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

Before
J.R. PERLAK, B.L. PAYTON-O'BRIEN, R.Q. WARD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DONALD J. BROWN
MASTER-AT-ARMS FIRST CLASS (E-6), U.S. NAVY

NMCCA 201100516
GENERAL COURT-MARTIAL

Sentence Adjudged: 23 June 2011.
Military Judge: CAPT Kevin O'Neil, JAGC, USN.
Convening Authority: Commander, Navy Region Northwest, Silverdale, WA.
Staff Judge Advocate's Recommendation: CDR T.F. DeAlicante, JAGC, USN.
For Appellant: LT Gregory Morison, JAGC, USN; LT David Dziengowski, JAGC, USN.
For Appellee: LT Joseph Moyer, JAGC, USN.

28 November 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:

A general court-martial consisting of officer and enlisted members convicted the appellant, contrary to his pleas, of two specifications of rape of a child, one specification of aggravated sexual abuse of a child,[1] two specifications of child

[1] In announcing findings as to the aggravated sexual abuse specification, the members found the appellant guilty except for the words that described the

endangerment, and three specifications of indecent liberties with a child, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to confinement for 45 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant raises five assignments of error on appeal: (1) the military judge erred by allowing a victim advocate to accompany a victim to the witness stand when she testified; (2) the testimony of the nurse practitioner who conducted the sexual assault forensic exam on the victim should have been excluded under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); (3) the Article 134 specifications fail to state offenses because they omit the terminal element; (4) the court martial order incorrectly states the pleas and findings at the appellant's court-martial; and (5) the military judge erred in denying the defense motion to produce discovery of electronic communications of the victim and her family.

After consideration of the record of trial, the appellant's assignments of error, the parties' pleadings, and the oral argument of the parties, we find merit in the appellant's fourth assignment of error and will order corrective action in our decretal paragraph. Otherwise, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

I. Procedural History

A. Factual Background

The appellant met Ms. RB in July of 2003 and they were married in August of 2004. At the time of the 2004 marriage to the appellant, Ms. RB had four children: MMB, a daughter, age 14; MB, a son, age 12; AW, a daughter, age 11; and JW, a son, age 8. None are the biological children of the appellant.

Ms. RB worked nights shift and, as a result, the appellant was often left alone in charge of the four children. During these times, the appellant regularly provided the children with alcohol and played drinking games with them. The appellant also provided MMB with pornography. A few months after they were married, while he was home caring for the children, the

---

sexual abuse act. As a result, the military judge entered a finding of not guilty as to that specification.

appellant had sexual intercourse with AW, who was 11 at the time. The appellant then continued to have sexual intercourse with AW over the course of approximately the next four years. The appellant's sexual actions with AW followed a usual pattern—the appellant would drink alcohol with the children, take AW upstairs under the guise of receiving a massage from her, and thereafter have sex with her in an upstairs bedroom. At one point during the four years AW thought she had become pregnant by him and subsequently suffered a miscarriage. The appellant's assaults of AW only stopped when she threatened to report him in 2008. Also, while the appellant was deployed from November 2006 to November 2007, he sent MMB prurient email messages. In 2009, AW finally revealed the appellant's sexual molestation to her mother. An investigation and this court-martial followed.

The appellant's general court martial commenced on 20 June 2011. At the time of the trial, AW was 17 years old and her 18th birthday was mere weeks away.

B. Pretrial Medical Exam and Admissibility Finding

On 18 March 2011, AW was evaluated by a nurse practitioner who was the clinical coordinator at an intervention center for assault and abuse. AW's travel to this medical evaluation was funded by the Government and AW was accompanied by the trial counsel to the appointment. AW had never had a gynecological examination before. When questioned about the reasons for the exam, AW stated, "I was kind of afraid that I might have had a miscarriage because [the appellant] never used protection and I was older, so there was a chance that I could have gotten pregnant."[2] The nurse conducted a sexual assault examination of AW, to include a medical history and physical examination.[3] The results of the medical history and physical examination are memorialized in her "Adolescent Sexual Assault Assessment Report." Prosecution Exhibit 2.

Admissibility of the statements made by AW to the nurse during the exam was the subject of a Government pretrial motion *in limine*. Appellate Exhibit XXXIX. The Government motion sought admission of AW's statements under the MIL. R. EVID. 803(4), Statements for Purpose of Medical Diagnosis, exception to the hearsay rule. Defense counsel argued that the statements did not fall under the medical diagnosis exception to the

[2] Record at 246.

[3] *Id.* at 708, 714.

hearsay rule.[4] Additionally, defense counsel argued that AW's statements were needlessly cumulative under MIL. R. EVID. 403, because the victim was going to testify at trial.

The military judge ruled that the statements made by AW fell within the MIL. R. EVID. 803(4) hearsay exception. AE LVII at 5-6. He determined that the statements were made during the course of a medical exam and, as such, were admissible at trial. *Id.* However, the military judge's ruling did not address the appellant's MIL. R. EVID. 403 objection. *Id.*

C. Article 134 Specifications

Specifications 1, 2 and 5 of Charge III (child endangerment and indecent liberties with a child) and the sole specification under Additional Charge I (indecent liberties with a child) omit the terminal element under Article 134, UCMJ.[5] Prior to trial, the military judge invited both sides to submit briefs on Specifications 1 and 2 of Charge III on an issue unrelated to the terminal element.[6] In its brief, the Government identified

---

[4] Appellate Exhibit XLIII.

[5] Charge III, Specification 1: In that [the appellant] from on or about November 2005 to on or about October 2008 had a duty for the care of [AW], a child under the age of 16 years, and did on divers occasions endanger the physical health and welfare of said [AW] by providing her with alcoholic beverages and that such conduct was by design.

Charge III, Specification 2: In that [the appellant] from on or about November 2005 to on or about August 2006 had a duty of care for [MMB], a child under the age of 16 years, and did on divers occasions endanger the physical health and welfare of said [MMB] by providing her with alcoholic beverages and that such conduct was by design.

Charge III, Specification 5: In that [the appellant] on divers occasions between on or about February 2004 and February 2005, take indecent liberties with [MMB], a female under 16 years of age, not the wife of the [the appellant] by providing her with pornography and telling her to masturbate and think of him or words to that effect with the intent to arouse sexual desires of the said [MMB].

Additional Charge I, Specification: In that [the appellant] on divers occasions between on or about October 2007 and October 2008, take indecent liberties in the physical presence of [AW], a female under 16 years of age, by showing her pornography, with the intent to arouse the sexual desires of the said [AW].

[6] The question to be addressed was "may the government use and charge under Article 134 child endangerment as it is now enumerated in the Manual, and has been enumerated since 1 October 2007, for conduct that predates 1 October 2007?" Record at 280. The briefs are AE LXII and LXIII.

the appellant's conduct as having "requisite prejudice to good order and discipline and service discrediting nature to constitute valid offenses under Article 134."[7] During the argument on the motion, the Government referred to the terminal elements of prejudice to good order and discipline and service discrediting conduct as they related to Article 134 offenses. In ruling on the motion, the military judge listed the elements of the Article 134 offenses, which included the terminal element. There was no objection by the appellant.

D. AW's Testimony and Accompanying Victim Advocate

AW, who was 17 years old at the time of trial, testified as a Government witness. Her initial testimony began on 20 June 2011; after only 15 questions by the trial counsel, AW started to cry. As the trial counsel attempted the next question, AW "burst into tears."[8] AW continued to cry as she struggled to answer more questions. She then stated "I can't do this," and requested a break.[9] At that time, the military judge excused the members and discussed with AW the courtroom process. He informed her that she should discuss with the trial counsel what adjustments she believed he could make to ensure her comfort. After a short recess, the trial counsel requested of the court that AW's victim advocate be seated next to AW during her testimony. The defense objected, instead requesting that the victim advocate be seated in the gallery. The military judge overruled the objection, and placed the court in an overnight recess.

The following morning, in an Article 39(a) session, the trial defense counsel renewed his objection, arguing that placing the victim advocate next to AW bolstered her credibility to the members. The military judge overruled defense counsel's objection and stated his intent to allow the victim advocate to sit next to AW during the testimony. The military judge proscribed any verbal communication or physical contact between AW and her advocate. Prior to the members' return to the courtroom, AW was seated on the witness stand and her advocate

---

[7] AE LXIII at 3.

[8] Record at 560.

[9] During a subsequent Article 39(a) session, the military judge described AW's demeanor as "not just crying during testimony, it was completely unintelligible and unable to speak because she was crying." *Id.* at 577.

was seated on the bailiff's chair next to AW.[10] Upon the members' return to the courtroom, the military judge informed the members that sitting next to AW was "an advocate that has been assigned to [AW]."[11] The military judge explained to the members that this was "an accommodation" he had made and that the members were not to interpret her presence as an endorsement of AW's credibility.[12] AW then finished her testimony without further incident. There is no indication that her advocate had any physical contact, verbal communication, or otherwise interfered with the testimony of AW.

E. The Nurse's Testimony

After AW's testimony on the merits, the nurse practitioner testified as a Government witness and the written report of her exam of AW was offered into evidence as Prosecution Exhibit 2. Absent defense objection, the military judge admitted her report. On direct examination, the nurse reviewed the physical results of her exam through the use of a diagram. She did not opine as to AW's truthfulness. Rather, her testimony on direct examination consisted of general statements in order to give context to the exam she had conducted on AW. However, during cross-examination, defense counsel elicited the specific statements made by AW to her during the exam. These statements included AW's identification of the appellant as her offender and the details of assaults.

---

[10] The record does not indicate the distance between the victim's position on the witness stand and her victim advocate in the bailiff's chair.

[11] Record at 581.

[12] The full text of the military judge's instruction to the members is as follows: "The government is about to continue their direct examination of [AW] where we were yesterday when we took an afternoon recess. You will notice that there is someone sitting next to [AW] this morning. This is Ms. []. She is an advocate that has been assigned to [AW], and I have made the decision to allow [her] to sit in the courtroom during [AW's] testimony. My decision to do that should in no way be interpreted by you as an endorsement by me or the government or anyone else of the credibility of [AW's] testimony. You will evaluate the credibility of her testimony in the same manner you will any other witness. And when I give you the instructions on the law that you must follow before you begin your closed session deliberations, and I do that in writing, I will further explain how you go about determining the credibility of a witness. This is an accommodation I have made. You will infer nothing from it." The military judge then inquired of the members if they could follow his instructions, to which he received an affirmative response. *Id.* at 581-82.

II. Discussion

A. The Victim Advocate in the Courtroom

The crux of the appellant's claim on appeal is that his constitutional rights to a fair trial and to confront witnesses against him were violated because the trial judge allowed the victim advocate to sit near AW while she testified, and that AW's testimony was improperly bolstered by calling the members' attention to the advocate. He claims these infringements on his rights were not justified by any specific finding of necessity.

We find that the presence of the advocate in the bailiff's chair during AW's testimony, or labeling her to the members as an "advocate," did not impinge on the appellant's constitutional right to a fair trial or his rights under the Sixth Amendment's Confrontation Clause. Because we reject the appellant's claims of constitutional violations, we review the military judge's decision to allow the victim advocate in the courtroom for an abuse of discretion, and conclude the military judge did not abuse his discretion in this regard.[13] *See, e.g.*, *United States v. Smith*, No. 20080256, 2008 CCA LEXIS 402, unpublished op. (N.M.Ct.Crim.App. 9 Dec 2008).

Military judges must "exercise reasonable control over the proceedings" and "ensure that the dignity and decorum of the proceedings are maintained." RULES FOR COURTS-MARTIAL 801(a)(2) and (3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Military judges must also "exercise reasonable control over the mode and order of interrogating witnesses . . . so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MIL. R. EVID. 611(a).

1. Right to Confrontation

The appellant asserts that the military judge failed to make a showing of necessity to justify the advocate's presence during the testimony. In cases involving a child victim where a defendant's right of confrontation is restricted, a finding of necessity must be made prior to limiting a defendant's ability

[13] We reject the appellant's argument that the military judge's decision in this regard should be reviewed under a *de novo* standard.

to confront the witness.[14] *Maryland v. Craig*, 497 U.S. 836 (1990). However, in this case, the appellant's right to confront AW was not limited.

The appellant was afforded all his rights under the Confrontation Clause regarding the testimony of AW. The rights guaranteed by the Confrontation Clause include a personal examination, testimony under oath, the right to cross-examination of the witness, and the ability of the jury to observe the demeanor of the witness. *Id.* at 846. In this case, AW personally appeared in the court and answered questions under oath from the trial counsel, the defense counsel, the military judge, and the members. Through his counsel, the appellant executed a robust cross-examination of AW. The members were present for AW's entire testimony, including her breakdown prior to the advocate's placement in the bailiff's seat the previous day. No evidence has been presented, and none is gleaned from the record, that the presence of the advocate limited these rights of confrontation in any way. Defense counsel's speculation that the advocate, who was seated in the bailiff's chair in apparent close proximity to AW, influenced her testimony is not supported by anything in the record. On the contrary, the record reveals that the advocate obeyed the instructions of the military judge and sat silently near AW. There is no indication of any interference by the advocate, or any apparent change in AW's testimony that we attribute to the presence of her advocate. *Cf. Reynolds v. Yates*, 2010 U.S. Dist. LEXIS 69111 (C.D. Calif. Mar. 15, 2010); *Akhtar v. Knowles*, 2009 U.S. Dist. LEXIS 1200 (E.D. Cal. Jan. 8, 2009). Thus, under the circumstances, the appellant was not denied his constitutional right of confrontation.

In analyzing the judge's decision to allow an adult attendant to accompany the minor child during her testimony, we look to the federal courts as well as our own service courts of review.[15] In the federal courts, victims under the age of 18 "have the right to be accompanied by an adult attendant to

---

[14] "The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Maryland v. Craig*, 497 U.S. 836, 857 (1990) (citations omitted).

[15] We note that an overwhelming majority of state jurisdictions which have considered this issue have sanctioned the practice in appropriate circumstances. A number of states have codified the practice as well.

provide emotional support." 18 U.S.C. §3509(i). The court retains discretion to "allow the adult attendant to remain in close physical proximity to or in contact" with the child. *Id.* This right to an adult attendant has been upheld where the witness has "testified in open court and the record is void of anything to suggest that [the adult attendant] prompted them in any way." *United States v. Grooms*, 978 F.2d 425, 429 (8th Cir. 1992).[16]

The modest amount of relevant military case law is consistent with the federal line of decisions. In *Romey, t*he Court of Military Appeals found no Fifth Amendment or Sixth Amendment violations where a mother acted as a testimonial assistant to a child victim. In that case, the victim's mother "acted essentially as an interpreter" by whispering the question to the child, receiving the whispered response, then repeating that response out loud for the record. 32 M.J. at 182. Because the mother "was not an eyewitness to the charged offenses, and . . . did not provide any substantive testimony for the Government," the *Romey* court found no bias in the process. *Id.* at 183-84.

In the current case, AW, who was 17 years old at the time of trial, testified in open court while the advocate sat in the bailiff's chair near her.[17] Any contact with AW or prompting of AW's testimony by the advocate was to be noted for the record. No such prompting or contact is noted in the record. Additional factors we have considered are: the advocate was not a witness to any of the charged offenses and was never called to testify in the trial; the advocate was not a member of the prosecution team. Except for her mere presence, the advocate did not

---

[16] While the appellant's brief cites to *United States v. Morriss*, 2006 U.S. Dist LEXIS 59243 (W.D. Mo. Aug. 22, 2006), in support of his position, his reliance is misplaced. *Morriss* involved a defense motion for a continuance to enable the defense counsel to properly prepare for trial. The Government opposed the continuance request due to the minor child's impending 18th birthday and subsequent loss of 18 U.S.C. §3509 protections. The magistrate ruled that there was no factual basis to determine if the statutory protections were relevant in the case, and thus found no factual basis existed to deny the defendant's constitutional right to *effective assistance of counsel.*

[17] We reject the appellant's argument that AW was a "non-child" due to her trial age of 17. Although the military recognizes the age of 16 as the "age of consent" for sexual activity, we reject the appellant's argument that victims who are 17 years old are thus not "children" for purposes of an accompanying support person, particularly when the scope of the testimony details years of sexual abuse dating well back before any misplaced notions of consent were in play.

participate in AW's testimony in any way. Therefore, we find that no abuse of discretion occurred by the military judge's allowing the advocate to sit in the bailiff's chair during AW's testimony.

Though we find no error in the military judge's decision, we also note that any purported error was cured and rendered harmless by the military judge's clear instructions to the members, and subsequent reconfirmation of their agreement to follow same. Members are presumed to follow the military judge's instructions. *United States v. Taylor,* 53 M.J. 195, 198 (C.A.A.F. 2000). The military judge provided an explanation to the members prior to AW's testimony. He introduced her as AW's advocate, but then instructed the members that her presence was not "an endorsement by me or the government or anyone else of the credibility of [AW]'s testimony." He instructed the members to adjudge her credibility just as any other witness and ordered them "to infer nothing" from his decision. All members responded affirmatively that they understood and could follow the military judge's actions. There is no evidence in the record to indicate that the members failed to follow his instructions.

2. Presumption of Innocence

The appellant claims that the presence of the victim advocate and the description used by the military judge, "advocate," denied him his constitutional presumption of innocence. The purported denial occurs, he asserts, when the members begin to see AW as a "victim" merely because she was assigned an advocate. However, the appellant's underlying logic fails to support this conclusion.

The appellant cites to Navy and Department of Defense regulations as supportive of his position. First, he argues that the mandatory all-hands sexual assault training and governing instructions of the Sexual Assault Victim Intervention program (SAVI) caused the members to assume AW was a victim of sexual assault. An examination of the instructions cited by the appellant does not, however, support this contention. Chief of Naval Operations Instruction (OPNAVINST) 1752.1B (29 Dec 2006)[18] calls for "mandatory activation of an on-call victim advocate *at the time of the sexual assault report* . . . ." (Emphasis

[18] The stated purpose of OPNAVINST 1752.1B is to "issue policy, prescribe procedures, and assign responsibility for implementation of the Sexual Assault Victim Intervention (SAVI) Program within the U.S. Navy."

added). The assignment of the victim advocate at the time of the reporting, prior to any investigation into the merits of the claim, casts doubt upon the appellant's contention that victim advocates are assigned only to victims of confirmed sexual assaults.[19]

3. Bolstering

We are also similarly not persuaded by the appellant's claim that the advocate's presence at trial improperly bolstered AW's testimony in violation of the Fifth Amendment. The alleged victim was a minor and extremely limited assistance was provided to her by the advocate. As previously stated herein, there was no evidence of any improper contact or prompting of AW by the advocate. The record indicates she was merely present and provided no testimony in this case. At is apparent from the record, the advocate's assistance was deemed necessary by the military judge, was exercised in a neutral fashion, and accompanied by a curative instruction. *Romey*, 32 M.J. at 184. *See also Sexton v. Howard*, 55 F.3d 1557 (11th Cir. 1995) (holding that where a prosecutor sat on the witness stand during the entire testimony and conducted direct examination of the witness with the witness on her lap, the prosecutor's behavior was not improper bolstering and did not "prejudicially affect the substantial rights of the defendant.").

B. Testimony of the Nurse Practitioner

The appellant next argues that the testimony of the nurse practitioner should have been excluded under the balancing test put forth under MIL. R. EVID. 403. If a military judge fails to conduct this balancing analysis, this court grants no deference. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F 2000). In ruling on the appellant's pretrial motion *in limine*, the military judge did not address the MIL. R. EVID. 403 balancing test. AE LVII. Consequently, we accord his ruling no deference and review his decision *de novo*. *Manns*, 54 M.J. at 166.

We first must determine the relevance of the nurse's testimony. Relevant evidence tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable." MIL. R. EVID. 401. The

[19] We note that Department of Defense Directive 6495.01 of October 6, 2005, defines a "victim" as one "who *asserts* direct physical, emotional, or pecuniary harm as a result of the commission of sexual assault." (Emphasis added).

nurse's testimony, admitted under MIL. R. EVID. 803(4) focused on her physical examination of AW and her findings.[20] Her testimony described the exam and physical damage observed in AW's genital area. This physical damage makes it more probable that AW was involved in some sexual activity, which is a fact of consequence in the case. MIL. R. EVID. 401 and 402. Because the evidence is relevant, we now determine whether the probative value was substantially outweighed by the danger of unfair prejudice per MIL. R. EVID. 403.

1. Human Lie Detector

We are not persuaded by the appellant's argument that the nurse acted as a "human lie detector." Several factors are considered to determine whether impermissible human lie detector testimony has occurred. *United States v. Jones,* 60 M.J. 964, 969 (A.F.Ct.Crim.App. 2005). Factors we consider are the role of both counsel, whether the defense objected or requested cautionary instructions, whether the witness was asked her opinion on the veracity of another witness' statement or whether a crime occurred, and whether the testimony in question is on a central matter in the case. *See United States v. Kasper,* 58 M.J. 314, 319 (C.A.A.F. 2003); *United States v. Schlamer*, 52 M.J. 80 (C.A.A.F. 1999); *United States v. Anderson* 51 M.J. 145 (C.A.A.F. 1999)); and *United States v. Halford*, 50 M.J. 402, 404 (C.A.A.F. 1999).

a. Role of Counsel

Trial counsel's line of questioning did not solicit any opinion testimony from the nurse. Rather, trial counsel merely questioned her regarding the context of the examination of AW. Trial counsel did not elicit the name of the offender, nor did trial counsel ask for specific answers regarding her examination of AW. Instead, he called for the nurse to generally outline the initial interview of AW's medical history. Trial counsel ensured that her testimony focused on her observations from the physical exam.

To the contrary, defense counsel elicited specific details of the nurse's conversation with AW. Defense counsel specifically cross-examined her regarding the identity of the perpetrator, the age range wherein the abuse occurred, the

[20] We agree with the military judge that the nurse's testimony concerning the statements made to her by AW were properly admissible under MIL R. EVID. 803(4), the hearsay exception for statements made pursuant to medical diagnosis. AE LVII.

frequency of the abuse, and the sexual acts constituting the abuse.

b. Lack of Defense Objection

The details of the nurse's interview with AW are contained in her nursing chart notes. The report is a transcribed narrative of her perceptions and comments on the exam, which was admitted into evidence as Prosecution Exhibit 2. The nurse's testimony was the topic of the Government's pretrial motion *in limine* and the accompanying defense response. AE XXXIX and XLIII. The defense sought to proscribe the statements made to the nurse by AW based on MIL. R. EVID. 403 and 803(4). AE XLIII. The motions and subsequent ruling address the statements provided by AW to the nurse. The defense did not specifically object when the nurse's report was offered into evidence during the trial. MIL. R. EVID. 103 requires a timely and specific objection to render proffered evidence inadmissible under MIL. R. EVID. 403. *Halford*, 50 M.J. at 402.

c. No Solicitation of the Nurse's Opinion

During her testimony, the Government did not ask the nurse whether she believed AW's allegations of sexual assault. Her direct testimony merely presented her findings from the physical examination conducted on AW. At no point did she opine on the veracity of AW or her allegation. We note that the nurse testified that her examination "neither proves nor disproves" sexual abuse,[21] and that findings "could be consistent" with accusations of sexual abuse.[22] Because of the indefinite language, we do not find the presence of "human lie detector" testimony in this case.

d. Ultimate Issue of the Case

The nurse did not testify as to the ultimate issue of the case. Human lie detector testimony regarding the ultimate issue in the case is an indicator of material prejudice of a substantial right. *Kasper,* 58 M.J. at 319. Whether the appellant sexually assaulted AW is the ultimate issue in this case. The nurse merely testified regarding the results of her physical evaluation. As previously indicated, she did not provide an opinion as to her beliefs about the AW's accusations,

[21] Record at 732.

[22] *Id.* at 739

and her findings were inconclusive as to whether sexual assault occurred. Her report outlined AW's claim that "her stepdad assaulted her." PE 2. But, at that point in the trial, the members were quite familiar with AW's claims against the appellant. Because she provided no conclusory testimony as to the ultimate issue of the case, the testimony is not indicative of any material prejudice to appellant.

2. MIL. R. EVID. 403 Balancing Test

While we agree with the appellant that the military judge failed to conduct a MIL. R. EVID. 403 balancing test on the record, we find that the military judge did not err in admitting this evidence. We are able to balance the probative value of the government's evidence versus its prejudice. As indicated herein, the evidence provided by the nurse was relevant and we find that its probative value was not substantially outweighed by the danger of unfair prejudice.

Additionally, careful comparison of the testimony of AW and the nurse reveals no needlessly cumulative evidence presented. On direct examination of AW, trial counsel did not ask about any details related to the medical examination. When questioned about the examination, AW merely testified on direct that she had a "gynecology exam" to "make sure everything was okay."[23] Defense counsel's own cross-examination of AW elicited specific details regarding the statements given to the nurse. In comparison, the nurse's direct testimony focused on the specific physical findings of the exam, from general health to AW's sexual health. This was the sole instance during the trial where members were informed of the sexual health and physical condition of AW. The nurse's testimony regarding AW's statements was limited and non-specific in nature, and demonstrated why she performed certain procedures. Because the nurse's testimony focused on the physical findings of the exam, we find that her testimony was not "needless presentation of cumulative evidence." MIL R. EVID. 403.

C. Omission of the Terminal Element

The appellant alleges, and the Government concedes, that Specifications 1, 2, and 5 of Charge III and the sole specification under Additional Charge III omit the terminal element of a properly alleged offense under Article 134, UCMJ.

[23] *Id.* at 605.

Pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), and *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), it was error to omit the terminal element from these specifications. The appellant did not object at trial, thus, we test this omission for plain error. *United States v. Humphries*, 71 M.J. at 209, 213-14 (C.A.A.F. 2012). Because there was error, in order to receive relief the appellant has the burden to show that, "the Government's error in failing to plead the terminal element of Article 134, UCMJ, resulted in material prejudice to [the appellant's] substantial, constitutional right to notice." *Id.* at 215. In order to assess prejudice this court must, "look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id.* at 215-16 (citations omitted).

The record reveals that the appellant had notice of the Government's theory of criminality, which specifically was that appellant's conduct was prejudicial to good order and discipline. In *Humphries*, the court found that there was no notice, and identified several flaws in the record, including that: the Government (1) did not mention the Article 134 charge in their opening statement; (2) did not present evidence or testimony about how Humphries' conduct satisfied clause 1 or 2 of the terminal element; and (3) did not attempt to tie together evidence or witnesses to the Article 134 charge. *Id.* at 216. This case is distinguishable from *Humphries.*

As discussed *infra,* the appellant was placed on notice during pretrial motions that he must defend against both clauses 1 and 2 of Article 134. Specifications 1, 2, and 5 of Charge III were the subject of a defense motion to dismiss on a basis other than the terminal element. AE LXII. In its bench brief, the defense centered its argument on the difference between child neglect and child endangerment. After the military judge enumerated the terminal element in his ruling on the motion, the appellant failed to object. Further, the appellant did not object after the military judge stated that the "government is not required to specifically allege the terminal element under Article 134."[24]

Page 3 of Appellate Exhibit LXIII provided ample notice to the appellant that the Government was alleging an offense under

[24] Record at 289.

both clause 1 and clause 2 of the terminal element.[25] During the subsequent hearing on the motion, the trial counsel reiterated the elements under both clauses while discussing a previous version of the child endangerment law.[26] The motion was submitted and argued prior to selecting the members, providing the defense sufficient time to develop a defense to the alleged terminal element of Article 134.

We hold that the appellant was not prejudiced by the missing element because there was demonstrably no failure of notice and any omission was sufficiently cured by the Government during the course of trial.

D. Court-Martial Order

The appellant is entitled to have the promulgating order correctly reflect the results of his proceeding. *United States v. Crumpley,* 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). When finding the appellant guilty of Specification 3 of Charge I, the members excepted the language, "to wit: licking the vagina of [AW]."[27] During a subsequent Article 39(a) session, the judge entered a finding of "not guilty" to Specification 3 of Charge I due to the members' failure to substitute additional language.[28] Nonetheless, the court-martial order inaccurately stated the finding to the specification as guilty. We shall order corrective action in our decretal paragraph. *Crumpley,* 49 M.J. at 539. We find that this error did not affect appellant's substantial rights, since no prejudice was alleged or is apparent.

E. Denial of Discovery Request – Electronic Communications

The appellant alleges that the military judge abused his discretion by denying a defense discovery motion pertaining to

---

[25] The Government's brief on the motion, AE LXIII, states that "[this] conduct is clearly recognizable as criminal and has the requisite prejudice to good order and discipline and service discrediting nature to constitute a valid offense under Article 134."

[26] "[T]his same sort of conduct would certainly . . . still have had the same prejudicial effect or the same effect on the discredit to the service that it had in 2007." *Id.* at 284.

[27] *Id.* at 1029; AE LIX.

[28] Record at 1034.

emails between AW and her relatives.[29] We review a military judge's decision on a request for discovery for abuse of discretion. *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999). A defense request during discovery "should indicate with reasonable specificity what materials are sought." R.C.M. 701, Analysis, App. 21 at A21-33. Where the information requested is not under control of the Government, the defense discovery request "'shall include a description of each item sufficient to show its relevance and necessity.'" *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987) (quoting R.C.M. 703(f)(3)). The appellant failed to establish the relevance or necessity of the emails sought, and merely asserted that the emails might contain evidence and admitted his request was broad. We find no abuse of discretion by the military judge in denying the defense motion.

III. Conclusion

The findings and sentence are affirmed. We direct that the supplemental court-martial order note that the military judge entered a finding of not guilty of Specification 3 of Charge I.

For the Court

R.H. TROIDL
Clerk of Court

Chief Judge PERLAK and Judge WARD concur.

[29] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).