

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

**Before
B.L. PAYTON-O'BRIEN, J.A. MAKSYM, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**HUGO I. VALENTIN, JR.
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS**

**NMCCA 201000683
GENERAL COURT-MARTIAL**

Sentence Adjudged: 15 April 2010.

Military Judge: LtCol Michael Mori, USMC.

Convening Authority: Commanding General, 3d Marine
Logistics Group, Marine Corps Base Hawaii, Kaneohe Bay, HI.

Staff Judge Advocate's Recommendation: LtCol J.J. Murphy,
USMC.

For Appellant: William E. Cassara, Civilian Appellate
Counsel; LCDR Michael Torrisi, JAGC, USN.

For Appellee: Maj Paul Ervasti, USMC.

17 May 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.**

PAYTON-O'BRIEN, Senior Judge:

The appellant was convicted, contrary to his pleas, by officer and enlisted members at a general court-martial of two specifications of rape of a child who had attained the age of 12 but not the age of 16, one specification of abusive sexual contact with a child who had attained the age of 12 but not the age of 16, and two specifications of indecent acts with a child,

violations of Article 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. He was sentenced to confinement for 15 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved only so much of the sentence as provided for confinement for 14 years, 10 months and 15 days, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge.

The appellant raises the following assignments of error (AOEs):¹

(1) The evidence is factually and legally insufficient to sustain the appellant's convictions;

(2) The convening authority erred in approving the adjudged sentence as there is no complete and accurate verbatim record of trial;

(3) The military judge erred by failing to properly instruct the members on the elements of Article 120(b) by changing the definition of force² and by instructing on a constructive force theory;

(4) The specifications alleging rape of a child fail to state an offense because they allege only half of the element of force;

(5) The trial defense counsel were ineffective during argument at trial and post-trial submissions when they essentially argued that the appellant was not truthful at trial, without first notifying him prior to argument and post-trial submissions, and without obtaining his consent³;

(6) Specifications 1 and 2 of Charge II (indecent acts with a child), fail to state an offense for lack of the terminal element;

¹ Assignments of Error 9-16 are raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

² The appellant alleges the definition of force was changed from "action to compel submission of another" to "action that compels submission of another."

³ The appellant submits that he would not have consented to the argument or submissions of his trial defense counsel.

(7) The military judge erred to the substantial prejudice of the appellant by admitting hearsay letters between the appellant and his former wife;

(8) The appellant is entitled to new post-trial processing because the convening authority erroneously believed the appellant had been convicted of the offenses involving a second child;

(9) The military judge abused his discretion when he refused to allow the defense counsel to use a visual aid during cross examination;

(10) The sentence was inappropriately severe;

(11) The military judge abused his discretion when he denied challenges for cause to Major (Maj) R and Master Sergeant (MSgt) W;

(12) The military judge erred by raising the issue of civilian counsel disqualification, failing to adequately advise the appellant of his right to conflict-free counsel, thereby effectively "pressuring" civilian counsel into withdrawing from his representation of the appellant;

(13) The military judge erred in allowing in as impeachment evidence the record of an out-of-court interview made by the victim;

(14) The appellant's due process rights were violated as a result of post-trial delay;

(15) Specifications 2 and 3 of Charge I (rape of a child and abusive sexual contact) fail to state an offense; and

(16) Cumulative errors require reversal.

After consideration of the pleadings of the parties, reviewing the entire record of trial, hearing oral argument, and taking into consideration the recent decisions of the Court of Appeals for the Armed Forces (CAAF) in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012), we find the military judge erred in instructing on constructive force as it pertained to the offenses of rape of a child by force, Specifications 1 and 2

under Charge I.⁴ We will set aside the findings of guilty of rape of a child, but affirm findings of guilty of the lesser included offense of aggravated sexual assault of a child and reassess the sentence. We conclude that no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Factual Background

The appellant was found guilty of raping by force, digitally penetrating, and inappropriately touching the breasts and buttocks of his 14-year-old stepdaughter, MR. In September 2006, while stationed at Camp Lejeune, North Carolina, MR's mother, GySgt IE, and the appellant were married.⁵ MR was 13 at the time her mother and the appellant married. After the marriage, GySgt IE received orders to deploy the following spring, so she began to make plans for her children while she was deployed.⁶ MR and her brother indicated they wished to move with the appellant to Hawaii and await their mother's return.⁷ In early 2007, GySgt IE deployed to Iraq, while her two children moved with the appellant to Hawaii to live with him for the duration of their mother's deployment.⁸

It was during GySgt IE's deployment that the sexual abuse by the appellant on his stepdaughter, MR, commenced. On several occasions just prior to MR's 14th birthday, the appellant touched MR's breasts and buttocks.⁹ In the ensuing months, he penetrated MR's vagina with his fingers and progressed to sexual intercourse on various occasions with MR.¹⁰ The sexual abuse of MR by the appellant took place in MR's bedroom as well as in the appellant's bedroom, while her brother slept nearby in his own bedroom.¹¹ MR never revealed the abuse to her mother while she

⁴ The appellant was arraigned on three specifications under Charge I, but the original Specification 1 was dismissed and the remaining two specifications were renumbered as Specifications 1 and 2.

⁵ Record at 947.

⁶ *Id.* at 948.

⁷ *Id.*

⁸ *Id.* at 948-49.

⁹ *Id.* at 673, 676, 681, 684-85, 695-96.

¹⁰ *Id.* at 690-96.

¹¹ *Id.* at 678-89.

was deployed, even though they maintained constant contact via email, webcam, and telephone.¹²

After GySgt IE returned from deployment, she came to Hawaii, resumed living with her children and the appellant, and began plans for a formal wedding with the appellant.¹³ On 5 January 2008, GySgt IE and MR spent the day shopping for wedding attire.¹⁴ Later that evening, GySgt IE retired to bed early before the appellant and her children did.¹⁵ GySgt IE awoke later that evening, realized that it was dark and that the appellant was not with her in bed, and went looking for him in the house.¹⁶ She discovered the appellant in her daughter's room, behind closed doors.¹⁷ When GySgt IE opened the door to MR's room, she found the appellant in her daughter's bed.¹⁸ Immediately, the appellant jumped out of her daughter's bed and "adjusted himself."¹⁹ GySgt IE proceeded quickly to the bed and took the covers off, revealing that MR was naked from the waist down.²⁰ The appellant denied doing anything wrong at first, but then told GySgt IE to ask MR "what she [MR] was doing while you were away."²¹ The appellant told GySgt IE that while she was deployed, MR was always walking around the house naked and going into the appellant's room at night naked.²² GySgt IE called 911 to report the appellant for molesting MR and the police arrived at the house shortly thereafter.²³

¹² *Id.* at 745-46.

¹³ *Id.* at 959.

¹⁴ *Id.*

¹⁵ *Id.* at 960-61.

¹⁶ *Id.* at 961.

¹⁷ *Id.*

¹⁸ MR testified that the appellant was sexually abusing her just prior to her mother coming into the room.

¹⁹ Record at 961.

²⁰ *Id.*

²¹ *Id.* at 961-62.

²² *Id.* at 962.

²³ *Id.*

The appellant was arrested and held in a civilian jail pending charges by the Hawaiian authorities. While in jail, the appellant exchanged numerous letters and telephone calls with GySgt IE while awaiting trial. During a telephone call with her, the appellant told GySgt IE that he touched MR.²⁴ Hawaiian authorities decided not to pursue charges against the appellant after GySgt IE and her children returned stateside and the Marine Corps then assumed jurisdiction.

The Sufficiency of the Record of Trial

The law requires that a record of trial be "complete" and contain a "substantially verbatim" transcript of the proceedings. Art. 54(c)(1), UCMJ; *United States v. Gray*, 7 M.J. 296, 297 (C.M.A. 1979). Whether a record is complete is a question of law, which we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). An incomplete record of trial is one with substantial omissions thus raising a presumption of prejudice that the Government must rebut. *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982). Conversely, insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one. *Henry*, 53 M.J. at 111. The determination of what constitutes a substantial omission from the record of trial is decided on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

We conclude that the omissions in this case are not substantial. We reach this conclusion for several reasons. First, the appellant cites to approximately 16²⁵ transcription errors, but these errors occur in a rather substantial record of trial totaling 1,857 pages. Second, the appellant does not offer any specific allegation as to how any of the errors affect his substantial rights or make appellate review impossible. The court acknowledges that there are inaudible responses in the record and places where it appears that a word or words may be missing or where there are typographical errors. The lack of any apparent impact on the appellant's rights or this court's ability to review makes their existence insubstantial. Third, the transcript was thoroughly reviewed. The military judge returned the record for corrections before he authenticated it, and listened to the audio files from important rulings during the Article 39(a), UCMJ, sessions during his review. Appellate Exhibit CCXII. Additionally, the appellant's individual

²⁴ *Id.* at 1616.

²⁵ See Government Brief of 28 Oct 2011 at 27.

military counsel (IMC) availed himself of an opportunity to review the record and registered no objections.²⁶

We recognize that the potential prejudice from having a record of trial that is less than complete or contains inaccurate information is that the appellant could be denied a full and fair review of his convictions. We do not find, however, that such conditions exist in this case. As we have determined, the record is substantially verbatim, except for the errors pointed out by the appellant in his brief and which we have noted herein, but we find that the appellant has not suffered any prejudice from the omissions. Second, the appellant's IMC was provided an opportunity to comment on any corrections he felt necessary to make the record accurate prior to authentication. Third, the appellant did not raise any legal issue concerning the record's accuracy prior to the CA taking his action.²⁷ In light of these facts, based upon our review of the record, only insubstantial omissions exist and the record is complete within the meaning of Article 54(c)(1), UCMJ. Thus, the appellant can receive a full and fair review of his convictions based on the completeness and accuracy of the current record of trial. Art. 66(c), UCMJ.

Failure to State an Offense - Rape

In his fourth assignment of error, the appellant avers that Specifications 1 and 2 under Charge I (rape of a child by force) are deficient because each specification omits the first half of the definition of force and does not provide notice as to what theory of criminality the appellant had to defend against. In light of our action setting aside the findings of guilty to rape and affirming findings of guilty to the lesser included offense of aggravated sexual assault of a child, whether the element of

²⁶ The IMC wrote in a 1 October 2010 e-mail to the military judge (AE CCXXII at 5): "WRT the accuracy of the ROT, I find it to be substantively accurate with no plain errors or defects. I trust that the typos were caught and/or corrected by the government or the court as I don't find those to be substantive errors. The defense will address the quality and quantity of the remaining inaudibles (as well as Moreno concerns) with the CA during the 1105/1106 process. In the end, the defense has received an adequate opportunity to examine the ROT prior to authentication pursuant to RCM 1103(i)(1)(B)."

²⁷ The clemency request from the IMC makes mention of the problems encountered in the transcription and authentication process and appears to even concede that the record ultimately was completed without substantial omissions. Request for Clemency of 15 Nov 2010 at 12.

force was properly alleged is no longer at issue, as the lesser-included offense does not require the proof of force.

Failure to State an Offense - Article 134 Offense

Whether a specification states an offense is a matter we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense if it alleges every element of the offense, either expressly or by necessary implication. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012); *Fosler*, 70 M.J. at 229; *Crafter*, 64 M.J. at 211; RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). When a specification does not expressly allege an element of the intended offense, appellate courts must determine whether the terminal element was necessarily implied. *Fosler*, 70 M.J. at 230. The interpretation of a specification in such a manner as to find an element was alleged by necessary implication is disfavored. *Ballan*, 71 M.J. at 33-34. Nonetheless, the law still remains that there is no error when a specification necessarily implies all the elements of an offense.

The specifications at issue read as follows:

Specification 1: In that [the appellant], on active duty, did, on divers occasions, on the island of Oahu, Hawaii, from on or about 16 April 2007 to on or about 30 September 2007, commit indecent acts upon M.R., a female under 16 years of age, not the wife of the said [appellant], by penetrating with his finger the genital opening of M.R., with intent to gratify the sexual desires of the said [appellant].

Specification 2: In that [the appellant], on active duty, did, on divers occasions, on the island of Oahu, Hawaii, from on or about 16 April 2007 to on or about 30 September 2007, commit indecent acts upon M.R., a female under 16 years of age, not the wife of the said [appellant], by touching with his hand the breast and buttocks of M.R., with intent to gratify the sexual desires of the said [appellant].

The specifications allege violations of Article 134, UCMJ, by committing indecent acts with a child.²⁸ The statutory

²⁸ Because these offenses occurred between April 2007 and September 2007, they were charged under Article 134, UCMJ, vice the "new" Article 120, UCMJ, established by the National Defense Authorization Act of 2006.

elements of this offense are: (1) the appellant did or failed to do certain acts and (2) under the circumstances, the appellant's conduct was either prejudicial to good order and discipline in the armed forces [a *clause (1) offense*], of a nature to bring discredit upon the armed forces [a *clause (2) offense*], or constituted a noncapital offense [a *clause (3) offense*]. See *Fosler*, 70 M.J. at 228-30; *United States v. Medina*, 66 M.J. 21, 24-26 (C.A.A.F. 2008); MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 87b.²⁹

Looking to the plain language contained within the four corners of the specifications, we are unable to conclude that they allege the terminal element expressly or by necessary implication. See *Nealy*, 71 M.J. 73, 2012 CAAF LEXIS 369, at *14-15. However, consistent with *Nealy*, having found error, we will test for prejudice.

The appellant has the burden of demonstrating prejudice. *Ballan*, 71 M.J. at 34 (citing *United States v. Girouard*, 70 M.J. 5, 11-12 (C.A.A.F. 2011)). The appellant has failed to meet that burden in this case. We can discern nothing from this record other than full awareness as to the crime alleged and the elements supporting that crime. There was no request for a bill of particulars, no argument as to whether the elements were supported, no surprise stated or objection raised when the elements were provided to the members in instructions before counsel arguments, no confusion or indication that the defense was misled by the pleadings, and no claim, prior to the pleadings before this court, that the specification was in any way defective. As we recently stated in *United States v. Hunt*, ___ M.J. ___, No. 201100398, 2012 CCA LEXIS 155, at *5 (N.M.Ct.Crim.App. 30 Apr 2012) (*en banc*), "[p]roof of prejudice, in the air, so to speak, is insufficient to support a conclusion that the plain error test has been satisfied."

For these reasons, the Article 134 specifications were defective because they failed to articulate all of the elements of the offense, either explicitly or by necessary implication. The error was plain and obvious, as this case is before us on direct appeal after the CAAF opinion in *Fosler*. However, we find no prejudice to the appellant, and decline to grant relief under our broader authority resting within Article 66(c), UCMJ.

Improper Severance of Civilian Trial Defense Counsel

²⁹ We cite the 2005 Manual as this Article 134 offense was in effect under that edition of the Manual.

R.C.M. 506(c) provides the authority for severance of an attorney client relationship. Specifically, under R.C.M. 506(c), the relationship may be severed with the "express consent of the accused." Whether there has been a proper severance of the attorney-client relationship is a mixed question of fact and law. *United States v. Spriggs*, 52 M.J. 235, 244 (C.A.A.F. 2000). Findings of fact are reviewed under an abuse of discretion standard and conclusions of law are reviewed *de novo*. *Id.*

In the instant case, trial counsel raised a pretrial motion *in limine* to exclude all testimony and argument related to the State of Hawaii's decision not to prosecute the appellant. AE XXI. Civilian defense counsel opposed the motion on the grounds that the non-cooperation of GySgt IE would be the proper subject of cross-examination.³⁰ In response, the prosecution brought to the attention of the court that GySgt IE's lack of cooperation with civilian authorities could be explained by the actions of civilian defense counsel.³¹ Civilian defense counsel represented to the court that he would be able to counter the Government's argument without having to personally testify.³² The military judge noted at that time it would be "premature" to say that the civilian defense counsel would be a witness, but he expressed concerns about the civilian defense counsel becoming a witness at a later point in the trial.³³ After the exchange with the civilian defense counsel, the military judge advised the appellant as to the possible issues concerning his counsel.³⁴ The military judge's main concern seemed to be that the civilian defense counsel would become disqualified in the middle of trial, causing a disadvantage to the appellant.³⁵

Ultimately, on 2 November 2009, at an Article 39(a), UCMJ, session of court, the civilian defense counsel sought to withdraw from representation due to the likely potential he

³⁰ AE XXVIII; Record at 174-79.

³¹ Record at 180.

³² *Id.* at 181.

³³ *Id.* at 183-84.

³⁴ *Id.* at 182-84.

³⁵ *Id.* at 182-83; 194.

would be called as a witness at trial.³⁶ After being advised by the military judge as to his rights in this regard, the appellant expressly consented to his civilian defense counsel's excusal, as he felt it would be in his best interests.³⁷ The military judge did not decide that the civilian defense counsel was disqualified, because it "hadn't reached that point," but he allowed him to withdraw with the appellant's consent.³⁸ The appellant subsequently submitted a request for an IMC, which was granted by the CA. The IMC, who was then serving as the Regional Defense Counsel for the Pacific Region, and the detailed defense counsel, were both elected by the appellant and represented him at trial.³⁹ The appellant elected not to retain a new civilian counsel.⁴⁰

Despite the appellant's contentions now on appeal, there is nothing in the record to indicate that the military judge pressured the appellant into releasing his civilian defense counsel. Rather, in reviewing the entirety of the record, the military judge's finding that the appellant expressly consented to the severance is supported. The record also reveals that the military judge properly advised the appellant as to his rights to counsel, prior to the appellant consenting to releasing his civilian defense counsel and electing to proceed with detailed defense counsel and IMC. We find that there was no improper severance of the attorney-client relationship.

Challenges of Members

The appellant next claims that the military judge abused his discretion by denying the defense challenges for cause against Maj R and MSgt W. We disagree.

In his court-martial member questionnaire, Maj R responded to a question concerning whether he expected or required the appellant to testify: "I would like to hear it but understand his rights."⁴¹ He also wrote in response to a question regarding

³⁶ *Id.* at 264.

³⁷ *Id.* at 266-29.

³⁸ *Id.* at 268-69.

³⁹ *Id.* at 276, 280-81.

⁴⁰ *Id.* at 281.

⁴¹ AE LVI at 42.

his expectation or requirement as to good military character evidence, "I think it makes sense for him to do so but I know that Marines who are role models at work do things after hours that shock their commanders."⁴² Then, during *voir dire* by the IMC as to his expectation for the appellant to present good military character evidence, Maj R responded, "Yes, I mean. I guess I would somewhat surprised if it didn't happen. I don't think it's necessary for his defense, but if there was no mention at all to what kind of Marine he was, I guess I would find that odd."⁴³

In his court-martial member questionnaire, MSgt W responded to a question concerning whether he expected or required the appellant to testify: "No. The Fifth Amendment guarantees his right to not testify."⁴⁴ He then responded to a question regarding his expectation for good military character evidence: "Expect" isn't the right word, sir. It's that you would assume that he would . . . And he has a long career so I assume that he would put on his military career as evidence, but I know that it's not required."⁴⁵ He further elaborated that it would "not really" be odd if there was no type of good military character evidence presented.⁴⁶

The military judge denied the defense challenge for cause of Maj R and MSgt W on both the basis of implied and actual bias.⁴⁷ The defense team then used its peremptory challenge on a different member, thereby preserving the denied challenge for cause for his appeal.⁴⁸ See R.C.M. 912(f)(4).

We review a military judge's ruling on a challenge for cause for an abuse of discretion. *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000) (citing *United States v.*

⁴² *Id.*

⁴³ Record at 573.

⁴⁴ AE LVI at 118.

⁴⁵ Record at 624.

⁴⁶ *Id.*

⁴⁷ We note that the defense challenged Maj R under an implied bias theory while they challenged MSgt W under an actual bias theory. The military judge denied the challenges as to both members under both actual and implied biases. *Id.* at 643.

⁴⁸ *Id.*

Napoleon, 46 M.J. 279, 283 (C.A.A.F. 1997)). "Actual and implied bias are separate legal tests, not separate grounds for challenge." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (citation and internal quotation marks omitted).

Considering the record as a whole, we find that the appellant did not meet his burden of establishing that grounds for challenge against Maj R or MSgt W based on implied or actual bias existed. Further, during *voir dire*, Maj R and MSgt W clearly demonstrated their willingness to judge the appellant's case based on the evidence presented at trial in accordance with the military judge's instructions and understood that the burden was never on the appellant to prove his innocence.⁴⁹ As the military judge adhered to the proper legal tests for actual and implied bias, utilizing the liberal grant mandate, this assignment of error has no merit.⁵⁰ See *Clay*, 64 M.J. at 276-77; *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987).

The Letters between the Appellant and his Wife

Admissibility of evidence is reviewed for an abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). We will not overturn a military judge's evidentiary decision unless that decision was "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Johnson*, 62 M.J. 31, 34 (C.A.A.F. 2005) (citations and internal quotation marks omitted).

The Government sought to introduce into evidence almost 130 pages of letters the appellant had written to GySgt IE, some of which included statements that indicated consciousness of guilt. The IMC opposed introduction of the letters. The military judge sustained the defense objection in part, making a determination that certain letters were not relevant.⁵¹ After applying a balancing test and making allowance for cumulativeness, the military judge determined that only three of the letters were relevant in that they contained communications that indicated a consciousness of guilt on the part of the appellant.⁵² Thus, the military judge admitted only three letters consisting of six handwritten pages by the appellant (Prosecution Exhibit 3)

⁴⁹ *Id.* at 530.

⁵⁰ *Id.* at 64.

⁵¹ *Id.* at 459-60.

⁵² *Id.* at 460-61.

without objection from the defense,⁵³ after the defense agreed with the military judge that these pages were relevant.⁵⁴ The remaining 125 pages⁵⁵ were not admitted into evidence. Now, on appeal, the appellant argues that all of the letters should have been admitted into evidence. We note the appellant did not seek to admit the remaining letters in his own case in chief.

In order to reverse, we must be convinced that the military judge committed a clear error of judgment. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). We find that the military judge did not commit a clear error of judgment and that he did not, therefore, abuse his discretion.

Use of the Visual Aid

The appellant's next assignment of error concerns the military judge's limits on defense counsel during the cross-examination of MR. The decision to permit or deny the use of demonstrative evidence generally has been held to be within the sound discretion of the military judge. *United States v. Pope*, 69 M.J. 328, 332 (C.A.A.F. 2011). Even if it was error to prohibit the use of demonstrative evidence, there was no material prejudice to the substantial rights of the appellant. *United States v. Stark*, 24 M.J. 381, 385 (C.M.A. 1987).

In the instant case, the military judge denied trial defense counsel's request to contemporaneously write down MR's testimony on a large pad of paper in view of the members while she was testifying, specifically for the purpose of recording her prior inconsistent statements.⁵⁶ The military judge did not limit or restrain the cross-examination of MR regarding the prior inconsistent statements. The content of the evidence the trial defense counsel wished to present was presented to the members, albeit just not in the form requested by the defense. However, given the military judge's wide discretion on these matters, we cannot find that the substantial rights of the appellant were materially prejudiced.

Military Judge's Instructions

⁵³ *Id.* at 661.

⁵⁴ *Id.* at 461.

⁵⁵ Marked as "Prosecution Exhibit 7 for ID."

⁵⁶ Record at 715.

A. The Instructions

After the members had received all evidence, the military judge discussed instructions with the counsel, wherein both sides indicated that "parental compulsion" was an appropriate instruction as to the force element of rape.⁵⁷ Then, just prior to instructing the members, the military judge asked, "Then, defense, before I bring -- bring the members in, do you have any objection or request for a specific instruction that is not already included in Appellate Exhibit CXC?" The individual military counsel replied, "No, Sir."⁵⁸ The military judge gave the following instruction regarding the elements of rape of a child:

- 1) [T]hat from on or about 1 October 2007 to on or about 5 January 2008, on the island of Oahu Hawaii, the accused, on diverse [sic] occasions, engaged in sexual acts, to wit; [sic] sexual intercourse, with [MR], and
- 2) [T]hat the accused did so by using force against [MR] to wit: by using power sufficient that she could not avoid or escape the sexual conduct, and
- 3) [T]hat at the time [MR] had not obtained [sic] the age of 16 years.

Record at 1675 (Specification 1 of Charge I).

- 1) [T]hat from on or about 1 October 2007 to on or about 5 January 2008, on the island of Oahu Hawaii, the accused on diverse [sic] occasions engaged in sexual acts, [to wit]: penetrating with his finger the genital opening of [MR],
- 2) [T]hat the accused did so by using force against [MR], to wit: by using power sufficient that she could not avoid or escape the sexual conduct, and
- 3) [T]hat, at the time [MR] had not obtained [sic] the age of 16 years"

Id. at 1677-78 (Specification 2 of Charge I).

⁵⁷ *Id.* at 1655.

⁵⁸ *Id.* at 1667.

The military judge also gave the following oral instructions on force and parental compulsion:

Force means, action that compels submission of another to overcome or prevent another's resistance by physical violence, strength, power, or restraint applied to another person sufficient that the other person could not avoid or escape the sexual act.

Sexual activity between a step parent and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a step parent's position of authority may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, normally [sic] children [invariably] accede to a parental will.

In deciding whether [MR] did not resist or ceased resistance because of constructive force in the form of parental distress or compulsion, you must consider all the facts and circumstances, including but not limited to [MR's] age when the alleged sexual act upon her by the accused began, [MR's] ability to fully comprehend the nature and meaning of all interactions between her and the accused, what effect, if any, the prior acts of the accused had on [MR], [MR's] knowledge of the accused parental power over her, and any implicit or explicit threats of punishment or physical harm if [MR] did not obey the accused's commands, if [MR] did not resist, or ceased resistance due to compulsion or duress of parental command, constructive force has been established and the act of sexual intercourse is done by force.

Id. at 1676, 1678-79. The military judge also gave these instructions when explaining Specification 2 under Charge I. *Id.* at 1678-79.

B. The AOE's

The appellant's challenge to the military judge's instructions are twofold: 1) the military judge's oral instructions to the members on force which stated the definition of force as "action that compels submission of another" instead of as an "action to compel submission of another" materially changed the definition of force from a specific intent crime to

a general intent crime; and 2) the military judge erred in instructing on a constructive force theory of parental compulsion which allowed the act of intercourse alone to satisfy the force element if the totality of the circumstances show that a parent used his or her position of authority over the child to coerce the child into intercourse.

C. The Standard

Whether a panel is properly instructed is a question of law, which this Court reviews *de novo*. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). The military judge bears the primary responsibility for assuring that the jury is properly instructed on the elements of the offenses raised by the evidence. *Id.* Trial defense counsel did not object to the military judge's instructions and, in fact, consented to the instructions.⁵⁹ "Failure to object to an instruction given or omitted waives the objection absent plain error." *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011) (citing R.C.M 920(f)). Plain error occurs if the following are shown: (1) there is error; (2) the error is plain and obvious; and, (3) the error results in material prejudice to a substantial right. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

A failure to provide correct and complete instructions to the members prior to deliberation on findings carries constitutional implications, specifically if the failure amounts to a denial of due process. *See United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979) (finding a denial of due process when the military judge failed to provide a curative instruction, in response to a member's question, that no inference could be drawn from accused's failure to take the stand). Furthermore, a jury instruction which lessens to any extent the Government's burden to prove every element of a crime violates due process. *See Francis v. Franklin*, 471 U.S. 307 (1985).

D. Changing the Definition of Force

The first aspect of the appellant's argument lacks merit. The change to the oral instruction was an insubstantial change and the written instructions provided to the members for their deliberations were correct in law. AE CXC. There was no objection by trial defense counsel relative to the oral instruction and the error was not plain. Further, for reasons

⁵⁹ Record at 1655.

previously articulated by this court, Article 120(b), UCMJ, rape by force, is not a specific intent crime. *United States v. Redd*, No. 201000682, 2011 CCA LEXIS 413, unpublished op. (N.M.Ct.Crim.App. 29 Dec 2011), *rev. granted*, ___ M.J. ___, 2012 CAAF LEXIS 483 (C.A.A.F. Apr. 19, 2012). Thus, the military judge did not "alter" a specific intent crime to a general intent crime. We find no such language in the statutory definition of force, the statutes criminalizing rape by force, the elements of this crime as set forth in the MCM, or within the Military Judge's Benchbook⁶⁰ instructions on rape. As we stated in *Redd*, "[w]ithout doubt, there are crimes under Article 120 that contain an element of specific intent." *Redd*, 2011 CCA LEXIS 413, at *11. However, rape of a child is not one of them.

E. Constructive Force

We do, however, agree with the appellant as to the second aspect of his argument pertaining to the military judge's instructions. We find that the theory of constructive force by parental compulsion is not encompassed in the definition of force under Article 120(t)(5), UCMJ. Despite the lack of defense counsel objection, it was plain error for the military judge to instruct the members that they could find constructive force based on a parental compulsion theory, and that the error materially prejudiced the appellant.

The appellant was charged with violating Article 120(b), UCMJ, rape of a child by force. The acts supporting this charge and its two specifications occurred between October 2007 and January 2008, and, therefore, fell within the changes incorporated to Article 120 by The National Defense Authorization Act (NDAA) for Fiscal Year 2006 (Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006)). The 2006 NDAA significantly changed Article 120. In addition to incorporating crimes that were previously charged within other sections of the code, the new version of the law divided sexual crimes into degrees of culpability, and included previously absent definitions of force and consent. This cafeteria-style statute was a marked change from the previous Article 120 charge of rape.

We find that the military judge erred in the inclusion of a constructive force instruction based on parental compulsion for several reasons. First, CAAF has stated that "each act of force described in Article 120(t)(5)(C), at a minimum, includes an offensive touching that satisfies the bodily harm element of

⁶⁰ Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 2-6-10 (Ch.2, 1 Jan 2010).

Article 120(t)(8).” *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (citations omitted). The facts in *Alston* are limited to a rape charged as physical force, but the *dicta* in the case suggests that the psychological compulsion of a constructive force doctrine could not satisfy Article 120(t)(5)(C). *Id.* Force under Article 120(t)(5)(C) is defined as, “action to compel submission of another or to overcome or prevent another’s resistance, by . . . physical violence strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.” Finding that “power” describes a physical act and not psychological forces conforms to the canon of statutory construction *noscitur a sociis*: words are judged by the company they keep. *United States v. Martinelli*, 62 M.J. 52, 61 (C.A.A.F. 2005). All of the words surrounding “power” in Article 120(t)(5)(C) contemplate physical action. To find that “power” means something other than physical compulsion would make “power” an anomaly in the middle of a list describing other physical acts.

Next, the legislative history supports a finding that the word “power” in (t)(5)(C) indicates a physical component. The text of the UCMJ’s rape statute remained relatively unchanged since the inception of the UCMJ⁶¹ until there was an official call from Congress to overhaul Article 120.⁶² The previous version of Article 120 was a common law rape statute that did not include a definition of force. As is typical with common law statutes, judicial opinions filled the void in the statute, including developing the concept of constructive force. See *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991) (holding that the force component of rape can be established by

⁶¹ See Major Martin Sims, *Coercive Sexual Intercourse: A Proposal to Amend Article 120, UCMJ, to Prevent the Misapplication of the Parental Duress Theory of the Constructive Force Doctrine of Rape* (1999)(unpublished LL.M. thesis, The Judge Advocate General's School, U.S. Army) (on file with The Judge Advocate General's Legal Center and School Library); Major Carl A. Johnson, *Nonconsensual Sex Crimes and the UCMJ: A Proposal for Reform* (2003) (unpublished LL.M. thesis, The Judge Advocate General's School, U.S. Army) (on file with The Judge Advocate General's Legal Center and School Library).

⁶² Public Law (P.L.) 108-375, the Ronald W. Reagan National Defense Authorization Act for fiscal year 2005, P.L. 108-375, § 571 required the Secretary of Defense to review the UCMJ and MCM “with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault” and to conform the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946 and *Manual for Courts-Martial, United States* (2002 ed.) . . . “more closely to other Federal laws and regulations that address such issues.”

constructive force inherent in a parent's position over a child).

A task force was assembled and six options for changing the statute were offered.⁶³ The task force ultimately recommended not changing the statute, for a variety of reasons including the belief that a major change to the law from a common law statute would eviscerate the applicability of military appellate court decisions.⁶⁴ In the six options presented, some included incorporating the parental compulsion theory of constructive force while other options did not. Ultimately the task force's recommendation not to change Article 120 was rejected, and the statute was amended without expressly including a theory of constructive force based on parental compulsion. Thus, Article 120(b) does not provide for a theory of constructive force and, although we recognize that constructive force was previously a creature created by judicial opinion, we decline to judicially create one now.

Finally, supporting our conclusion that constructive force is not included in the definition of force for rape of a child under the current version of Article 120, UCMJ, is the definition of force for the crime of rape of a child in the 2012 MCM.⁶⁵ In the 2012 statute, rape of a child, a violation of 120b(a), UCMJ, which has an effective date of 28 June 2012, the theory of constructive force is expressly included in the definition of force. Article 120b(h)(2) states that "in the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force." The express inclusion of the theory in the new statute, which is an updated version of the former, indicates that the theory was simply not included in the prior version under which the appellant was convicted.

The military judge's instruction as to constructive force was a plain and obvious error. Thus, our next question is whether the appellant was materially prejudiced by the error. We find that he was. The members were given an instruction that lessened the Government's burden to prove physical force.

⁶³ DoD 2004 Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice, <http://www.dod.mil/dodgc/php> (last visited 8 May 2012).

⁶⁴ *Id.* at 56.

⁶⁵ Article 120 has been amended, yet again, by The National Defense Authorization Act (NDAA) for Fiscal Year 2012 (Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011)).

Therefore, the findings of guilty as to the rape of a child by force, Specifications 1 and 2 under Charge I, may not be affirmed.

F. Lesser Included Offense

Although we cannot affirm the findings of guilty of rape of a child by force, we next consider whether there is evidence in the record on each of the elements of the lesser included offense of aggravated sexual assault of a child who had attained the age of 12 but not the age of 16, under Article 120d. See *United States v. Upham*, 66 M.J. 83, 88 (C.A.A.F. 2008) (citing *United States v. McKinley*, 27 M.J. 78, 79 (C.M.A. 1988)).

The elements of the offense of rape by force of a child who had attained the age of 12 but not 16 are: (1) that the accused engaged in a sexual act⁶⁶ with a child; (2) that at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and (3) that the accused did so by using force against the child. Art. 120(b)(2), UCMJ; MCM, Part IV, ¶ 45b(2)(b). The elements of the offense of aggravated sexual assault of a child who had attained the age of 12 but not the age of 16 are: (1) that the accused engaged in a sexual act with a child; and (2) that at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years." Art. 120(d), UCMJ; MCM, Part IV, ¶ 45b(4). The latter is a lesser included offense of the former and we find evidence as to both specifications of aggravated sexual assault of a child who had attained the age of 12 but not the age of 16 in the record of trial.

Factual and Legal Sufficiency

The appellant asserts that the evidence was legally and factually insufficient to support a finding of guilty to all charges and specifications. We will consider the sufficiency of the evidence as to the offenses of aggravated sexual assault of a child who had attained the age of 12 but not the age of 16, abusive sexual contact, and indecent acts with a child.

⁶⁶ "Sexual act" means contact between the penis and vulva, and for the purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight; or the penetration, however slight, of the genital opening of another by a hand or finger 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. MCM, Part IV, ¶ 45t(1)(A) and (B).

Issues of legal and factual sufficiency are reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Wincklemann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979)); see also Art. 66(c), UCMJ. When testing for legal sufficiency all reasonable inferences are drawn in favor of the prosecution. *United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008). 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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007).

We start our analysis with an examination of the elements of the crimes. The elements of aggravated sexual assault of a child who had attained the age of 12 but not the age of 16 were listed in the previous section of this opinion.

The elements of abusive sexual contact with a child are: (1) that the accused engaged in sexual contact with a child; and (2) that at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years. Article 120(i), UCMJ; MCM, Part IV, ¶ 45b(9).

The elements of indecent acts with a child are: (1) that the accused committed a certain act upon or with the body of a certain person; (2) that the person was under 16 years of age and not the spouse of the accused; (3) that the act of the accused was indecent; (4) that the accused committed the act with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desire of the accused, the victim or both; and (5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, Part IV, ¶ 87b(1) (2005 ed.).⁶⁷

⁶⁷ Citing to the 2005 edition of the Manual due to the applicability of that edition to these offenses.

The appellant's argument is that the evidence is insufficient because the bulk of the evidence against the appellant came from the victim, MR, and that her testimony lacks veracity as illustrated by the myriad discrepancies between the various statements she gave about the incidents. We disagree.

It is clear from the review of the record of trial that evidence exists which proves every element of the charges for which the appellant was convicted, to include the two specifications of aggravated sexual assault of a child who had attained the age of 12 but not the age of 16. After carefully reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are persuaded that a reasonable fact-finder, in this case the members, could indeed have found all the essential elements of the offenses beyond a reasonable doubt. *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006). Furthermore, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt as to those charges. *Turner*, 25 M.J. at 325.

Ineffective Assistance of Trial Defense Counsel

The appellant avers his trial defense counsel were ineffective during closing argument and post-trial submissions by effectively arguing that the appellant was not truthful at trial. He alleges that his counsel did not notify him of their intentions prior to argument and post-trial submissions, and that he would not have consented to either the argument or the post-trial submissions.

Service members have the right to effective assistance of counsel at their courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). An appellant is entitled to effective post-trial representation by the same standard as representation at trial. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997).

We begin with the presumption that trial defense counsel provided effective assistance throughout the trial. The presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *Davis*, 60 M.J. at 473 (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)); see also *Strickland v. Washington*, 466 U.S. 688, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). The

tactical and strategic choices made by defense counsel need not be perfect; instead, they must be judged by a standard ordinarily expected of fallible lawyers. See *United States v. Curtis*, 44 M.J. 106, 119 (C.A.A.F. 1996). "[S]econd-guessing, sweeping generalizations, and hindsight will not suffice." *Davis*, 60 M.J. at 473 (citations omitted). We note that the appellant "'must surmount a very high hurdle'" in a claim of ineffective assistance of counsel. *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

Ineffective assistance of counsel involves a mixed question of law and fact, which requires a *de novo* review. *Davis*, 60 M.J. at 473 (citing *Anderson*, 55 M.J. at 201). A three-prong test is used to determine if the presumption of competence has been overcome:

- (1) Are the allegations true; if so, is there a reasonable explanation for counsel's actions?;
- (2) If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers?; and
- (3) If defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant argues that the statements of his IMC during closing argument that the appellant "hid[] a few things" and was not "forthright about his relationship with a poolee" because he was "embarrassed about a couple of things," amounted to characterizing the appellant as a liar before the members.⁶⁸ The appellant avers that his counsel's strategy to deal with the evidence that the appellant's relationship with a poolee⁶⁹ was more than he had originally admitted was deficient, since the IMC later argued that the appellant was a truthful person. The

⁶⁸ Record at 1723-24.

⁶⁹ In its rebuttal case, in an effort to impeach the appellant's credibility, the Government offered testimony to counter the appellant's own testimony that while assigned as a recruiter he had not had a prohibited sexual relationship with a member of the delayed entry program, commonly referred to as a poolee.

appellant also avers that the IMC's failure to provide him a copy of the clemency petition prior to submission was error.

Having carefully considered the record of trial, including the appellant's brief affidavit, we find that the appellant has not met his burden to show that the defense strategy, either at trial or in clemency, was unreasonable under prevailing norms. *Davis*, 60 M.J. at 473. We therefore conclude that the appellant was not denied effective representation under applicable standards of review. Accordingly, we find the appellant's claim to be without merit.

Even if error was committed, the appellant has failed to demonstrate prejudice. The evidence of his abuse of MR was substantial and he was convicted of very serious crimes involving MR. The defense strategy to try and lessen the impact of what appeared to be the appellant's lack of forthrightness concerning a relationship with a poolee was a reasonable course of action with both the members and the CA. We will not play Monday-morning quarterback with regard to counsel strategy in this regard. The appellant has not offered or demonstrated what further matters of clemency he would have raised that would have made the outcome of the CA's decision different. Furthermore, we note in the clemency petition filed by the appellant's counsel, a detailed and lengthy handwritten letter was provided by the appellant, with numerous letters from the appellant's family and friends dated after the trial had ended. The IMC cites to a meeting he had with the appellant at Fort Leavenworth, Kansas prior to submission of clemency matters in order to "meaningful assist [appellant] in the preparation of this clemency request".⁷⁰ Finally, AE XXVI indicates the appellant was provided his appellate rights upon the completion of trial and he demonstrated an understanding of his appellate rights.⁷¹

Error in the Convening Authority's Action

An appellant is entitled to have his official records correctly reflect the results of his proceeding. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We agree with the appellant that the court-martial order incorrectly reflects that the appellant was found guilty of one specification of indecent acts with AJ. Court-Martial Order of

⁷⁰ Clemency Request at 3.

⁷¹ Record at 1851.

23 Nov 2010 at 3. We will order corrective action in our decretal paragraph.

The appellant argues that the error in the court-martial order shows that the CA in deciding his post-trial action mistakenly believed that the appellant was convicted of indecent acts with another child under the age of 16. The record, however, reveals that the CA was aware that the appellant was found not guilty of this charge, as reflect by the proper findings in the results of trial and staff judge advocate's recommendation. Both of these documents were considered by the CA before taking action. We conclude that the error in his court-martial order did not reflect an incorrectly held belief about the outcome of the trial.

Although not assigned as error, we also note the court-martial order fails to list one specification under Article 120 upon which the appellant was arraigned (the original Specification 1 under Charge 1), to which a plea of not guilty was entered, however, the specification was ultimately withdrawn and dismissed by the Government during the merits phase of the trial. We will order corrective action in our decretal paragraph. We find no prejudice to the appellant.

Post-Trial Delay

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citation omitted). Appellate delay can result in a due process violation if the delay is facially unreasonable. *Id.* at 136. A CA's failure to take action within 120 days of the completion of trial, the failure to docket the record of trial with the service court within 30 days of the CA's action, or the failure of the service court to decide a case within 18 months of docketing is facially unreasonable and triggers the four-factor analysis of *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to determine whether or not the appellant's due process rights have been violated by the post-trial delay. *Moreno*, 63 M.J. at 142. In this case, the CA failed to take his action within 120 days of the completion of trial, thus triggering the *Barker* analysis.

The four-factor analysis of *Barker* examines the following: 1) the length of the delay; 2) The reasons for the delay; 3) the appellant's assertion of the right to timely review and appeal; and 4) prejudice. 407 U.S. at 530. Whether post-trial delay constitutes a due process violation is reviewed *de novo*. *United*

States v. Bush, 68 M.J. 96, 102 (C.A.A.F. 2009) (citing *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006)). If there is error, we must be convinced beyond a reasonable doubt that the error was harmless. *United States v. Gosser*, 64 M.J. 93, 99 (C.A.A.F. 2006).

In the instant case, the appellant was convicted on 15 April 2010; the CA took action on 23 November 2010, exceeding the 120-day *Moreno* standard. The reasons for the delay in completing the CA's action stem from a 15-volume record, with almost 1,900 pages of transcript, and containing approximately 1000 pages of prosecution, defense and appellate exhibits. Due to court reporting equipment issues, action was required to correct numerous transcription errors. The appellant has asserted his rights on appeal, but the record does not demonstrate evidence of prejudice resulting from the post-trial delay in completing the CA's action.

The appellant alleges that he suffered prejudice from his continued confinement, his future registration as a sex offender, the attempts of the prison counselors to have him attend treatment, and the stress on his family from his continued confinement. The appellant's claims are not a "particularized anxiety" with a nexus to the post-trial delay, but rather are no more than the "normal anxiety experienced by prisoners awaiting an appellate decision," which does not warrant relief. See *Moreno*, 63 M.J. at 140.

Severity of the Sentence / Sentence Reassessment

We disagree with the appellant's tenth assignment of error that the sentence adjudged is unduly severe. However, the appellant's claim that his sentence is inappropriately severe is resolved by our sentence reassessment in light of our affirming the lesser included offense of aggravated sexual assault of a child. We conclude that if the error had not occurred, the appellant would not have been sentenced to more than 13 years confinement, a dishonorable discharge, reduction to pay grade E-1, and forfeiture of all pay and allowances. We also conclude that such a sentence is appropriate for this offender and his offenses. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986).

Notwithstanding the effect our corrective action has on the maximum imposable sentence,⁷² we may reassess a sentence instead

⁷² The maximum authorized confinement is reduced from life without the possibility of parole to 61 years.

of ordering a rehearing if we are convinced that the sentence "would have been at least of a certain magnitude" but for the trial error. *Id.* at 307. If a court of criminal appeals "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," it must return the case for sentence rehearing rather than reassess the sentence itself. *Id.*

The appellant stands convicted of sexually abusing his stepdaughter over a substantial period of time while her mother was deployed, acts which continued after the mother returned home. Both GySgt IE and MR testified about the effects of the sexual abuse on their family. Our affirming of the lesser included offense of aggravated sexual assault of a child does not change the facts of this tragic case. Although the label of one of the crimes of which the appellant stands convicted changed from rape by force to aggravated sexual assault, the offense remains serious and egregious. Although the sentencing landscape changed in a *de minimus* manner, we are confident that the appellant's sentence would have been at least a certain magnitude.

These factors place the case within the zone of *Sales* reassessment. Unfortunately, the crimes of which the appellant stands convicted are not unique. This court has seen all too many cases of sexual abuse. The reassessed offenses in this case are serious, bore aggravating circumstances, and are of a nature that we as appellate judges would have experience with and knowledge of what would be normally awarded. The sentences adjudged by members we have seen in cases similar to the appellant's have been at least as severe as, if not greater, than that approved by the convening authority.

Recognizing that the appellant stands convicted of an offense no longer involving the element of force, and for which the punishment is 20 years for each specification as opposed to life without parole, we are confident that members would impose, and the CA would approve, a sentence including at least 13 years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge.

Remaining Assignments of Error

As to the remaining unaddressed assignments of error, numbers (13) (15), and (16), raised pursuant to *Grostefon*, 12 M.J. at 431, we find the appellant's arguments to be without merit. *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

Conclusion

The finding of guilty to Charges I and Specification 3 thereunder, and Charge II and the specifications thereunder are affirmed. The finding of guilty to Specification 1 under Charge I is affirmed except for the words "by using power sufficient that she could not avoid or escape the sexual conduct." The finding of guilty to Specification 2 under Charge I is affirmed except for the words "by using power sufficient that M.R. could not avoid or escape the sexual contact." We affirm only so much of the sentence as provides for confinement for 13 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

The supplemental court-martial order shall reflect that the original Specification 1 under Charge I upon which the appellant was arraigned, was ultimately dismissed and the remaining specifications under Charge I renumbered, and that the appellant was found "not guilty" of Specification 5 under Charge II.

Senior Judge MAKSYM and Senior Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court