (C.G. Ct. Crim. App. 2018), *rev. denied* 78 M.J. 105, 2018 CAAF LEXIS 559 (C.A.A.F., Aug. 22, 2018).

Moreover, the appellant fails to cite a single case holding that a charge or specification alleging rape of a child under Article 120b, UCMJ, must describe the specific type of sexual act to be found sufficient. An error is not plain if it requires this court to extend established precedent. *United States v. Mitchell*, 77 M.J. 725, 735 (N-M. Ct. Crim. App. 2018) (citing *United States v. Nieto*, 66 M.J. 146, 151 (C.A.A.F. 2008) (Stucky, J., concurring) (error not plain if the theory requires "the extension of precedent.") (citation

omitted)). With no binding or persuasive authority holding that the specific underlying conduct must be explicitly pleaded in the specification, any claimed error is neither clear nor obvious.

Regardless, **[*41]** even were we to find plain error, the appellant is entitled to a remedy only if he can show prejudice to a substantial right. *See Ballan*, 71 M.J. at 35. "An error in charging an offense is not subject to automatic dismissal, even though it affects constitutional rights." *United States v. Wilkins*, 71 M.J. 410, 413 (C.A.A.F. 2012) (citing *Humphries*, 71 M.J. at 212). Because the appellant did not object at trial, he bears the burden of proving prejudice and must show "that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to his substantial, constitutional right to notice." *Id.* at 413 (alterations, citation, and internal quotation marks omitted). Here, the appellant fails to do so because he cannot establish prejudice to his ability to defend against the charge he was convicted of or his right to notice.

In *Wilkins*, the CAAF held that an appellant failed to show prejudice from a plain charging error because his defense theory would not have changed had the error not been present. *Id.* at 414-15. Here, the appellant's defense did not focus on which particular conduct he was charged with committing upon GB. He never requested a bill of particulars pursuant to R.C.M. 906(b)(6) or moved for a finding of not guilty under R.C.M. 917. Rather, the appellant's defense was that he did **[*42]** not commit *any* sexual act with GB and that the Skype messages with "Hailey Burtnett" reflected fantasy role play using GB's green teddy

bear. Therefore, even if the government had alleged the specific conduct described in the texts, we are unconvinced that the appellant's trial strategy would have changed.

In addition, when a specification is defective because it fails to allege an essential element, "we look to the record to determine whether notice of the missing element is somewhere extant in the trial record." *Humphries*, 71 M.J. at 215-16. Here, the record conclusively demonstrates that the appellant was on notice of the specific acts underlying the charged specifications. The appellant was aware of every substantive piece of evidence the government presented to the members, including the complete exchange of Skype text messages between himself and "Hailey Burtnett" and the results of both his and GB's gonorrhea tests.

Finally, the military judge properly instructed the members on the definition of "sexual act," incorporating the various theories of liability.[35] The members returned general verdicts of guilty to two of the three specifications alleging that the appellant raped GB. The CAAF has explained that **[*43]** general verdicts are allowed when multiple theories of liability are alleged:

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[35] *See* Record at 854; AE XCIII at 7 ("'Sexual act' means the penetration, however slight, of the vulva or anus or mouth by the penis. 'Sexual act' also means the penetration of another by any part of the body or by any object with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.").

> [A] court-martial panel, like a civilian jury, returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the reasons for its decision to convict or acquit. In returning such a general verdict, a court-martial panel resolves the issue presented to it: did the accused commit the offense charged . . . beyond a reasonable doubt? A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt.

United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 2007) (citations and internal quotation marks omitted); *see also Schad v. Arizona*, 501 U.S. 624, 631, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality opinion) ("We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone."). Consequently, we conclude that even if Specifications 1 and 3 of Charge II failed to allege an essential element, the record demonstrates that the appellant had notice of the Specifications and cannot, therefore, demonstrate material **[*44]** prejudice to a substantial right.

2. Ineffective assistance of counsel

The appellant alleges that his trial defense team provided ineffective assistance because they failed to either file a motion for a finding of not guilty or to object in any way to the alleged failure of

Specifications 1 and 3 of Charge II to state an offense. We analyze ineffective assistance of counsel claims under the test outlined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to prove ineffective assistance of counsel, the appellant must show that his trial defense team's performance was deficient and that the deficiency deprived him of a fair trial. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). "When reviewing ineffectiveness claims, 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant.' Rather, '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.'" *United States v. Datavs*, 71 M.J. 420, 424-25 (C.A.A.F. 2012) (alteration in original) (internal citation omitted) (quoting *Strickland*, 466 U.S. at 697).

With respect to *Strickland's* prejudice prong, when an allegation of ineffective assistance of counsel is based on a failure to make a motion, the appellant "must show that there is a reasonable **[*45]** probability that such a motion would have been meritorious." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citation and internal quotation marks omitted); *see also United States v. Flack*, 47 M.J. 415, 417 (C.A.A.F. 1998) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). Because we have concluded that Specifications 1 and 3 of Charge II did allege all essential elements of the offense of rape of a child, any motion for relief filed by the appellant's trial defense team would not have been

meritorious. Therefore, the appellant suffered no prejudice.

E. Legal and Factual Sufficiency

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). The test for factual sufficiency is whether "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this court is] convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citation, internal quotation marks, and emphasis omitted). 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 reasonable doubt does not mean, however, **[*46]** that the evidence must be free from conflict. *United States v. Goode*, 54 M.J. 836, 841 (N-M. Ct. Crim. App. 2001). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98, (C.A.A.F. 2018) (quoting *Rosario*, 76 M.J. at 117).

1. Sexual acts

The appellant challenges the factual sufficiency of his convictions for child rape, conspiracy to commit child rape, and making a false official statement—denying that he raped GB. The appellant argues that the government failed to prove beyond a reasonable doubt that he committed a sexual act upon GB for two reasons: (1) the Skype messages with "Hailey Burtnett" simply reflect fantasies; and (2) GB's positive Diatherix test result was unreliable and could not corroborate that any sexual acts occurred. We disagree.

The appellant was convicted of raping GB on 29 March 2016 and again on 15 May 2016. The graphic Skype conversations between the appellant and "Hailey Burtnett" on those two days reflect a real-time narration of the appellant's crimes.[36] On 29 March, "Hailey Burtnett" initiates the Skype session with the appellant and asks to see GB before asking the appellant **[*47]** if he was "in the mood."[37] The conversation quickly turns to GB, with "Hailey Burtnett" directing the appellant to perform various sexual activities on his son, beginning with kissing GB and then removing his diaper, and progressing to the appellant performing fellatio on GB, rubbing lotion on

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[36] *See* PE 5; PE 9; and PE 12. PE 5 is the chat log retrieved from the Microsoft Company detailing the Skype user names, content, and dates and times of the Skype text messages between "Hailey Burtnett" and the appellant. Record at 582-83. PE 9 contains the screen shots of the Skype conversation taken from the appellant's cell phone. Record at 570-572. PE 12 is a report containing the text of the Skype conversations prepared by a computer forensic expert that extracted the information from the appellant's phone. Record at 691-94.

[37] PE 5 at 6.

GB's penis and buttocks, and then penetrating GB's anus with his finger and penis.[38] The text messages make clear that "Hailey Burtnett" is responding to what she is seeing. On several occasions after she directs the appellant to perform a specific sexual act or to move his camera into a certain position, "Hailey Burtnett" responds with positive commentary, telling the appellant, "good" or "yes."[39] After she directed the appellant to digitally penetrate GB, "Hailey Burtnett" responded "Ohh yes" and "wow."[40] The appellant's replies also indicate that he is actually performing the sexual acts directed by "Hailey Burtnett." During one portion of the text conversation, the appellant told "Hailey Burtnett" that he "kinda" ejaculated; she responded: "I know . . . but not [all the] way."[41]

The 15 May Skype conversation is similar. After a short exchange of pleasantries, the conversation once again **[*48]** turns to GB, with "Hailey Burtnett" again directing the appellant to kiss GB before asking the appellant to put his penis in GB's mouth. She specifically directs the appellant to "tell him to open his mouth up wider . . . say open it big."[42] "Hailey Burtnett" once again directs the appellant to rub

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[38] *See* PE 5 at 6-9.

[39] *Id.* at 8.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 23.

lotion on GB's penis and to perform fellatio on GB. She comments that "he likes it so much."[43]

Further, the appellant's statements during his NCIS interrogation are incredible and demonstrate a consciousness of guilt. Indeed, false statements or explanations "by an accused in explaining an alleged offense may themselves tend to show guilt." *United States v. Colcol*, 16 M.J. 479, 484 (C.M.A. 1983) (citing *Wilson v. United States*, 162 U.S. 613, 16 S. Ct. 895, 40 L. Ed. 1090 (1896)). First, the appellant told NCIS agents that "Hailey Burtnett" was someone he knew from his hometown. Yet NCIS agents checked with local law enforcement and the local schools and could find no record of anyone with her name. A forensic analysis of their Skype chat logs revealed, in fact, that "Hailey Burtnett's" IP address resolved to several locations in Europe—not Clearwater, FL, as the appellant claimed. Next, the appellant told Special Agent CM that he did not touch his son inappropriately and that the Skype messages simply reflect fantasy: **[*49]** that he dressed up his son's green teddy bear in a diaper and "d[id] weird stuff to it."[44] But this assertion is belied by the record. Not only do the Skype messages of 29 March and 15 May fail to ever reference a teddy bear or the teddy bear's name ('Scout"), they also describe in graphic detail the human anatomy of a prepubescent boy. The Skype messages always refer to the appellant's son by name and, when "Hailey Burtnett" asked the appellant if GB was home, the appellant sent her a photograph of

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[43] *Id.*

[44] AE LXXV at 4.

his son—not a green teddy bear.[45] Moreover, additional Skype messages between "Hailey Burtnett" and the appellant make clear that the two are talking about GB. Throughout their conversations, "Hailey Burtnett" asks the appellant if GB is home, when he will return, or when she will get to see him next. The appellant's responses, too, reveal that they are talking about GB and not a teddy bear. The appellant tells "Hailey Burtnett" that GB is sleeping, or that he just ate, or that he is with his mother. In short, there is no indication whatsoever that the appellant and "Hailey Burtnett" are talking about a teddy bear. Finally, GB's positive test for gonorrhea—a disease that can only be transmitted **[*50]** through sexual contact—corroborated the Skype messages.

Thus, after weighing the evidence and making allowances for not having personally observed the witnesses, we are convinced beyond reasonable doubt that the appellant committed a sexual act upon GB on 29 March 2016 and again on 15 May 2016 and that his convictions for rape of a child, conspiracy to commit rape of a child, and making a false official statement are, therefore, factually sufficient.

2. Production and distribution of child pornography

Finally, the appellant avers that his convictions for producing and distributing child pornography, as well as his conviction for conspiracy to produce and distribute child pornography, are not legally and factually sufficient. The appellant argues that the

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[45] Record at 721, 739; PE 9 at 107.

government presented no evidence that any files containing child pornography were created, manufactured or distributed using the Skype application. In support of his argument, the appellant cites *United States v. Malone*, No. 201000387, 2011 CCA LEXIS 115, at *13-16 (N-M. Ct. Crim. App. 28 June 2011) (unpub. op.), *rev. denied*, 70 M.J. 367 (C.A.A.F. 2011), where we held that "streaming video" was not legally sufficient to prove distribution of child pornography.

The appellant's reliance on *Malone* is misplaced. In *Malone*, we held that **[*51]** a servicemember's conviction for distributing child pornography under 18 U.S.C. § 2252A(a)(2)(A) was not legally sufficient because there was no evidence that Malone delivered child pornography "to the possession of another." *Id.* at *14. There, a fellow Sailor had accessed files on the appellant's computer and viewed them in "streaming video format." Because the Sailor did not possess the videos in any manner, we held that the evidence was legally insufficient to establish distribution.

Unlike *Malone*, the appellant was charged with clause 2, Article 134, UCMJ, offenses for producing and distributing child pornography where the "said conduct was of a nature to bring discredit upon the armed forces."[46] Under Article 36, UCMJ, the President has the authority to issue "[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under [the UCMJ] triable in courts-

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[46] Charge Sheet; *see also* MCM, Part IV, P 60.c.(1) ("Clause 2 offenses involve conduct of a nature to bring to bring discredit upon the armed forces.").

martial . . . ." The MCM is the document through which the President exercises his Article 36 rule-making authority. The President specifically prescribed the elements, modes of proof and corresponding definitions for the appellant's offenses.[47]

Thus, we first look to the elements of the offenses charged and the corresponding **[*52]** definitions prescribed by the President. The elements of producing child pornography as alleged in Specifications 1 and 5 of Charge III are:

> (1) That the appellant knowingly and wrongfully produced child pornography, to wit: a video of a minor engaging in sexually explicit conduct;
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> (2) That the production was with the intent to distribute; and
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> (3) That, under the circumstances, the conduct of the appellant was of a nature to bring discredit
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> upon the armed forces.[48]

The elements of distributing child pornography as alleged in Specifications 2 and 6 of Charge III are:

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[47] *See* MCM, Part IV, P 68b.b and c. This offense was added to the MCM by Executive Order 13593, signed 13 December 2011, after *Malone* was decided by our court.

[48] *See* 10 U.S.C. § 934 (2012); MCM, Part IV, P 68b.b.(4). Because the appellant was charged with producing *with the intent to distribute*, the second element was added by the military judge. *See* Record at 852-53; AE XCIII at 4, 6.

> (1) That the appellant knowingly and wrongfully distributed child pornography, to wit: a video of a minor engaging in sexually explicit conduct; and
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> (2) That, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces.[49]

Child pornography is defined as "material that contains either an obscene *visual depiction* of a minor engaging in sexually explicit conduct or a *visual depiction* of an actual minor engaging in sexually explicit conduct."[50] Distributing simply means "delivering to the actual or constructive possession of another." **[*53]** [51] Possession, in turn, "means exercising control of something" and "may be direct physical custody . . . or it may be constructive."[52] The term producing means "creating or manufacturing"; that is, "making child pornography that did not previously exist."[53]

Finally, the term "visual depiction" as used in the definition of "Child Pornography" includes:

> any developed or undeveloped photograph, picture, film or video; any digital or computer image, picture, film, or video made by any means, *including those transmitted by any means*

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[49] 10 U.S.C. § 934 (2012); MCM Part IV, P 68b.b.(3).

[50] MCM, Part IV, P 68b.c.(1) (emphasis added).

[51] *Id.* at P 68b.c.(3).

[52] *Id.* at P 68b.c.(5).

[53] *Id.* at P 68b.c.(6).

> *including streaming media, even if not stored in a permanent format*; or any digital or electronic data capable of conversion into a visual image.[54]

The government presented evidence that the appellant committed sexual acts on his two-year-old son while "live streaming" the misconduct to an individual identifying herself as "Hailey Burtnett" via the Skype application on his cell phone. The President specifically defined "child pornography" in terms of a "visual depiction" and that term is further defined to include streaming video. By engaging in "sexually explicit conduct" with his son and transmitting it live via "streaming video," the appellant, therefore, **[*54]** created child pornography that did not previously exist.

Likewise, by engaging in a live communication with "Hailey Burtnett" in which he streamed visual depictions of himself raping GB, while receiving instant message instructions and feedback from Hailey, the appellant delivered child pornography to the constructive possession of another. "Constructive possession" is "[c]ontrol or dominion over a property without actual possession or custody of it."[55] Under the circumstances presented here, we conclude that "Hailey Burtnett" had "control or dominion" over the streaming media because she could end the transmission at any time by closing the Skype application on her phone, tablet, or computer (or by

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[54] *Id.* at P 68b.c.(8) (emphasis added).

[55] *Constructive Possession*, BLACK'S LAW DICTIONARY (10th ed. 2014).

powering off the device); she could take screenshots of the video; or she could use another camera or cell phone to record the video depicted on her screen. In short, once broadcast via live stream, the person in receipt of streaming video has myriad ways to exercise control over the video.

Consequently, after considering the evidence in the light most favorable to the government, we conclude that rational members could have found beyond a reasonable doubt that the appellant **[*55]** wrongfully produced and distributed child pornography and that he conspired to wrongfully produce and distribute child pornography. Moreover, after taking a fresh, impartial look at the evidence, we ourselves are convinced beyond reasonable doubt of the appellant's guilt.

III. CONCLUSION

After careful consideration of the record of proceedings and the briefs and oral argument of appellate counsel, we have determined that the approved findings and sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights occurred. Arts. 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a) and 866(c). Accordingly, the findings and the sentence are **AFFIRMED**.

Judge TANG and Judge LAWRENCE concur.