UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BRIAN L. BRIMEYER
AVIATION ELECTRONICS TECHNICIAN FIRST CLASS (E-6)
U.S. NAVY

NMCCA 201100141
GENERAL COURT-MARTIAL

Sentence Adjudged: 19 August 2010.
Military Judge: LtCol Thomas Sanzi, USMC.
Convening Authority: Commander, Navy Region Northwest, Silverdale, WA.
Staff Judge Advocate's Recommendation: CDR T.F. Alicante, JAGC, USN; **Addendum:** LTJG L.S. Yang, JAGC, USN.
For Appellant: Capt Bow Bottomly, USMC; Capt Michael Berry, USMC.
For Appellee: Capt Mark V. Balfantz, USMC.

28 June 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

MODZELEWSKI, Judge:

A panel of members with enlisted representation convicted the appellant, contrary to his pleas, of one specification of rape of a child under the age of twelve, three specifications of aggravated sexual contact with a child under the age of twelve, one specification of sodomy with a child under the age of

twelve, and one specification of receiving child pornography, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The members sentenced the appellant to thirty-three years confinement and a dishonorable discharge. The convening authority approved the adjudged sentence.

The appellant initially assigned six errors (AOEs): (I) that the military judge erred in failing to provide prompt curative instructions following human-lie-detector testimony; (II) that the finding of guilty as to Charge II, Specification 3[1] should be set aside as violative of *United States V. Walters*;[2] (III) that the evidence was factually and legally insufficient to sustain the conviction for receipt of child pornography; (IV) that the military judge abused his discretion by permitting a social worker to testify about statements that the children made to her; (V) that trial defense counsel was ineffective in failing to object to a medical document containing hearsay; and (VI) that the evidence was legally and factually insufficient to sustain any of appellant's convictions.[3]

Subsequently, the appellant submitted three additional briefs that raised Supplemental Assigned Errors (Supp. AOEs) I – X.[4] Although these supplemental assertions were in part duplicative of the initial six, the appellant assigned five new errors: that the circumstances surrounding the interviews of the children violated the appellant's right to confrontation (Supp. AOE V); that the military judge failed to fully instruct the members on the child pornography specification (Supp. AOE VII); that the military judge abused his discretion by denying defense's challenge for cause of a panel member (Supp. AOE VIII); that the specification of the Additional Charge [sic] failed to state an offense under Article 120 (Supp. AOE IX); and that the errors enumerated in the appellate defense counsel's

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[1] After granting a RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) motion for a finding of not guilty on four specifications, the military judge regrettably ordered the remaining specifications renumbered on the new cleansed charge sheet. For clarity's sake, we will refer to the specifications as they were numbered on the original charge sheet and subsequently on the convening authority's action.

[2] *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003).

[3] AOE's III – VI were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[4] Supp. AOEs I - X were also raised pursuant to *Grostefon*.

brief and those identified by the appellant *pro se* require reversal as cumulative error (Supp. AOE X).

After consideration of the pleadings of the parties, as well as the entire record of trial, we set aside and dismiss one specification of aggravated sexual contact, conclude that the remaining findings are correct in law and fact, and reassess the sentence. Arts. 59(a) and 66(c), UCMJ. Following our corrective action, we find that no error materially prejudicial to the substantial rights of the appellant remains.

Factual Summary

The appellant and his wife were licensed as foster parents in California and in Washington State. Between 2001 and 2008, they accepted a total of approximately thirty children for foster care while stationed first in California, then in Washington, and later again in California. In August 2008, a child who had left their foster care alleged that she had been sexually abused by the appellant. Law enforcement initiated an investigation that ultimately identified three other children who also claimed to have been sexually abused by the appellant.

Based on forensic interviews of the children, the appellant was charged with twelve specifications of sexual abuse of the four children, all charged as offenses committed against a child under the age of twelve. The charges included the following offenses: rape, sodomy, aggravated sexual contact, and indecent acts (for acts prior to October 2007).

During the course of the investigation, an NCIS agent seized the appellant's computer. When he was asked for his consent to search the hard drive several days later, the appellant remarked, "Isn't it true that these people, pedophiles, who watch child pornography have ways--find programs of deleting the information?"[5] The subsequent forensic analysis revealed that the appellant had installed a program called "Clean Up," which is advertised to delete temporary files, internet history, and cookies, and that the program had been last run shortly before the computer was seized. Although the computer forensic analyst found only a few days of internet history, he was able to retrieve the following data from the hard drive: search terms for child pornography; cookies from websites containing child pornography; downloaded images of child pornography, and a limited amount of recent internet

[5] Record at 550.

history that included searches for child pornography and three images of child pornography opened in Internet Explorer. As a result of the forensic analysis, the appellant was charged with both receipt and possession of child pornography.

At trial, all four children took the stand. From an objective read of the record, these young children were difficult witnesses both on direct and cross examination: they were non-responsive to some questions and scattered in responses to others. The military judge granted a RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) motion for a finding of not guilty as to four specifications, as the trial counsel had not elicited any testimony from the children on those events.[6] The members later returned mixed findings to the remaining specifications. In summary, the members convicted the appellant of the following offenses: rape of Child #1 on divers occasions; two specifications of aggravated sexual contact with Child #2; and sodomy and aggravated sexual contact with Child #3, both on 1 August 2008 in California. Additionally, the members convicted the appellant of both possession and receipt of child pornography.[7] He was found not guilty of the offense involving Child #4 (indecent acts), not guilty of sodomy of Child #1, and not guilty of sodomy of Child #2.

Human-Lie-Detector Testimony from the Defense Expert

The appellant's first assignment of error (AOE I) arises from the testimony of his own expert consultant, whom the defense called as an expert witness at trial. As an expert in Forensic Psychology, Dr. Jeffrey Younggren testified in detail about how children form memories, and how their memories are altered, or contaminated, by particular factors. He testified at great length about how children's memories are contaminated in sexual abuse cases by numerous factors, to include suggestive or biased interviews, repeated interviews, and family dynamics. Dr. Younggren also testified regarding delayed disclosures: he stated that, despite popular misconceptions to the contrary, 80% to 85% of children who have suffered sexual abuse will disclose

[6] Charge I, Specifications 3 and 5; Charge II, Specification 2; and Charge III, Specification 5. In granting the motion, the military judge mistakenly "dismissed" the specifications, rather than entering findings of "Not Guilty." That mistake was repeated on the convening authority's action.

[7] The military judge then dismissed Specification 2 of Charge III (possession of child pornography) as multiplicious for findings with Specification 1 (receipt of child pornography).

the abuse when questioned about it in a safe environment.[8] Dr. Younggren then testified that the children's allegations in this case suffered from several of the problems that he had highlighted, such as delayed disclosures, contamination of memory in the course of interviews, disparities between their reports, and interview protocols that were "hardly the gold standard."[9]

When the defense counsel asked whether the appellant's impending divorce from his wife might have played a role in the allegations, Dr. Younggren responded that "things like divorce impact false allegation rates."[10] On cross-examination, Dr. Younggren agreed with trial counsel that, even in cases of divorce, the rate of false allegations is fairly low.[11] Defense counsel did not object to either the question or the response.

A member shortly thereafter asked the question: "You said the rate of false allegations is low. How low?" Dr. Younggren responded in pertinent part: "[T]he rates of false allegations in the general population fall somewhere between 4 and 8 percent of cases, and if you put social factors in . . . divorce doubles it, so that the research would show that the divorce factor, social factors, dysfunctional factors can drive it up to 8 to 16 percent, but those are tough numbers. I think it's better to say low. Most children who say . . . they have been sexually abused, from a statistical perspective, have been sexually abused, but not all children who say they've been sexually abused, or even groups of children, are actually abused."[12]

The defense team knew what Dr. Younggren would say in response to the member's question, as he had testified on the identical question at the earlier *Daubert* hearing.[13] They did not object to the member's proposed question when the written copy was circulated (Appellate Exhibit CXXXI), raised no

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[8] Record at 948-56.

[9] *Id*. at 958, 965.

[10] *Id*. at 964.

[11] *Id*. at 966.

[12] *Id*. at 969-70.

[13] *Id.* at 331-32; *Daubert v. Merrill Dow Pharmaceuticals,* 509 U.S. 579 (1993).

concerns about his answer, and did not request any type of curative instruction to the members.

In his closing argument, trial counsel cited Dr. Younggren's statistics, again without objection from defense counsel. The military judge, in instructing the members on findings, gave them a standard expert witness instruction, cautioning then not to consider as evidence any testimony or implication from Dr. Younggren that he believed a crime occurred or found a witness credible. Relying on *United States v. Brooks*,[14] the appellant now claims that Dr. Younggren's response was impermissible "human-lie-detector testimony," and that the military judge erred to the substantial prejudice of the appellant when he failed to provide prompt curative instructions to the members. We disagree.

The Court of Appeals for the Armed Forces (CAAF) has consistently rejected the admissibility of so-called human lie detector testimony, which it describes as "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case."[15] This issue typically arises during the testimony of a Government expert witness, called by trial counsel to describe the typical symptoms or reactions of sexual assault victims, and whether the alleged victim in a particular case is exhibiting those symptoms. In a long line of cases, CAAF has held that an expert on the subject of child abuse is not permitted to testify or opine that the alleged victim is telling the truth.[16]

In *Brooks*, the Government witness testified about motivations for false sexual abuse allegations by children. He then testified specifically about rates of false allegations, citing rates as low as 2% in cases not involving divorce. There was neither an objection made nor a cautionary instruction given with respect to this testimony.

CAAF determined that this "credibility quantification testimony" invaded the province of the court members to determine the credibility of the victim and violated the limitations of MILITARY RULE OF EVIDENCE 608, MANUAL FOR COURTS-MARTIAL,

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[14] 64 M.J. 325 (C.A.A.F. 2007).

[15] *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003).

[16] *See, e.g.*, *Kasper*, 58 M.J. at 315; *United States v. Birdsall*, 47 M.J. 404, 409 (C.A.A.F. 1998); *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990); *United States v. Arruza*, 26 M.J. 234, 236 (C.M.A. 1988).

UNITED STATES (2008 ed.) on admissible testimony relating to truthfulness. Because the *Brooks* case did not involve divorce, CAAF found the expert's statement suggested that there was better than a 98% probability that the victim was telling the truth, and that this testimony provided a mathematical statement approaching certainty about the reliability of the victim's testimony.

The court concluded that admitting the testimony was error, that the error was plain and obvious, and that it had materially prejudiced the appellant's substantial rights. Noting that the case hinged on the victim's credibility, CAAF determined that the inadmissible evidence may have had particular impact upon the pivotal credibility issue and ultimately the question of guilt.[17] The testimony "'impart[ed] an undeserved scientific stamp of approval on the credibility of the victim[ ] in this case.'"[18]

Similarly, in *United States v. Mullins*,[19] CAAF again found that it was error to admit statistical testimony about how often false accusations of sexual abuse occur, as the Government expert's inference that there was a one in two hundred chance that the victim was lying undermined the duty of the panel members to determine guilt.[20]

We find the facts before us quite distinct from those in *Brooks, Mullins*, and the other human lie detector cases cited above. In this long line of cases, the offensive testimony invariably came from a Government expert. That expert had examined and interviewed the children, was on the stand testifying that their symptoms and behaviors were consistent with those of a sexual abuse victim, and then testifying either obliquely or directly that the children were truthful. In *Brooks* and *Mullins*, the expert also cited "credibility quantification testimony," that is, statistics indicating that very small percentages of allegations are false. In that context, CAAF has found the testimony imprints an "undeserved scientific stamp of approval on the credibility of the victims in [the] case."[21]

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[17] *Brooks*, 64 M.J. at 330.

[18] *Id*. (quoting *Birdsall*, 47 M.J. at 410).

[19] 69 M.J. 113 (C.A.A.F. 2010).

[20] *Id*. at 116.

[21] *Birdsall*, 47 M.J. at 410.

In contrast, Dr. Younggren was testifying as a defense expert, indeed as their primary witness. It was clear to the members that Dr. Younggren had not met or interviewed the children, but instead had reviewed their statements and videos of their interviews. His testimony in no way indicated that he believed the children in this case. To the contrary, he repeatedly pointed out numerous flaws in the children's allegations, including the fact that they had not disclosed any abuse when initially given opportunities to do so, that they had changed their accounts, that they had been improperly interviewed, and that their memories had been "contaminated" by a number of factors that he specified for the members. In the context of his testimony, Dr. Younggren's use of the statistics in no way conveyed to the members that he believed the children or found their accounts credible.

Moreover, this court notes that Dr. Younggren was citing to statistics significantly more favorable for the defense than those quoted in *Mullins* and *Brooks*. Because this case involved an impending divorce,[22] Dr. Younggren cited to rates of false allegations as high as 8% to 16%.[23]

When the defense counsel checked "No Objection" on the member's questionnaire, they knew what Dr. Younggren's response would be from his earlier testimony same issue at the *Daubert* hearing.[24] They knew that his statistics in fact did not convey with a mathematical certainty that the children were telling the truth, but instead conveyed that there are a significant number of false allegations. Indeed, after citing the statistic of 8% to 16%, Dr. Younggren concluded by saying, "Most children who . . . say they have been sexually abused, from a statistical perspective, have been sexually abused, but not all children who say they've been sexually abused, or even groups of children, are actually abused."[25] That is, as a defense expert, Dr. Younggren properly ended his testimony on the same skeptical note that he had maintained throughout his testimony. No objective observer of Dr. Younggren's testimony could conclude that he was using these statistics to put a stamp of approval on the children's allegations.

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[22] Record at 684.

[23] *Id*. at 970.

[24] *Id*. at 331-32.

[25] *Id*. at 970.

Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error. MIL. R. EVID. 103(d). To demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights.

Turning to the first prong, this court is not convinced that the military judge erred in admitting this evidence or in failing to promptly issue a curative instruction. *Brooks* and *Mullins* clearly stand for the proposition that "credibility quantification testimony" is inadmissible in the context of human lie detector testimony: an expert testifying that a child's behavior is consistent with that of a sexual abuse victim may not give that testimony a stamp of scientific surety.

This context was entirely different. Dr. Younggren was in no way functioning as a human lie detector and lending credence to the children's testimony. The entire thrust of his testimony was that the children's testimony was tainted by critical factors that included the passage of time, improper interview protocols, and repeated questioning. Defense counsel had affirmatively waived any objection on the member's questionnaire, and the military judge knew that the expert's response was not going to be 2% to 5%, but instead as high as 8% to 16%, thereby eliminating the concern of mathematical certainty found in both *Brooks* and *Mullins*. Dr. Younggren's testimony did not impart an undeserved scientific stamp of approval on the credibility of the victim.[26] Nor did it put an "impressively qualified expert's stamp of truthfulness on a witness' story."[27] In light of these factors, we decline to find error on the part of the military judge.

Assuming error *arguendo*, we find that it was certainly not plain and obvious for the reasons cited above. The defense counsel had raised with his own expert the specific issue of whether there is an increase of false allegations in times of divorce, effectively opening the door. When the member asked a follow-on question, and the defense counsel waived any objection, it was surely not obvious or plain to the military judge that the response of Dr. Younggren, which the military

[26] *Birdsall*, 47 M.J. at 410.

[27] *Brooks*, 64 M.J. at 330 (citations and internal quotation marks omitted).

judge anticipated to be a statistic of 8% to 16%, would be error under either the *Brooks* or *Mullins* holdings.

Finally, even assuming plain and obvious error, the court finds that the error was not materially prejudicial to the appellant's substantial rights. Prejudice results when there is "undue influence on a jury's role in determining the ultimate facts in the case."[28] We look at the erroneous testimony in context to determine if the witness's opinion amounts to prejudicial error.[29] CAAF has determined that context includes such factors as an immediate instruction, the standard instruction, and the strength of the Government's case. Here, the military judge gave a standard instruction cautioning the members that they may not consider Dr. Younggren's testimony as indicating that he believed the victims.[30] But in the unique circumstances in which this testimony arose, we need look no further than the context of the witness's testimony, as the offending mathematical evidence was cited by a defense expert who clearly was skeptical of the children's accounts, and who immediately followed the statistics by highlighting that not all allegations are true. We find no merit in this assignment of error.

Charge II, Specification 3 In Light of *Walters*

In Specification 3 of Charge II, the appellant was charged with sodomy of Child #3 on divers occasions on or about 1 August 2008. The specification on the charge sheet, which follows the sample specification in the Manual for Courts-Martial,[31] simply alleges sodomy, without specifying oral or anal sodomy.[32] The benchbook instruction for Article 125 requires the military judge to state the type of sodomy.[33] The military judge believed

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[28] *Birdsall,* 47 M.J. at 411.

[29] *Mullins*, 69 M.J. at 117; *United States v. Eggen*, 51 M.J. 159, 161 (C.A.A.F. 1999).

[30] Record at 1094.

[31] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 51b.

[32] Charge Sheet, Charge II, Specifications 3: "In that [the appellant] did, at or near ... California..., on divers occasions, on or about 1 August 2008, commit sodomy with [Child #3], a child under the age of 12."

[33] Military Judge' Benchbook, Dept. of the Army Pamphlet 27-9 at 3-51-1(c)(1 Jan 2010). Elements: (1) That (state the time and place alleged), the accused engaged in unnatural carnal copulation with (state the name of the alleged victim) by _____.

that both oral and anal sodomy had been raised by the evidence[34] and instructed the members on both theories.

During deliberations, the members asked for instructions on findings by exceptions, and subsequently returned a finding of guilty to the specification excepting the words "on divers occasions" and "and anus." The appellant now asserts that the finding of guilty is ambiguous, as the members excepted out the words "on divers occasions" without substituting language that clearly puts the appellant and reviewing courts on notice of what conduct served as the basis for the findings. Relying on *United States v. Walters*,[35] the appellant contends that we cannot now conduct our required factual sufficiency review (AOE II). We disagree.

The record establishes that on 1 August 2008, the day of an anticipated children's party, the appellant took both Child #3 and Child #2 to that party.[36] Child #3 testified that on that day, the appellant made her perform fellatio on him.[37] Her testimony was clear and unambiguous as to that event. She did not testify that he anally sodomized her that day.[38] In his opening statement, trial counsel told the members that they would hear about an act of oral sodomy on 1 August 2008, prior to the party. Again in his closing argument, trial counsel discussed the oral sodomy that occurred on 1 August 2008.

It is unclear from the record why the specification originally alleged that sodomy occurred "on divers occasions" in a specification that narrowly focuses upon a single identifiable event occurring on 1 August 2008. It is likewise not entirely clear from the record why the military judge believed that anal sodomy had been raised by the evidence.[39] What is perfectly

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[34] Record at 1123.

[35] 58 M.J. 391 (C.A.A.F. 2003).

[36] Record at 723-24.

[37] *Id*. at 785-86.

[38] *Id*.

[39] Although Child #3 did not testify to any anal sodomy occurring on that specific date, Child #2 referred to the fact that Child #3 told her the appellant "stuck his penis up her butt hole" before the social event. Record at 767. The answer was not responsive to the question asked, which did not contemplate hearsay, and counsel moved quickly on. This hearsay testimony, however, may have prompted the military judge to instruct on anal sodomy.

clear is that the members convicted the appellant of one act of oral sodomy on 1 August 2008, as described quite precisely by Child #3 on the witness stand. The appellant was clearly on notice of what conduct served as the basis for the finding of guilt of Specification 3 of Charge II.[40] Our review of the record convinces us that there is only a single possible incident that meets all the details of the specification for which the appellant was convicted.[41] The appellant has not met his burden in demonstrating any *Walters* or double jeopardy concerns, and we conclude that this assignment of error is without merit.

Factual and Legal Sufficiency

The appellant challenges the factual and legal sufficiency of the findings of guilty (AOEs III and VI, and Supp AOEs I, II, and III).[42] In accordance with Article 66(c), UCMJ, this court reviews issues of legal and factual sufficiency *de novo*.[43] Legal sufficiency is determined by asking "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt."[44] When testing for legal sufficiency, this court must draw every reasonable inference from the record in favor of the prosecution.[45] In contrast, 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, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt."[46] Reasonable doubt, however, does not mean the evidence must be free from conflict.[47]

Regardless, the members found the appellant not guilty of any act of sodomy related to this testimony.

[40] *Walters*, 58 M.J. at 396.

[41] *United States v. Wilson*, 67 M.J. at 423, 429 (C.A.A.F. 2009).

[42] All raised pursuant to *Grostefon*.

[43] *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[44] *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) (citation omitted).

[45] *United States v. McGinty,* 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker,* 32 M.J. 281, 284 (C.M.A. 1991)).

[46] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

[47] *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007).

Factual and Legal Sufficiency as to Receipt of Child Pornography

We turn first to the conviction for knowing receipt of child pornography, for which the Government was required to prove: (1) that the appellant knowingly received images of child pornography; (2) that he knew the images he received contained visual depictions of minors engaging in sexually explicit conduct; and (3) that the images had been transported in interstate commerce.[48] The appellant avers insufficient proof of his knowing and conscious receipt. (AOE III and Supp. AOE I). We disagree.

Mrs. Brimeyer testified that she and her husband had purchased the computer on which the images were found in 2006; that it was new, and not refurbished; that it had not been loaned out at any time; and that it was used primarily by the appellant and herself.[49] Agent Morales, a computer forensic analyst then employed with the FBI Cybercrimes Task Force, testified that he analyzed the appellant's computer and found the following: in the temporary internet history file, he found three images of child pornography that had been opened in Internet Explorer;[50] in the unallocated portion of the hard drive in which deleted files are stored, he found at least 86 images of suspected child pornography and search terms indicative of internet searches for child pornography;[51] in the cookies folder, he found evidence of visits to web sites consistent with searches for child pornography;[52] in the Google search bar, he found search terms for child pornography;[53] and from the unallocated space, he was able to reconstruct partial pages of websites advertising child pornography.[54]

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[48] Although the Article 134, UCMJ, clause 1 and 2 language was alternatively charged in Specification 1, the military judge instructed only on clause 3. Accordingly, we review this specification in the context only of clause 3.

[49] Record at 662-64.

[50] *Id*. at 614-16; Prosecution Exhibit 8.

[51] Record at 585, 592-99; PE 5; PE 8.

[52] Record at 587-91; PE 4.

[53] Record at 600-03; PE 6.

[54] Record at 603-07; PE 7.

Additionally, Agent Morales found the software program "Clean Up," which erases internet history and click use. The program had last been run shortly before the computer had been seized in August 2008. As a consequence, instead of the typical six to eight months of internet history, Agent Morales found only three to four days of history.[55]

Considering the evidence of the images found in the temporary internet folder, the search terms, the reconstructed web pages, and the cookie folder in the light most favorable to the prosecution, we are persuaded that a reasonable fact finder could have found all the essential elements of knowing receipt of child pornography beyond a reasonable doubt.[56] Moreover, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.[57]

Factual and Legal Sufficiency as to Article 120 and 125 Specifications

We turn next to the Article 120 and Article 125 specifications of which the appellant was convicted, and his contention of factual and legal insufficiency (Supp. AOEs II and III). The appellant was convicted of rape on divers occasions of Child #1 during the period she was placed as a foster child, when she was approximately five to six years of age. She was eleven when she testified. Child #1 testified that "Brian had sex with me. . . . It happened twice."[58] She provided graphic details of one of those occasions. Her testimony was corroborated by physical evidence. In June 2005, one month after she left the Brimeyer home, Child #1 was examined by a physician. Three years later, after making the allegation that ultimately led to this case, she was examined again. The findings of both physical exams were irregular and showed evidence of vaginal scarring consistent with sexual abuse.[59]

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[55] Record at 610-12.

[56] *See Dobson*, 63 M.J. at 21.

[57] *See Turner*, 25 M.J. at 325.

[58] Record at 740.

[59] *Id*. at 893-99.

The appellant was convicted of two specifications of aggravated sexual contact with Child #2 by touching her vagina. Nine years old at the time of trial, Child #2 testified unequivocally that the appellant touched her vagina with his hands "[a] lot of times," "maybe three times a week,".[60] She testified specifically that on the day of the party the appellant said he would not take her and Child #3 to the event if they didn't allow him to touch them.[61]

Child #2 testified that she had previously disclosed the sexual abuse to an adult caretaker, but that no action was taken. Child #2's testimony as to that earlier disclosure was corroborated by another witness.[62] On direct and cross-examination, Child #2 explained why she didn't disclose to the investigators when first questioned: that she was scared of the appellant because he had threatened her and Child #3.[63] Finally, the court notes that Child #2's testimony about the appellant touching her vagina was corroborated by Child #5, who testified that he saw the appellant touch both Child #2 and Child #3 on "their privates" with his hand.[64]

The appellant was also convicted of two offenses against Child #3: the specification of oral sodomy on 1 August 2008 discussed above and a specification of aggravated sexual contact by digitally penetrating her anus on or about the same date. Child #3 was eight years old at the time of trial, and was testifying about events that occurred when she was five and six years old. As noted in the discussion above, Child #3 testified clearly and unequivocally that, on the day of the aforementioned children's party, the appellant made her perform fellatio on him.[65] Her testimony was clear and unambiguous as to that event and date.

Child #3's testimony about other sexual abuse was not as well tethered to a particular event or time frame. As she relayed her story of various acts of abuse, she jumped around in time and place between the months in Washington in 2007 and the

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[60] *Id*. at 764-65.

[61] *Id.* at 766.

[62] *Id.* at 721-22.

[63] *Id*. at 768-69.

[64] *Id*. at 809-13.

[65] *Id*. at 785-86.

summer of 2008 in California. Child #3 testified unequivocally that the appellant "stuck his finger up [Child #2's] and I's bottom." But she placed that event as occurring in "the old house" in Washington.[66] When the trial counsel asked her about what happened in California, Child #3 said "he did the same things," but then spoke specifically only about oral sodomy.[67] Child #3 did not testify that anal digital penetration occurred in California in 2008, and no other direct evidence was offered as to this precise act during this particular time frame.

On direct examination, Child #3 explained that she hadn't reported the sexual abuse: "Because we were so little. We didn't know what . . . that it was wrong or right. We were only six and five."[68] On cross-examination, she explained that she hadn't disclosed initially to investigators because "I was too scared."[69]

Considering the testimony of Child #1, Child #2, and Child #3, and the corroborating medical evidence relevant to Child #1 in the light most favorable to the prosecution, we are persuaded that a reasonable fact finder could have found all the essential elements of rape of Child #1 (Charge I, Specification 1), aggravated sexual contact with Child #2 (Charge I, Specifications 2 and 4), and sodomy of Child #3 (Charge III, Specification 1). Moreover, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt of these specifications beyond a reasonable doubt.[70]

Because Child #3 did not testify clearly that the appellant digitally penetrated her in California in August 2008, we are not convinced that a reasonable fact finder could have found all the essential elements of the offense of aggravated sexual contact with Child #3 in California on or about 1 August 2008. Moreover, because of the ambiguity in the testimony of this young child, we ourselves are not convinced beyond a reasonable doubt that the appellant committed this particular offense in the time frame and location with which he was charged and

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[66] *Id.*

[67] *Id.*

[68] *Id.* at 785.

[69] *Id*. at 793.

[70] *See Turner*, 25 M.J. at 325.

convicted. Accordingly, we set aside the finding of guilty as to Specification 4 of Charge I and order Specification 4 of Charge I dismissed.

Denial of Challenge for Cause

The appellant contends that the military judge abused his discretion in denying the defense challenge for cause against CDR Gaspar for implied bias (Supp. AOE VIII). CDR Gaspar was a family physician who stated during *voir dire* that a small part of his practice involved children (10-15%); that he had never diagnosed sexual abuse in a child or adult; that he had never referred a patient to law enforcement; and that he had never served in any capacity in the Family Advocacy Program. He was apparently identified as a potential Government witness in a trial of a physician on sexual assault charges. However, the intended purpose of his testimony was simply to describe the standards of care or protocols for examining patients. That case, which we note is entirely dissimilar to the one at bar, resolved without his testimony.

The military judge conducted a thorough analysis of the test for implied bias on the record, weighed all the appropriate factors, specifically noted that the court was mindful of the liberal grant mandate for defense challenges, described CDR Gaspar's demeanor during his *voir dire*, and found no basis for removing CDR Gaspar for implied bias.[71]

RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) mandates that a member be excused whenever he should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." This rule encompasses challenges based upon both actual bias and implied bias. "Implied bias exists when 'regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced . . . .'"[72] The test for determining a challenge for implied bias is objective, "viewed through the eyes of the public, focusing on the appearance of fairness."[73] We evaluate challenges for actual or implied bias based on the totality of the factual

[71] Record at 501-04.

[72] *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007) (citation omitted).

[73] *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (citation and internal quotation marks omitted).

circumstances.[74] Our standard of review on a challenge for cause premised on implied bias is less deferential than abuse of discretion but more deferential than *de novo* review.[75]

We find that the military judge did not err in denying the challenge. We find nothing to suggest that most people in the same position as CDR Gaspar (i.e., a family physician) would be prejudiced.[76] CDR Gaspar had no close professional or personal ties with anyone who was a victim of a similar crime, no close relationship with any party or witness to the court-martial, no relationship with another member of the court martial, and no experience with similar offenses or expertise in related areas that would cause doubt as to his impartiality.

The court notes that the military judge had granted four defense challenges for cause based on the supplemental questionnaires alone, before bringing the members in for *voir dire*, and that he granted three more challenges for cause following *voir dire*. Those three challenges were initially raised by trial counsel, but were predicated on the members' bias against the accused and his crimes: the defense counsel joined the challenges. Looking at the totality of the factual circumstances, we are confident that, viewed through the eyes of the public, the military judge's denial of the challenge against CDR Gasper did not create any doubt as to the fairness of the appellant's court-martial.

Hearsay Statements to Clinical Social Worker

We turn next to the appellant's assertion that the military judge abused his discretion by permitting a clinical social worker to testify about hearsay statements made by Child #3 and Child #5 under the MIL. R. EVID. 803(4) exception.[77] At trial, the social worker testified about her treatment of the children, and related statements that Child #5, Child #3, and Child #2 made to her in the course of treatment.[78]

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[74] *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010)

[75] *Id.*

[76] *Briggs*, 64 M.J. at 286.

[77] AOE IV/Supp. AOE IV, both raised pursuant to *Grostefon*.

[78] Record at 876-77.

The admissibility of these statements was fully litigated in a pretrial motions session, during which the social worker explained her role and her interactions with the children as follows. As a licensed clinical social worker in private practice, she works with children and families on mental health issues as defined in the Diagnostic Manual for Mental Health Disorders. Her practice includes the diagnosis and treatment of children who are sexual abuse victims: of the 1,000 children she has treated, approximately 20-30% have experienced sexual abuse.[79] Her sessions with her patients focus on problems the children are having at school or at home: she tells them "I am here to make things better," asks open-ended questions, and follows their lead.[80]

The social worker further testified that she has treated Child #5, Child #3, and Child #2 since the spring of 2009, shortly after they disclosed the abuse. She knew in general that the children had disclosed sexual abuse, but none of the specific allegations. The purpose of their therapy sessions has been to help and treat the children, and the children understand that these sessions are a "part of them getting better." She testified that she was in no way involved with law enforcement or seeking evidence, and that the children did not believe that their sessions with her were a part of the law enforcement process. In the course of their therapy sessions, Child #5, Child #3, and Child #2 each made various disclosure to her concerning incidents of sexual abuse by the appellant.[81]

MIL. R. EVID. 803(4) permits admission of statements made for purposes of medical diagnosis or treatment. The courts have adopted a two-prong approach to determine whether statements are admissible under this hearsay exception: 1) were the statements made for purposes of medical diagnosis or treatment?; and 2) did the patient make the statement with the expectation of receiving medical diagnosis or treatment?[82] As the appellant objected prior to trial, we review the military judge's ruling admitting this evidence for an abuse of discretion.[83] We find that the children's statements to the social worker in her capacity as

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[79] *Id*. at 109-12.

[80] *Id.* at 122-28.

[81] *Id*. at 134-36, 128-31.

[82] *United States v. Edens*, 31 M.J. 267, 269 (C.M.A. 1990).

[83] *United States v. Cucuzzella*, 66 M.J. 57, 59 (C.A.A.F. 2008).

their therapist satisfy this test, that they were properly admissible as exceptions to the hearsay rule, and that the military judge did not abuse his discretion in allowing her to testify as to those statements.

First, we find that the social worker qualifies as a medical treatment provider within the meaning of MIL. R. EVID. 803(4). In *United States v. Morgan,* the court held that, under the appropriate circumstances, psychologists and social workers may fall within the scope of the medical treatment exception to the hearsay rule.[84] As a licensed clinical social worker who was treating these children, she held a status within the meaning of this rule. The children understood that talking to her about their problems was part of them "getting better," an age-appropriate term that captures her role in assessing and treating their mental health problems.[85]

The second prong of the *Edens* test requires that the declarant understand that the statements were made with an expectation of receiving medical treatment of diagnosis.[86] The critical question is the motive of the patient in giving the information and the patient's expectation that if he gives truthful information, it will help him to be healed.[87] The social worker's testimony established that the children understood that their therapy sessions with her, and the conversations that they had, were a part of their treatment.[88] She explained the importance of the treatment in terms understandable to a child, and there is sufficient evidence that the child knew that their conversations with the social worker were related to medical diagnosis and treatment.[89] We conclude that the military judge did not abuse his discretion in admitting this evidence as a MIL. R. EVID. 803(4) exception to the hearsay rule.

Even assuming *arguendo* that the military judge did abuse his discretion in allowing the social worker to testify about

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[84] 40 M.J. 405, 408 (C.M.A. 1994).

[85] *Morgan*, 40 M.J. at 409.

[86] *Edens*, 31 M.J. at 269.

[87] *Morgan*, 40 M.J. at 408.

[88] *See United States v. Quigley*, 40 M.J. 64, 65-66 (C.M.A. 1994).

[89] *Cf*. *United States v. Siroky*, 44 M.J. 394, 400 (C.A.A.F. 1996).

the statements that the children made to her, we find that any error did not materially prejudice the appellant's substantial rights. Her testimony during the prosecution's case-in-chief was quite short and quite limited. Before the social worker took the stand, the children had already testified to these same matters, had been subject to cross-examination by the defense on these same statements, and had provided legally and factually sufficient testimony to convict the appellant of those specifications that we are affirming.

In their wake, the social worker testified only that: (1) Child #5 told her that he saw the appellant touching Child #2 and Child #3 in their private parts; (2) Child #3 reported that the appellant had "touched her bottom," and that "he put his penis in her bottom and it hurt";[90] and (3) Child #2 gave few details about what the appellant had done to her, and said only that "he touched her bottom or the private parts."[91] In light of the more compelling, direct testimony of the three children, the social worker's testimony as to their hearsay statements was of minimal value to the Government's case.

Remaining *Grostefon* Issues

After carefully reviewing the record of trial, the assigned errors, and the Government's response, we find that the remaining assignments of error do not merit relief.

As discussed above, we set aside the guilty finding for Specification 4 of Charge I (aggravated sexual contact of Child #3) for reasons of factual and legal sufficiency. We affirm the remaining findings of guilty as to Specifications 1, 2, and 6 of Charge I, Specification 3 of Charge II, and Specification 1 of Charge III. We now must consider whether it is appropriate to reassess the appellant's sentence.

Sentence Reassessment

It is well-established that "a Court of Criminal Appeals (CCA), in dismissing a charge, may reassess the sentence and that sentence must be equal to or no greater than a sentence that would have been imposed if there had been no error.[92] If the CCA

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[90] The court notes that the members found the appellant not guilty of anal sodomy of Child #3.

[91] Record at 876-77.

[92] *United States v. Moffeit,* 63 M.J. 40, 41 (C.A.A.F. 2006) (citing *United States v. Sales,* 22 M.J. 305, 308 (C.M.A. 1986)).

is satisfied that "the sentence adjudged would have been of at least a certain severity, than a sentence of that severity or less will be free of the prejudicial effects of error . . . ."[93]

Although our action on findings changes the sentencing landscape, the change is not sufficiently dramatic so as to gravitate away from our ability to reassess.[94] We have set aside a finding of guilty for digital anal penetration of Child #3, a child under the age of 12, an offense with a maximum sentence of twenty years and a dishonorable discharge. Nevertheless, the appellant remains convicted of sodomy of that same child, rape of Child #1, a child under the age of 12 on divers occasions, aggravated sexual contact with Child #2, a child under the age of 12, and knowing receipt of child pornography. The maximum penalty for the remaining offenses remains the same: confinement for life without the eligibility for parole, total forfeitures, and a dishonorable discharge.

Upon reassessment, we affirm the adjudged sentence of confinement for thirty-three years and a dishonorable discharge. Considering the number of offenses of which the appellant was found guilty, the fact that he sexually abused three different children under his care, and that he remains convicted of a more serious offense against the same child, we are convinced that, absent the error, the members would have imposed a sentence of the same severity.

Conclusion

Accordingly, we set aside the finding of guilty of Specification 4 of Charge I and dismiss Specification 4 of Charge I. The findings of guilty for the remaining specifications and the charges are affirmed.[95] The finding of guilty as to receipt of child pornography (Specification 1 of Charge III) has been reviewed, and is affirmed, as a clause 3 offense. The supplemental court-martial order shall state findings of Not Guilty to Specifications 3 and 5 under Charge I, Specification 2 under Charge II, and Specification 4 under

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[93] *Id*. (citation and internal quotation marks omitted).

[94] *United States v. Buber,* 62 M.J. 476, 479 (C.A.A.F. 2006).

[95] Specification 1 of Charge I (rape of Child #1, a child under the age of 12, on divers occasions), Specifications 2 and 4 of Charge I (aggravated sexual contact with Child #2), Specification 3 of Charge II (sodomy of Child #3), and Specification 1 of Charge III (knowing receipt of child pornography).

Charge III. After reassessment of the sentence, we affirm the sentence as approved by the convening authority.

Senior Judge PERLAK and Senior Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court