**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class WARREN R. BRESSLER, SR.**
**United States Air Force**

**ACM 38660**

**16 December 2016**

Sentence adjudged 19 April 2014 by GCM convened at Travis Air Force Base, California. Military Judges: Matthew P. Stoffel (arraignment) and Christopher M. Schumann.

Approved Sentence: Dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Jeffrey A. Davis, Jr. and Major Michael A. Schrama.

Appellate Counsel for the United States: Major Thomas J. Alford; Major Mary Ellen Payne; Major Meredith L. Steer; Captain Tyler B. Musselman; and Gerald R. Bruce, Esquire.

Before

MAYBERRY, DUBRISKE, and J. BROWN
Appellate Military Judges

OPINION OF THE COURT



DUBRISKE, Senior Judge:

At a general court-martial composed of officer and enlisted members, Appellant was convicted, contrary to his pleas, of sexual assault, indecent exposure, indecent viewing, assault consummated by a battery, communicating a threat, communicating indecent language, adultery, and failure to pay a debt, in violation of Articles 120, 120c, 128, and 134, UCMJ, 10 U.S.C. §§ 920, 920c, 928, 934. Appellant was sentenced to a dishonorable discharge, 20 years of confinement, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, Appellant raises 44 assignments of error,[1] which we have combined into 13 issues for this opinion: (1) the court-martial was without jurisdiction over Appellant because his active duty orders had expired; (2) the assistant trial counsel was disqualified from her duties because she served as Appellant's accuser; (3) three panel members should have been excused for cause; (4) certain evidence was improperly admitted pursuant to Military Rule of Evidence (Mil. R. Evid.) 404(b); (5) certain evidence was improperly admitted pursuant to Mil. R. Evid. 413; (6) errors occurred with the admission of various items of evidence at trial; (7) ineffective assistance of counsel; (8) prosecutorial misconduct; (9) factually and legally insufficient evidence in support of Appellant's convictions; (10) sentence severity; (11) post-trial processing error; (12) cruel and unusual punishment; and (13) due process violation for untimely post-trial processing.

Appellant also appears to claim he was not mentally competent to participate in his defense as he was under the influence of prescription medications and alcohol leading up to and during his trial. Although not alleged as error, we resolve this claim below. Additionally, we have evaluated whether Appellant's right to speedy appellate review was violated due to the length of time necessary to complete our review of this case.[2]

Additionally, Appellant raises a number of supplemental complaints, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), in his various declarations and related documents previously accepted by this court after the filing of his initial brief. We have considered but reject the remaining issues not addressed here as they require no additional analysis nor warrant relief. *See United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

*Background*

The charges in this case stem from Appellant's inappropriate sexual relationship with his stepdaughter, BZ, while she was visiting Appellant in September 2012 during his temporary duty assignment at an Air Force installation in Mississippi. The indecent language specification also covered communications Appellant had with BZ immediately prior to her trip to Mississippi.

[1] Five of these allegations of error were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). One of these *Grostefon* assignments of error requested the court consider whether Appellant's trial defense counsel were ineffective for reasons cited by Appellant in an affidavit submitted in conjunction with his appellate brief. Appellant alleges 13 separate claims of ineffective assistance of counsel, many of which overlap with claims asserted by his appellate counsel.

[2] Appellant also alleges the record of trial is incomplete, as Appellate Exhibit XI, consisting of three compact discs documenting the video deposition of Appellant's wife, could not be viewed in its entirety. However, the discs attached to the original record of trial were viewable and examined by the court.

After a litigated trial, Appellant was convicted of two specifications of sexual assault for engaging in sexual intercourse and oral sodomy with the then-17-year-old BZ by use of bodily harm. The sexual intercourse was also the basis for the adultery charge. He was also convicted of intentionally viewing BZ's private area without her consent, engaging in indecent language with her, and intentionally exposing his genitalia to her on multiple occasions. Appellant was further convicted of assault for hitting BZ in the face after she disclosed portions of the abuse to her mother.[3]

As part of its case, the Government presented testimony from EP, the older half-sister of BZ, pursuant to Mil. R. Evid. 413. EP described how Appellant sexually abused her over a period of years, until she left the home after disclosing the abuse in 2006 when she was 15 years old. Similarly, BZ also testified to uncharged sexual abuse by Appellant prior to his entry on active duty with the United States Air Force.

Appellant was also convicted of communicating a threat to the wife of an active duty Airman after that couple allowed BZ to live with them following the incidents in Mississippi. Finally, he was convicted of dishonorably failing to pay his $5,600.00 debt for leasing privatized housing at another installation.

Additional facts necessary to resolve Appellant's assignments of error are provided below.

*Jurisdiction*

Appellant argues the Government lacked personal jurisdiction over him on the day the panel announced its findings and sentence. Specifically, Appellant alleges the military orders placing him on active duty for purposes of trial expired the day prior to the announcement of findings and imposition of a sentence in his case. When personal jurisdiction is challenged on appeal, we review this question of law de novo. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000).

In response to this assignment of error, the Government submitted copies of Appellant's active duty orders and amendments, along with an affidavit from the active duty chief master sergeant whose office generated the orders for Appellant to attend his court-martial. These documents conclusively establish Appellant was on active duty orders on the day findings were announced and the sentence imposed. *See* Article 2(d)(1)(B), UCMJ, 10 U.S.C. § 802(d)(1)(B). As such, we reject this assignment of error, as well as a related assignment of error that Appellant's counsel were ineffective for failing to contest jurisdiction.

[3] He was acquitted of kicking BZ in the stomach during this same incident, threatening to kill her, and providing her alcohol.

*Assistant Trial Counsel as Accuser*

Captain (Capt) AH, the assistant trial counsel at Appellant's trial, also served as the "accuser" for the additional charge and its two specifications, which alleged Appellant indecently exposed his genitals to BZ and wrongfully viewed her private area. Capt AH's name and signature are on the charge sheet. Her name was also announced twice as the individual who preferred the additional charges: once during arraignment on 6 September 2013, and again, by the assistant trial counsel herself, during the initial Article 39(a), UCMJ, 10 U.S.C. § 839(a), session on 14 January 2014. Capt AH did not reference her personal involvement with preferral during the pretrial session where the parties discussed their qualifications. Instead, she stated she had not acted in any manner which may tend to disqualify her. Appellant's trial defense counsel did not object to her role as assistant trial counsel or challenge the preferral of the additional charge. Appellant now alleges: (1) the assistant trial counsel should have been disqualified from serving at trial due to her role as accuser; (2) his trial was tainted by unlawful command influence due to her dual role; (3) this conduct constituted prosecutorial misconduct; and (4) his trial defense counsel were ineffective for failing to have Capt AH disqualified.

A person who prefers charges against an accused must "sign the charges and specifications under oath" and "state that . . . [she] has personal knowledge of or has investigated the matters set forth . . . [therein] and that they are in fact true to the best of . . . [her] knowledge and belief." Rule for Courts-Martial (R.C.M.) 307(b)(1)–(2). There is no evidence here that Capt AH had any prior involvement with Appellant's case or these charged offenses. When the individual who prefers the charges has not actually been injured by the accused's alleged misconduct, she is considered a "statutory" accuser. *United States v. Yarbrough*, 22 M.J. 138, 139 (C.M.A. 1986); *see also* Article 1(9), UCMJ, 10 U.S.C. § 801(9) (defining "accuser" as someone "who signs and swears to charges"). R.C.M. 502(d)(4)(A) states that no person shall act as trial counsel or assistant trial counsel in any case in which she has been the accuser. *See also* Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 4.1.4 (6 June 2013) ("A judge advocate, not the accuser, shall serve as counsel to represent the United States.").

Capt AH signed and swore to the additional charge and thus was disqualified from serving as trial counsel. She did not reference her participation as a "statutory" accuser when announcing her qualifications at trial, the defense counsel did not object, and the military judge did not reference this dual status. *See* R.C.M. 901(d)(1) (requires the trial counsel to announce on the record whether she has acted in any manner that may tend to disqualify her) and R.C.M. 901(d)(3) (if it appears any counsel may be disqualified, the military judge shall decide the matter and take appropriate action).

"Disqualification of counsel is not a jurisdictional defect; such error must be tested for prejudice." R.C.M. 901(d), Discussion; *Wright v. United States*, 2 M.J. 9, 10 (C.M.A.

1976). The Defense had notice of Capt AH's dual role through the charge sheet and her announcement at trial.

When an accused fails to raise this issue at trial, we review it for plain error. *United States v. Reist*, 50 M.J. 108, 109–10 (C.A.A.F. 1999); *United States v. Tittel*, 53 M.J. 313, 31415 (C.A.A.F. 2000). To prevail, Appellant must establish there was plain or obvious error that materially prejudiced his substantial rights. *Reist*, 50 M.J. at 110. In *Reist*, our superior court found no material prejudice where the trial counsel also signed the charge sheet as an accuser and then made the Government's sentencing argument, concluding the trial counsel's action of signing the charge sheet as an accuser did not show a personal animus or interest in the case. *Id.*; *see also* Article 1(9), UCMJ, 10 U.S.C. § 801(9); *cf. United States v. Ashby*, 68 M.J. 108, 130 (C.A.A.F. 2009) (holding the test for determining if a convening authority has an other than official interest in the prosecution is whether he is so closely connected to the offense that a reasonable person would conclude he had a personal interest in the matter). Appellant does not allege that Capt AH exhibited a personal animus or interest in his case, nor does he claim any prejudice from actions taken or not taken by Capt AH before or during the trial. We similarly find no suggestion of personal animus or interest. Although we are troubled by the lack of discussion of this issue on the record at trial, we hold that any error in having Capt AH serve as the assistant trial counsel did not materially prejudice the substantial rights of Appellant.

As an alternative argument, Appellant contends his trial was tainted by the appearance of unlawful command influence when Capt AH was assigned to and remained on his case as assistant trial counsel after serving as one of his accusers.[4] Appellant has the burden to "show facts which, if true, constitute unlawful command influence, and that this unlawful command influence has a logical connection to the court-martial, in terms of potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *Id.* In addressing whether the appearance of unlawful command influence has been created, we consider whether "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). We find Appellant has failed to meet his burden. The dual role of Capt AH, although a violation of R.C.M. 502, does not create a situation of unlawful command influence, nor the appearance of it. Under the circumstances of this case, which includes Capt AH's limited role in the trial and Appellant's failure to object to her participation, the involvement of Capt AH during Appellant's trial could not reasonably be perceived by a disinterested member of the public as indicative of an unfair proceeding.

[4] As this issue involves allegations of unlawful command influence in the adjudicative process, we do not find it forfeited by Appellant's failure to raise it at trial. *United States v. Brown*, 45 M.J. 389, 398 (C.A.A.F. 2006).

As a third argument, Appellant contends Capt AH engaged in prosecutorial misconduct by serving as both trial counsel and accuser, and by not announcing on the record that there was a ground for her disqualification as trial counsel. When an accused fails to object to alleged prosecutorial misconduct at trial, the allegations are reviewed for plain error, which requires plain or obvious error that materially prejudiced his substantial rights. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). Prosecutorial misconduct is "behavior by the [trial counsel] that 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Id.* at 178 (quoting *Berger v. United States*, 295 U.S. 78, 94 (1935)). It includes action or inaction by a trial counsel in violation of a Rule for Courts-Martial. *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). In evaluating such an allegation, we "gauge the overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003). Here, we find Capt AH's failure to disclose the grounds for disqualification, although a violation of her duty under R.C.M. 502, did not prejudice Appellant where he and his counsel were on notice of her dual status and did not raise an objection, and where Appellant alleges no harm or injury from her involvement. *See United States v. Golston*, 53 M.J. 61, 66–67 (C.A.A.F. 2000).

We also reject Appellant's argument that his trial defense counsel were ineffective for failing to have Capt AH disqualified. Trial defense counsel explain in a joint declaration ordered by this court that because the Government could have easily corrected this problem, the Defense elected not to challenge Capt AH in order to prevent further delay in the case and to keep the relatively inexperienced Capt AH on the case. This is a reasonable decision by the defense counsel. *See United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) (holding that, as a general matter, courts will not second-guess the strategic or tactical decision made at trial by defense counsel). In light of these conclusions and applying the applicable standards, we find Appellant has failed to meet his burden of demonstrating deficient performance, let alone that any deficiency in his defense counsel's conduct resulted in prejudice. *See United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010).

*Challenges for Cause*

During voir dire, a prospective court member, Lieutenant Colonel (Lt Col) S, disclosed he had previously sat as a panel member on a sexual assault case that involved allegations similar to the ones Appellant was facing. He also had a sister-in-law who had been sexually assaulted by a babysitter.

A second panel member, Lt Col R, indicated that two Airmen under his command had been victims of sexual assault and one of them had committed suicide, perhaps as a result of the sexual assault. Also, during group voir dire, Lt Col R answered affirmatively when asked whether he had "heard of negative perceptions regarding defense attorneys in

general," while also saying he had never had a negative experience with a military defense counsel. During individual voir dire, Lt Col R clarified that the "negative perception" stemmed from pop culture and the media, and would not influence his ability to be fair. He also affirmed that his dealings with Government and Defense attorneys revealed both sides to be passionate and proficient at their jobs.

The Defense challenged both members for cause based on implied bias. The military judge denied the challenges, and Appellant now argues the judge erred in doing so. We disagree.

R.C.M. 912(f)(1)(N) provides that a member shall be excused for cause whenever it appears the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." "This rule encompasses challenges based upon both actual and implied bias." *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008) (citing *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007)).

The test for implied bias is "objective, viewed through the eyes of the public, focusing on the appearance of fairness." *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (quoting *Clay*, 64 M.J. at 276) (quotation marks omitted). "The hypothetical 'public' is assumed to be familiar with the military justice system." *Id.* (citing *United States v. Downing*, 56 M.J. 419, 423 (C.A.A.F. 2002)). We review rulings on challenges for implied bias "under a standard less deferential than abuse of discretion but more deferential than de novo." *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (quoting *United States v. Miles*, 58 M.J. 192, 195 (C.A.A.F. 2003)) (quotation marks omitted). "[M]ilitary judges must follow the liberal-grant mandate in ruling on challenges for cause[.]" *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993). "The liberal grant mandate recognizes the unique nature of military courts-martial panels, particularly that those bodies are detailed by convening authorities and that the accused has only one peremptory challenge." *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006) (citing *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005)).

A panel member is not per se precluded from serving on a panel if a close relative has been a victim of a similar crime. *United States v. Miles*, 58 M.J. 192, 195 (C.A.A.F. 2003). Likewise, a panel member is not per se disqualified because of prior service as a member on a case involving similar charges. *See* R.C.M. 912(f)(1) (delineating mandatory grounds for excusal); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002) (rejecting a per se rule). Here, we find no additional circumstances indicating implied bias. Lt Col S was not close to his sister-in-law and had not discussed with her the assault she had experienced almost 20 years earlier. Lt Col S stated neither experience would affect his ability to be fair and impartial in Appellant's court-martial and, under the circumstances, this is objectively reasonable. We thus find no error in denying the challenge for cause against Lt Col S.

Regarding Lt Col R, the member clarified that his reference to having "heard" negative perceptions of defense counsel came from pop culture and the media, and that he did not personally hold these views. The military judge observed his demeanor when answering the questions to determine credibility in the case of an actual bias challenge. The military judge then applied an objective test for implied bias, stating his assessment of the member "in the eyes of the public" while also considering the liberal grant mandate. This court "does not expect record dissertations" on a judge's denial of an implied bias challenge, and here, the military judge's analysis provided "a clear signal that the military judge applied the right law." *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015) (quotation marks and brackets omitted). We find no error in denying the challenge for cause against Lt Col R.

Appellant also contends his trial defense counsel were ineffective for failing to challenge another member, Master Sergeant (MSgt) L, for cause based on implied bias. During voir dire by the defense counsel, MSgt L indicated she thought the Defense should offer their own witnesses and evidence during criminal trials, saying she would like to hear from both sides before reaching a decision on guilt. She also indicated that if she was on trial, she would choose to testify, although she could understand why another person may choose not to do so. After questioning by the trial counsel and military judge, MSgt L agreed she would follow the military judge's instructions and hold the Government to its burden of proving Appellant's guilt beyond a reasonable doubt.[5]

In their declaration, trial defense counsel explain they did not challenge MSgt L for cause because they believed she was properly rehabilitated by the end of voir dire. Also, the Defense believed a female panel member would have a difficult time believing BZ's story and would be more receptive to the Defense's "rebellious teenager" theory of the case. We decline to second-guess this decision by defense counsel and we find the failure to challenge MSgt L did not constitute ineffective assistance of counsel. *See Perez*, 64 M.J. at 243. In light of these conclusions and applying the applicable standards, we also find Appellant has failed to meet his burden of demonstrating that any deficiency in his defense counsel's conduct during voir dire resulted in prejudice.[6] *See Green*, 68 M.J. at 361.

*Military Rule of Evidence 404(b) Evidence*

Evidence of uncharged misconduct is impermissible for the purpose of showing an accused's predisposition toward crime or criminal character. However, uncharged

[5] Although not raised as a specific allegation of error by Appellant, we find the military judge did not err in failing to sua sponte remove MSgt L for either actual or implied bias.

[6] We note Master Sergeant L provided a letter during clemency requesting the convening authority reduce Appellant's term of confinement.

misconduct can be admitted for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Mil. R. Evid. 404(b). These categories are merely illustrative and not exclusive: "It is not necessary that 'evidence fit snugly into a pigeon hole provided by Mil. R. Evid. 404(b).'" *United States v. Acton*, 38 M.J. 330, 333 (C.M.A. 1993) (quoting *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989)). Evidence admissible under Mil. R. Evid. 404(b) must still meet the requirement under Mil. R. Evid. 403 that its prejudicial value not substantially outweigh its probative value. *Id*.

Appellant argues the military judge improperly admitted evidence pursuant to Mil. R. Evid. 404(b) regarding Appellant's negative interactions and abusive history with his family. He raises four specific complaints about the military judge's handling of this issue: (1) he made the ruling without any evidentiary support for it; (2) his ruling improperly limited the Defense's ability to cross-examine BZ; (3) he abused his discretion by finding the Defense opened the door to this evidence during cross-examination; and (4) he failed to instruct the panel members to disregard the evidence after BZ's testimony failed to link the uncharged misconduct to her fear of Appellant and failure to report his allegations of abuse.

We review a military judge's evidentiary rulings for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). We will not overturn a military judge's ruling unless it is "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous,'" *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)), or influenced by an erroneous view of the law. *Id*. (citing *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)).

Prior to trial, the Government notified the Defense of its intention to admit evidence of certain uncharged misconduct by Appellant, including specific instances where he had physically and verbally abused his wife and children over an extended period of time. Trial defense counsel filed a motion in limine to exclude this evidence. In its response, the Government stated the evidence was admissible to show Appellant's "intent, plan and preparation to commit the [alleged] offenses," specifically that his physical and verbal abuse of BZ and her siblings caused BZ to fear him and allowed him to commit the offenses with minimal concern about BZ reporting him. The Government also contended this evidence demonstrated the absence of mistake or accident relative to the charge that Appellant threatened BZ. During the motions hearing, however, trial counsel's argument instead focused on an additional rationale: that evidence of the fearful and abusive family environment was admissible to explain why BZ disclosed the allegations in a belated and initially incomplete manner.

As part of the pretrial litigation, the Government presented testimony from BZ, EP and one of Appellant's sons, Staff Sergeant (SSgt) JB. All three testified that Appellant had struck them at various points during their childhood and that they had witnessed their

siblings being struck. They also described Appellant as verbally abusive and that he threatened them with physical violence. All three described themselves as being afraid of Appellant as they were growing up. In the pretrial session, BZ testified that her fear of being physically abused by Appellant was part of the reason she was apprehensive about taking the trip to Mississippi, along with her concern about what she viewed as Appellant's obsession with her.

The military judge applied the three-pronged test for determining admissibility of "other acts" evidence under Mil. R. Evid. 404(b) as set out in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). This test asks: (1) does the evidence reasonably support a finding by the court members that Appellant committed prior crimes, wrongs or acts; (2) is a "fact . . . of consequence" made "more" or "less probable" by the existence of this evidence; and (3) is the "probative value . . . substantially outweighed by the danger of unfair prejudice?" *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (quoting *Reynolds*, 29 M.J. at 109) (alteration in original).

Applying these standards, the military judge conditionally granted the Defense motion and ruled the evidence of the familial abuse could only be admitted in rebuttal if the Defense challenged BZ's motives for making the sexual abuse allegations. In that circumstance, the military judge said he would allow the Government to elicit testimony on redirect as to the circumstances behind her not reporting or not completely reporting the sexual abuse. At that point, he found the familial abuse evidence would be relevant to show BZ was aware of this abuse which created in her a fear of Appellant that contributed to her inability to either resist Appellant's actions or report the charged sexual abuse.[7]

In her direct testimony before the members, BZ described the incidents that led to the allegations in the case. BZ testified that she did not tell anyone about what was happening because she was "scared," but she did not explain why she felt that way. She also testified that, after an incident where her mother saw Appellant lying next to her in bed, she chose not to tell her mother about his sexual abuse because her mother loved Appellant and BZ did not want her to be hurt. She also did not want her mother to be angry with her and leave her as she did not know whom her mother would believe or how she would react. BZ testified that seeing what happened when her half-sister, EP, had come forward with allegations of abuse—EP left the home, Appellant called EP a liar, and the children were then forbidden to talk about her or associate with her—made her feel alone and even more scared to tell. When BZ did tell her mother about some of Appellant's abuse, she did not want her mother to confront Appellant in front of BZ because she was scared of Appellant and did not know what he would do. BZ also testified that she did not tell the investigators everything that happened because she was embarrassed and uncomfortable talking about it.

[7] In making this ruling, he found the evidence was not relevant under the Government's theory that this abuse of his children provided Appellant with a better opportunity to commit the charged offenses.

During cross-examination, the Defense questioned BZ about her initial statement to law enforcement, which included a denial that she had any sexual contact with Appellant while in Mississippi. Trial defense counsel also addressed other inconsistencies with her trial testimony, including a letter she wrote to Appellant prior to the Mississippi trip where she stated she loved and missed him and could not wait to see him again. The Defense also elicited that, after returning from Mississippi, BZ had been kicked out of the house and faced other disciplinary consequences after she struck her mother in public and later broke into a home on base.

At the end of the Defense's cross-examination, trial counsel argued the Defense had opened the door with questions that indicated BZ had a bias or motive to fabricate allegations against Appellant. Trial counsel argued the Mil. R. Evid. 404(b) abuse evidence would now explain why BZ reported the offenses the way she did. In response, the Defense argued that the point of the cross-examination was to impeach BZ by demonstrating she had made prior inconsistent statements, and that the Defense had intentionally limited its cross-examination in an effort to avoid opening the door to uncharged misconduct evidence. Additionally, the Defense noted BZ's incomplete statements to law enforcement occurred after she had already left the control of Appellant and thus her upbringing should not be a factor in her subsequent reporting of the allegations. In the Defense's view, the door would only have been opened if they explicitly asked BZ why she did not resist Appellant's advances or why she did not report him earlier. To rule otherwise, and to find that any challenge to BZ's credibility opened the door, the Defense argued, would improperly impinge on Appellant's right to cross-examine the victim, citing *United States v. Everage*, 19 M.J. 189 (C.M.A. 1985).

The military judge disagreed. He concluded the general tenor of the Defense's cross-examination was to suggest BZ had fabricated the allegations against her stepfather, and that the Defense had posed specific questions to suggest BZ was biased, had made prior inconsistent statements, including denying that certain sexual activity had occurred, or had a motive to fabricate the allegations. He thus found the door had been opened to allow the Government to explore whether an abusive home life contributed to her prior reluctance to report or fully report the details of her allegations. Apparently recognizing that BZ had not yet made that link, the military judge warned trial counsel, while BZ was not in the courtroom, that if BZ did not say her home environment contributed to her reluctance to report Appellant, the uncharged abuse evidence would not be admitted.

During redirect, when asked why she did not originally report all the details of the alleged abuse, BZ stated it was because she felt uncomfortable discussing it in front of the investigators as it made her feel disgusted and embarrassed. The trial counsel then asked BZ about the abusive family environment, and BZ answered "yes" when asked whether Appellant was physically abusive with her and her siblings. The military judge sustained a Defense objection to a question about the specific types of abuse, reminding trial counsel

that a prerequisite to this evidence—the link between the abuse and her delayed reporting—had not yet been made. Trying to remedy that issue, the trial counsel then asked a leading question about whether BZ was currently afraid of Appellant, leading to another sustained objection. BZ testified that she felt scared when she thinks about being in the same room as Appellant because of the threats he made and "what he's done in the past." Through a series of leading questions, the trial counsel elicited "yes" answers to questions about whether BZ experienced fear of Appellant when she talked about the allegations. When the trial counsel was forced to return to non-leading questions, BZ stated she had not told investigators the whole story because she did not want anyone to think less of her, because she did not like talking about the situation, and because she felt embarrassed. The Defense elected not to engage in additional questioning of BZ.

Appellant contends an insufficient evidentiary predicate was established to make the uncharged misconduct evidence admissible as BZ never testified that her delayed and incomplete reporting of the offenses was due to her abusive upbringing. Appellant also argues the Defense did not open the door to that evidence during its cross-examination, and that the military judge's initial ruling improperly constricted the Defense's ability to conduct its cross-examination of BZ. Finally, if the Defense did open the door to this evidence, this action constituted ineffective assistance of counsel.

It is important to evaluate Appellant's complaints in light of the limited familial abuse that was admitted before the members. The Government's planned Mil. R. Evid. 404(b) evidence consisted of multiple specific instances of physical and verbal abuse inflicted on family members by Appellant over a multi-year period. None of those details were ultimately admitted before the members. Instead, all the panel heard on this subject was BZ's generic testimony that Appellant had physically abused her and her siblings. BZ also testified that she was afraid of being struck by Appellant when she was growing up, was afraid of him when she talked about the allegations, and did not immediately report his sexual abuse because she was scared, did not want to hurt her mother, and did not know how her mother would react. Her half-sister, EP, testified that she felt tense, nervous, and afraid when she was growing up, and that she believed her siblings had those same feelings; however, she did not testify about why she felt that way.[8] EP testified that she did not tell anyone about Appellant's sexual abuse of her as it was happening because she was scared and did not want to get in trouble.

[8] As discussed in more detail below, when evaluating Appellant's ineffective assistance of counsel claims, the Government elicited testimony from a civilian detective during the Defense's case-in-chief that he did not review 14 other social service referrals when evaluating EP's sexual abuse allegations. The panel was instructed that these references to social service referrals were admitted solely to challenge the detective's testimony about the completeness of his investigation, and that they were not to consider them for any other purpose or conclude that additional Child Protective Services reports exist. Because of this instruction, we are not considering this testimony to be encompassed within this assignment of error.

We conclude the admission of this limited evidence did not constitute an abuse of the military judge's discretion. Evidence of uncharged physical abuse can be relevant and admissible to demonstrate why a sexual assault victim did not promptly or completely report the abuse, which is a purpose other than to demonstrate Appellant's predisposition to crime. *See United States v. Baumann*, 54 M.J. 100, 104 (C.A.A.F. 2000) (holding evidence of an accused's uncharged misconduct can be offered under Mil. R. Evid. 404(b) to show a motive for some action by a person other than the accused and can be relevant to rebut a defense suggestion the witness had a motive to falsely manipulate the criminal process); *United States v. Robles*, 53 M.J. 783, 788 (A.F. Ct. Crim. App. 2000) (holding that a family member victim's knowledge of the accused's domestic violence is admissible and relevant to explain the victim's failure to report sexual abuse); *State v. Wilson*, 808 P.2d 754, 757 (Wash. App. 1991) (holding evidence of prior domestic violence admissible regarding the victim's state of mind to show why the victim submitted and did not report or escape it).

Although BZ did not expressly state that she had delayed her reporting of Appellant's sexual abuse because she feared him due to his history of physical abuse, that is a fair inference from the entirety of her testimony. It was clear from her direct testimony that she had not disclosed the sexual abuse for a number of years after she claimed it began, and that she did not disclose it because she was scared, along with other explanations for her delayed reporting. In its opening statement, the Defense noted Appellant was innocent and that almost all the charges stemmed from BZ, "a troubled young lady" from "an imperfect family." During cross-examination, the Defense pointed out that her initial statement to investigators did not include many of the allegations she was making at trial about the Mississippi trip, which implied BZ had fabricated allegations that were not part of that statement.

In light of this, we find this generalized reference to physical abuse provides some context for why BZ was afraid to report the sexual abuse, and thus makes a fact of consequence more or less probable. Given the limited evidence that was presented in this regard, we find the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the members. Thus, it was not an abuse of discretion for the military judge to admit it.[9] Because the military judge authorized the Defense to extend their questioning outside the scope of the redirect examination in order to cover questions they had avoided during the initial cross-examination, we also find Appellant's ability to cross-examine BZ was not prejudiced.[10]

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[9] In light of these conclusions and applying the applicable standards, we find Appellant has failed to meet his burden of demonstrating that any deficiency in his defense counsel's conduct resulted in prejudice. *See Green*, 68 M.J. at 361.

[10] In response to Appellant's ineffective assistance of counsel claim, we discuss below why trial defense counsel declined to cross-examine BZ further on this matter.

Appellant also argues the military judge abused his discretion by failing to instruct the panel to disregard the Mil. R. Evid. 404(b) evidence. Given the above conclusions, we find that instructing the panel to disregard the physical abuse evidence was not required. We note, however, that although the military judge indicated he would seek input from the parties about how to instruct the panel on the proper use of this uncharged misconduct, no such instruction was given and the record contains no explanation for its absence.[11] We thus turn our analysis to whether the military judge erred by failing to give a limiting instruction.

Whether a jury was properly instructed is a question of law reviewed de novo. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). Failure to object to an instruction given or omitted waives the objection absent plain error. R.C.M 920(f). "The plain error standard is met when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citation and quotation marks omitted). Mil. R. Evid. 105 states "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, *upon request*, shall restrict the evidence to its proper scope and instruct the members accordingly." (Emphasis added.). Since trial defense counsel did not request a limiting instruction or object to its omission, the issue is forfeited absent plain error. R.C.M. 920(f); *see United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998); *United States v. Sousa*, 72 M.J. 643, 651 (A.F. Ct. Crim. App. 2013).

We find no plain error here. Although we could envision a case where trial counsel's presentation of uncharged misconduct might require the military judge to cure any misunderstanding as to the permissible uses of evidence admitted for a limited purpose, this is not that case. The challenged evidence did not show that Appellant necessarily committed a crime given its limited nature. Thus, it was uncertain whether a limiting instruction was warranted. Also, the trial counsel did not argue this evidence in any way that would have invited the members to use this conduct for an improper purpose. Finally, we would note the panel members were provided with a general instruction on the proper use of uncharged misconduct.

[11] The record indicates the parties and military judge discussed his proposed instructions at two sessions held under Rule for Courts-Martial 802 and that the military judge then made changes to the instructions after each session. The draft instructions are not part of the record and there is no indication of what changes were made or why. Discussions of counsel's proposed changes to instructions should be conducted on the record. *See United States v. Sadler*, 29 M.J. 370, 373 n.3 (C.M.A. 1990).

*Uncharged Misconduct under Military Rule of Evidence 413*

In addition to the evidence of the charged offenses relating to BZ, the Government sought to introduce evidence through Mil. R. Evid. 413 of Appellant's alleged sexual abuse of EP.[12] Appellant filed a timely motion in limine objecting to the admission of the evidence. After a hearing, the military judge denied the Defense motion. The military judge set out his analysis in a written ruling. Appellant asserts the military judge erred by admitting this evidence, and that trial counsel made improper argument about this evidence before the members.[13]

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Id.* (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)) (quotation marks omitted).

Mil. R. Evid. 413(a) allows evidence of an uncharged sexual assault to be admitted and "be considered on any matter to which it is relevant." This includes demonstrating an accused's propensity to commit the charged offenses. *United States v. Parker*, 59 M.J. 195, 198 (C.A.A.F. 2003); *United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000). Our superior court has noted that "inherent in [Mil. R. Evid.] 413 is a general presumption in favor of admission." *United States v. Berry*, 61 M.J. 91, 94–95 (C.A.A.F. 2005). Certain procedural safeguards are required in order to protect the accused from an unconstitutional application of Mil. R. Evid. 413. *Schroder*, 65 M.J. at 55. This includes the requirement that the military judge make "threshold findings" that: (1) the accused is charged with sexual assault; (2) the proffered evidence is evidence of his commission of another offense of sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401 and 402. *Id.*; *Solomon*, 72 M.J. at 179.

Once these threshold findings are made, the military judge is constitutionally required to apply a balancing test under Mil. R. Evid. 403. *Berry*, 61 M.J. at 95. Mil. R. Evid. 403 provides that "[t]he military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." In conducting the balancing test for Mil. R. Evid. 413 evidence, the military judge should consider the following non-exhaustive *Wright* factors to determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice: strength of proof of the prior act, probative weight of the evidence, potential for less prejudicial evidence, distraction of the factfinder,

[12] The military judge also admitted evidence of Appellant's uncharged sexual abuse of BZ. Appellant does not contest that ruling on appeal. In any event, we find no abuse of discretion in this ruling by the military judge.

[13] The admissibility issue is raised pursuant to *Grostefon*, 12 M.J. at 431.

time needed for proof of the prior conduct, temporal proximity, frequency of the acts, presence or lack of intervening circumstances, and the relationship between the parties. *Id.*

Appellant's primary complaints about the admission of evidence regarding sexual abuse of EP are: (1) the allegations were nearly ten years old by the time of Appellant's trial; (2) the allegations were previously investigated by civilian law enforcement and a decision was made not to charge Appellant; and (3) the introduction of this evidence regarding EP improperly diverted the members' attention from the actual charges to EP's allegations.

We find the military judge did not abuse his discretion in admitting this evidence. He appropriately conducted a thorough Mil. R. Evid. 413 analysis, including balancing under Mil. R. Evid. 403. He correctly found the first and second threshold requirements were met because Appellant was charged with sexual assault and Appellant's conduct with EP falls within that same definition. Regarding the third threshold requirement, the military judge found EP's testimony relevant under Mil. R. Evid. 401 and 402, finding it had a tendency to make it more probable that Appellant would commit other offenses of sexual assault, specifically the charged offenses in the case. We find no abuse of discretion in the military judge's conclusions in this regard. The evidence regarding EP does have some tendency to make it more probable that Appellant committed sexual acts with a vulnerable stepdaughter, and thus the military judge did not abuse his discretion in finding it relevant. *See Berry*, 61 M.J. at 94.

We also find no abuse of discretion in the military judge's application of the balancing test to this evidence pursuant to Mil. R. Evid. 403. He issued a detailed written explanation for each of the *Wright* factors. "When a military judge articulates his properly conducted [Mil. R. Evid.] 403 balancing test on the record, the decision will not be overturned absent a clear abuse of discretion." *Solomon*, 72 M.J. at 180 (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)). This assessment included the strong proof of the allegation involving EP, the strong probative weight of the evidence, the limited time required for proof of this evidence, the temporal proximity between when EP raised her allegations and when the charged offenses occurred (while also recognizing that any remoteness in time would be offset by the reliability of the evidence), the similarities between the facts and circumstances of both victim's allegations, the lack of distraction because the panel could hear and evaluate all the evidence, and the lack of any evidence of collusion or tampering with the testimony. After applying this balancing test, the military judge found this evidence relevant and its probative value not substantially outweighed by the danger of unfair prejudice, confusion of the issues, potential to mislead the members nor by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Appellant also complains about the trial counsel's findings argument that referred to the Mil. R. Evid. 413 evidence in conjunction with the charged offenses. He contends

the trial counsel improperly argued the members could trust that the reports of sexual abuse are accurate and true and thus Appellant was guilty of the charged offenses because the two sets of charges support each other due to their similarity and consistency. We disagree and find the trial counsel's argument was not plain error.

Once evidence has been properly admitted under Mil. R. Evid. 413, the Government may "introduce similarities between a charged offense and prior conduct" to show propensity. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (citing *Wright*, 53 M.J. at 480). A trial counsel's argument that encourages the members "to focus on such similarities to show modus operandi and propensity" can be a reasonable inference fairly derived from the evidence. *Id*. at 153.

Here, trial counsel's argument was consistent with the instructions provided to the panel regarding the use of this evidence. If the panel found by a preponderance of the evidence that the uncharged offenses involving EP or BZ occurred, the panel was allowed to consider this evidence for its bearing on any matter to which it was relevant regarding the sexual assault specifications involving BZ, including its tendency, if any, to show Appellant's predisposition to engage in sexual offenses or to prove he intended to gratify his sexual desires. The panel was told this evidence could not be used to overcome a failure of proof in the government's case; thus, Appellant could not be convicted of sexually assaulting BZ solely because the panel believed he assaulted EP or otherwise had a propensity to engage in similar sexual offenses. As such, trial counsel's argument regarding this evidence did not constitute plain error.

*Evidentiary Issues*

1. Testimony from MD

Appellant first complains that irrelevant and prejudicial evidence was admitted during the testimony of Appellant's sister-in-law, MD. MD testified at trial that she visited her sister (Appellant's wife) while Appellant was attending training in Mississippi. Over a Defense hearsay objection, MD was permitted to testify that she purchased meals and groceries for the family because it appeared her sister was willing to accept the financial assistance. She also testified Appellant's wife refused to purchase a pair of shoes that one of the children had requested. The Government used this evidence to argue Appellant was spending money on lingerie for BZ at the same time his family required financial assistance from a relative. Appellant now contends this evidence should have been excluded as irrelevant uncharged misconduct as it tended to show Appellant was not providing adequate support for his family.

We do not find plain error in admitting this evidence. Even if we assume the testimony was irrelevant, we do not believe this error resulted in material prejudice to Appellant's substantial rights. The testimony about Appellant's financial situation was

very limited, and there was no attempt by the witness to connect Appellant's financial troubles to his abuse of BZ. Moreover, we would note the court members were properly instructed on the prohibition of using evidence of criminal disposition to establish Appellant's guilt.

2. Leading questions

Appellant also contends prejudicial error occurred when trial counsel was allowed to ask leading questions of BZ during his direct and redirect examinations. In a declaration submitted on appeal, trial defense counsel explained that they were focused on ensuring BZ's testimony remained within the bounds of the military judge's ruling on the uncharged misconduct evidence regarding Appellant's physical abuse. As such, the defense counsel initially elected to allow trial counsel to lead BZ through her direct testimony to prevent her from opening the door to that evidence. They also explained BZ often had a quizzical look on her face during this testimony and that the trial counsel's use of leading questions led BZ to tell her story in a detached and unemotional manner during her direct testimony.

Having witnessed BZ's performance on direct examination, however, the defense counsel affirmatively changed their strategy during her redirect examination and began objecting to the form of trial counsel's questions, now believing BZ would be unable to use uncharged misconduct to articulate her delay in reporting Appellant's abuse. This strategy was successful, as the Government ultimately was not allowed to present evidence from other family members about prior specific instances of physical abuse. The defense counsel also argued to the panel during closing argument that the Government's use of leading questions called BZ's credibility into question.

We find no plain error in the trial counsel's use of leading questions. Without an objection being lodged, we cannot fault the military judge for failing to intercede *sua sponte*. And as noted above, the Defense had tactical reasons why it allowed BZ to be led during direct examination. Moreover, we do not find Appellant was prejudiced by the method of BZ's examination at trial.

3. Trip home from Mississippi

Appellant also argues BZ introduced prejudicial and irrelevant evidence during her testimony when she described the multi-day bus trip she took back to Arizona after leaving Appellant in Mississippi. Appellant likewise complains hearsay evidence was improperly admitted when BZ testified about the phone call she had with her mother from Mississippi after she had been sexually abused.

In their declaration, the trial defense counsel explain they chose to allow BZ to testify about the circumstances of her trip home because her testimony was bizarre,

sounded embellished, and was not fully corroborated by cell phone records. The trial defense counsel believed this would negatively impact BZ's credibility with the panel.

The trial defense counsel also elected to allow BZ to testify about hearsay statements her mother made during that phone call for several reasons. First, BZ's testimony about her mother's statements was inconsistent with the testimony of another witness who spoke to the mother that same night. Additionally, BZ's testimony that her mother repeatedly prodded BZ for information during this call did not square with BZ's claim that she did not tell her mother everything about Appellant's actions. The trial defense counsel also claim they wanted this evidence admitted in order to bolster the Defense theory that BZ had major credibility problems.

We find no plain error in the admission of this testimony. The Defense had tactical reasons for allowing BZ to testify on these matters. As such, we cannot say the military judge erred in failing to intercede *sua sponte*.

4. Testimony of Staff Sergeant JS

Appellant also argues that hearsay evidence was improperly admitted through the testimony of SSgt JS, who attended technical school with Appellant in Mississippi and stayed near him in the same hotel. After BZ called her mother, LB, from Mississippi to disclose Appellant had sexually abused her, LB called SSgt JS for assistance. Appellant contends SSgt JS's testimony about LB's statements during this conversation constituted inadmissible hearsay. Trial defense counsel did not object to this specific testimony, so we examine for plain error.

The Government in its answer recognizes SSgt JS did repeat out-of-court statements from Appellant's spouse. However, the Government claims the statements were not offered for the truth of the matter asserted, but instead were admitted to show the effect on the listener; that is, why SSgt JS allowed BZ to stay with him alone in his hotel room.

Without an objection being lodged, we cannot fault the military judge for failing to intercede *sua sponte* on this line of questioning. Beyond possible tactical reasons for the Defense to allow such testimony, there were also hearsay exceptions in play. Additionally, we do not find Appellant was prejudiced by the admission of this testimony. Trial counsel made absolutely no mention of this testimony during his findings argument. Moreover, it is arguable that SSgt JS's testimony was beneficial to Appellant as it contradicted BZ's earlier testimony about supportive statements her mother allegedly made before she reported some of Appellant's abuse. For these reasons, we find no plain error.

*Ineffective Assistance of Counsel*

In addition to the ineffective assistance of counsel allegations discussed elsewhere in this opinion, Appellant contends his trial defense counsel were ineffective for a variety of other reasons. We address many of Appellant's claims below. With regard to any claims raised by Appellant but not addressed in this opinion, we have considered and summarily reject the remaining issues as these complaints require no additional analysis or warrant relief.[14] *See Matias*, 25 M.J. at 363.

We review claims of ineffective assistance of counsel de novo, applying the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). Under that test, "in order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Green*, 68 M.J. at 361 (citing *Strickland*, 466 U.S. at 687; *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)).

The deficiency prong requires Appellant to show his counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Strickland*, 466 U.S. at 688. To determine whether the presumption of competence has been overcome as alleged by an appellant, we examine whether there is a reasonable explanation for counsel's actions and whether defense counsel's level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011).

The prejudice prong requires Appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In doing so, Appellant "must surmount a very high hurdle." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (citing *Strickland*, 466 U.S. at 689). This is because counsel is presumed competent in the performance of his or her representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *Moulton*, 47 M.J. at 229).

[14] As an example, Appellant claims his trial defense counsel did not adequately prepare for his court-martial, failed to secure and present certain documentary evidence, and failed to ask necessary and relevant questions of witnesses. Appellant also argues his counsel were ineffective for failing to object to the admission of certain evidence or arguments of trial counsel. As we have found there is no error prejudicial to a substantial right of Appellant with regard to these issues as discussed elsewhere in this opinion, we likewise find Appellant has failed to meet his burden of demonstrating deficient performance by his trial defense counsel that resulted in prejudice.

In this case, we ordered Appellant's trial defense counsel to provide declarations addressing the allegations raised by Appellant in his assignments of error and supporting affidavit. Appellant's trial defense counsel provided two joint declarations, which were accepted by the court, addressing the matters alleged in Appellant's submissions.[15] In response to these declarations, Appellant submitted additional matters regarding the performance of his counsel.

Based on our review of the various declarations, we determined additional information from trial defense counsel was necessary to facilitate a meaningful review of Appellant's claims. Trial defense counsel each filed a separate declaration in response to this second order that addressed specific areas of concern. In response to these declarations, Appellant filed additional affidavits, as well as case file information provided to Appellant by his trial defense counsel.

"[T]he defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76 (citing *Polk*, 32 M.J. at 153). When there is a factual dispute, however, appellate courts determine whether further fact-finding is required, including whether a post-trial fact-finding hearing is necessary. *United States v. Ginn*, 47 M.J. 236, 242–43 (C.A.A.F. 1997). This determination in a non-guilty plea case is guided by the following principles:

> First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis.
>
> Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.
>
> Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.
>
> Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

[15] The second joint declaration was not ordered by this court. It was submitted after we declined to accept an affidavit from the Defense's expert consultant that was attached to their original declaration.

*Ginn*, 47 M.J. at 248; *see also United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

Having considered the *Ginn* factors and our review of Appellant's claims, declarations from trial defense counsel, and the matters contained in the record, we find we can resolve the issues in this case without ordering additional fact-finding. For the majority of Appellant's claims, the factual basis supporting Appellant's allegations of legal error are uncontroverted. Instead, the resolution of Appellant's claims turn on the reasoning behind the tactical and strategic litigation decisions made by trial defense counsel in this case. Regarding other issues, we find the appellate pleadings and the record of trial "compellingly demonstrate" the improbability of those facts as alleged by Appellant.

Prior to analyzing the specific conduct of trial defense counsel as alleged deficient by Appellant, we generally recognize trial defense counsel were somewhat limited in how they could attack BZ's allegations. Notwithstanding the Mil. R. Evid. 413 evidence which established a pattern of abuse by Appellant towards his stepdaughters, BZ's testimony regarding the sexual and physical abuse in Mississippi was corroborated in certain critical aspects by other witnesses. While trial defense counsel attempted to establish much of this corroboration was manufactured by BZ to "frame" Appellant, this attack was difficult given the complex scheme required for BZ to actually generate false or misleading evidence against Appellant.[16] Furthermore, while there were clearly credibility issues with BZ and questions surrounding her motive for reporting the allegations, trial defense counsel had to remain cognizant of the history of abusive and neglectful behavior by both Appellant and his spouse, and the impact the admission of this evidence could have on his case.

1. Failure to challenge speedy trial or allege pretrial restraint

Appellant alleges his trial defense counsel were ineffective for failing to raise a speedy trial motion or, in the alternative, failing to seek credit for Appellant's pretrial restraint.

Appellant contends he was ordered by his commander on 1 October 2012 not to enter the state of Arizona, not to have contact with his terminally ill wife, and to check in with his unit twice per day. Appellant contends these conditions constituted restrictions tantamount to confinement, entitling him to day-for-day credit for the time he was subject

[16] For example, the defense argued BZ used Appellant's cell phone to create incriminating text messages later viewed by Mrs. DL. This attack was supported by Mrs. DL's testimony about a phone conversation she overheard between BZ and EP. However, given the totality of the evidence admitted at trial, it was unlikely BZ could have both developed and executed this detailed scheme prior to her departure from Mississippi. On appeal, Appellant now claims BZ actually sent the text messages from the phone of a friend, and that Mrs. DL was duped by BZ to believe her previous conversations with the person answering the phone for this number was Appellant, when it was in fact BZ's friend. However, this theory, if suggested at trial, would have then eliminated the beneficial testimony of Mrs. DL.

to these conditions. He also argues that the imposition of these conditions triggered the speedy trial clock, requiring him to be brought to trial within 120 days.

We find Appellant's trial defense counsel were not ineffective for failing to raise a speedy trial motion as the conditions referenced by Appellant did not constitute the imposition of restraint under R.C.M. 304(a)(2)-(4), which is required to trigger the speedy trial clock. *See* R.C.M. 707(a). Similarly, these conditions are not sufficiently onerous to be tantamount to confinement. *See United States v. King*, 58 M.J. 110, 112 (C.A.A.F. 2012). Thus, Appellant's speedy trial rights were not violated and he was not entitled to credit for pretrial restraint. In light of these conclusions and applying the applicable standards, we find Appellant has failed to meet his burden of demonstrating that any deficiency in his defense counsel's conduct resulted in prejudice.

2. Failure to find witness from Mississippi

Appellant also contends his trial defense counsel were ineffective for failing to ask that the Government find and produce an individual who was staying in the hotel room next to Appellant in Mississippi. In their joint declaration, trial defense counsel describe the limited information they had on this individual and their efforts to find him.

In a later filing, Appellant provided this court with a declaration from this individual after Appellant's appellate defense counsel found him. In that declaration, the potential witness describes observing no abnormal or suspicious behavior when he was in the presence of Appellant and BZ. He also states that he never heard any sexual noises emanating from Appellant's hotel room, despite the hotel's thin walls.

Having reviewed this declaration in light of the evidence adduced at trial, we conclude that, even if the defense counsel were deficient for failing to find or procure this witness prior to trial, this deficiency did not result in prejudice to Appellant as we do not find a reasonable probability that there would have been a different result if this witness had testified at trial. *Gooch*, 69 M.J. at 362. BZ did not testify that any noises were made during the sexual encounters in the hotel room, nor did she testify that she acted strangely in Appellant's presence during that trip. Moreover, contrary to the claim in Appellant's initial declaration, we note the witness disclosed in his affidavit that he did recall hearing a verbal altercation between Appellant and BZ on the evening prior to her departure from Mississippi. This statement arguably buttresses BZ's testimony regarding Appellant's physical assault of her once she disclosed limited details of the sexual assault to her mother. For these reasons, we find Appellant has failed to meet his burden of demonstrating that his defense counsel's conduct resulted in prejudice.

3. Inadequate cross-examination or impeachment of BZ and EP

Appellant next claims his trial defense counsel failed to adequately cross-examine or impeach BZ and EP at trial, including using prior inconsistent statements and documentary evidence.

In her declaration, Major (Maj) JW advised she initially prepared over 200 questions to use during her cross-examination of BZ. She eventually limited her cross-examination, however, because of her understanding of the military judge's ruling on the admission of uncharged misconduct.

Once the military judge ruled the Defense opened the door for the Government to discuss how uncharged misconduct impacted BZ's willingness to report Appellant's abuse, Maj JW was prepared to expand her examination of BZ after the Government completed their re-direct examination. However, once the Government was unable to effectively elicit information from BZ regarding her fear of Appellant, Maj JW made a tactical decision not to question BZ further to prevent the Government from revisiting the uncharged misconduct during further examination.

With regard to the cross-examination of EP, trial defense counsel decided not to cross-examine EP to avoid further discussions of uncharged misconduct. Instead, as noted below, trial defense counsel called the civilian detective who declined to refer EP's allegations for prosecution.

As we find these tactical decisions to be reasonable, we will not second-guess them on appeal. *See Perez*, 64 M.J. at 243. Moreover, we find trial defense counsel's use of additional inconsistent statements from BZ would likely not have changed the outcome of Appellant's trial. Trial defense counsel was able to raise a number of inconsistent statements during her initial cross-examination, which resulted in the military judge providing the panel with the appropriate instruction on how to consider BZ's inconsistencies in reporting allegations of abuse. While BZ provided a number of other statements in which she did not report the full extent of Appellant's abuse, evidence of her erratic reporting was sufficiently before the panel members.

We also find prejudice lacking from trial defense counsel's handling of EP. Trial defense counsel was successful in limiting EP's discussion of Appellant's physically abusive conduct during her direct examination. Provided EP's credibility had been attacked, trial counsel had already stated on the record they were prepared to bring up incidents of physical abuse to explain EP's delayed reporting. Instead, trial defense counsel decided to impeach EP through the testimony of the civilian detective who investigated the allegations raised by her against Appellant. As we find this evidence more powerful than impeaching the credibility of EP based on her inconsistent and delayed reporting of abuse, we find counsel were effective in their handling of this witness.

4. Opening door to prejudicial evidence

Appellant next claims his counsel were ineffective for opening the door to prejudicial evidence during both their cross-examination of BZ and direct examination of a civilian detective in their case-in-chief. In attacking trial defense counsel's handling of BZ, Appellant argues counsel had two options once they successfully limited the admission of uncharged misconduct by the Government under Mil. R. Evid. 404(b): (1) abide by the military judge's ruling and not engage in areas of examination that would open the door to evidence of uncharged misconduct or (2) fully cross-examine BZ with an understanding the questioning would open the door to uncharged misconduct. Appellant faults his trial defense counsel for opening the door and then not fully exploiting impeachment evidence against BZ once the door was opened.

As discussed above, we have found trial defense counsel's tactics once the door to uncharged misconduct was opened to be reasonable given BZ's testimony on redirect. Additionally, even if trial defense counsels' performance was deficient, we find Appellant has failed to establish prejudice. The evidence of uncharged conduct admitted at trial was not extremely compelling given BZ's inability to clearly connect the abuse to her failure to report the sexual abuse in a timely and consistent manner. Trial defense counsel was also able to limit the admission of additional Mil. R. Evid. 404(b) evidence based on her handling of EP's testimony, as well as the testimony of Appellant's son, SSgt JB. Finally, we would note the panel members were instructed on the proper use of uncharged misconduct evidence, and that this evidence could not be used to convict Appellant solely on the fact he was a bad person. For all of these reasons, we do not believe the admission of uncharged misconduct changed the result in Appellant's case.

Appellant also contends his trial defense counsel were ineffective by opening the door to the introduction of prejudicial evidence through the direct examination of the civilian police detective who investigated EP's allegations in 2006. The detective testified during the Defense's case-in-chief that he conducted a full investigation of EP's allegations and closed the case as unsubstantiated without Appellant being arrested or charged. Over Defense objection, the trial counsel then led the investigator through a list of other social service investigations involving Appellant and his children that the officer had not reviewed as part of his investigation. Appellant now contends his defense counsel were ineffective in opening the door to this damaging evidence.

In their joint declaration, trial defense counsel explain the difficulty they faced in trying to introduce evidence that impeached the Government's witnesses without opening the door to uncharged misconduct. The defense counsel made the tactical decision to ask these questions of the civilian police officer in order to discredit EP's sexual assault allegations. Given this witness arguably provided the most effective evidence to discredit the damaging propensity evidence offered by EP, we find trial defense counsel's decision

was an "objectively reasonable choice in strategy from the alternatives available at the time" to the Defense; we therefore decline to second guess the decision. *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (internal quotation marks and citation omitted).

Additionally, we find Appellant has failed to meet his burden of demonstrating that any deficiency in his defense counsel's conduct resulted in prejudice. As the panel members were instructed by the military judge, the cross-examination questions could only be used to show the officer's week-long investigation was insufficient to fully evaluate EP's claims of abuse. The witness was not questioned about specific allegations within these investigations or whether the allegations were in fact substantiated. Moreover, based on questioning by the court panel, the witness clarified he requested reports from at least seven different jurisdictions based on EP's statements to him about where Appellant's abuse took place. This testimony, we believe, sufficiently mitigated any benefit the Government might have obtained by its initial cross-examination of this witness.

5. Failure to introduce videotaped testimony of Appellant's wife

Appellant's wife, LB, was diagnosed with terminal cancer in 2012 and passed away in October 2013 prior to Appellant's trial. In an August 2013 deposition, she testified that she did not believe either of her daughters' allegations about Appellant and provided explanations for their motives to lie, including their poor character for truthfulness. LB also noted the allegations made by EP were proven to be unfounded after a civilian law enforcement investigation. Additionally, she testified that BZ's allegation she had been inappropriately touched by a high school teacher was later determined to be unsubstantiated.

Appellant alleges his trial defense counsel were ineffective for failing to introduce the deposition into evidence. In making this allegation, Appellant provides no specific claims as to how LB's deposition should have been used in support of his case. Instead, Appellant argues trial defense counsel had noted earlier they intended to use the deposition based on BZ's testimony on direct examination and, therefore, should have followed through on this statement.

In their joint declaration, trial defense counsel explained they made the difficult decision not to use the deposition because they were certain the admission of any deposition testimony would lead the military judge to admit evidence of abusive treatment by both Appellant and LB. As such, this risk outweighed the benefit of admitting the deposition in their opinion. Instead, they elected not to object to the admission of certain statements by Appellant's wife offered through other witnesses, in order to get before the members some of her statements and beliefs regarding weaknesses in the case against Appellant.

We do not find this tactical decision by trial defense counsel equated to deficient performance. The testimony of LB on matters helpful to Appellant's case would have likely opened the door further to previous allegations of abuse by both Appellant and LB towards their children. While the Defense had already opened the door to some of this damaging evidence through its cross-examination of BZ, we cannot fault counsel for taking steps to limit the negative impact of this evidence on the members.[17]

Furthermore, although not specifically noted by trial defense counsel, the admission of LB's deposition had the potential to admit significantly damaging information against Appellant outside of the Mil. R. Evid. 404(b) context. As an example, LB testified BZ had truthfully reported in the past that she had been sexually abused by one of her stepbrothers. Given LB also testified BZ possessed poor character for truthfulness, this specific instance of BZ's truthfulness was likely available for use by the Government at trial. *See* Mil. R. Evid. 608(b). While this area of questioning could only have been used to test the basis for LB's opinion, the obvious negative impact to Appellant's case provides a secondary reason for justifying trial defense counsels' tactical choice here.

Moreover, we do not find Appellant was prejudiced by the failure to admit LB's deposition. Outside of the testimony discussed above which implicated damaging character evidence, LB's testimony was not extremely favorable to Appellant's case. LB testified she saw a bruise on BZ's face the day after she returned from visiting Appellant, which cut against the Defense's theory supported by another witnesses that BZ used cosmetics to resemble a bruise before leaving Mississippi. LB also denied during the deposition she had a previous conversation with the mother of one of BZ's friends, Mrs. DL, about the sexually-based text messages BZ showed Mrs. DL from Appellant. Had this portion of LB's deposition been admitted, the Defense's favorable testimony from Mrs. DL regarding BZ's manufacturing of incriminating text messages would have likely been discredited.

Concerning areas where LB's testimony was helpful, trial defense counsel was able to use other witnesses to provide similar evidence. For example, regarding the reason why BZ went to visit Appellant in Mississippi instead of LB, the Defense called a family friend who testified BZ "begged" to go to on the trip once it was decided LB could not go because of her ongoing cancer treatment. This testimony rebutted the Government's theory that Appellant arranged the trip to provide him the opportunity to abuse BZ.

We also question, when examining prejudice, how impactful LB's testimony would have been given the obvious bias she displayed during the deposition. Her claim Appellant was never alone with EP to facilitate the claimed abuse was not credible. Likewise, her explanation as to why she let her 17-year-old daughter sleep in a hotel room alone with

[17] Trial defense counsel attempted to use LB's death to Appellant's benefit by arguing during findings that LB "[is] not here to give you her side of what happened."

Appellant's classmate, SSgt JS, after the disturbance between Appellant and BZ further points towards her bias in favor of Appellant. When cross-examined on this issue, LB denied she told SSgt JS that BZ reported Appellant had attempted to take a shower with her. Instead, she testified she simply called SSgt JS to check up on BZ and Appellant due to general concerns she had based on her earlier conversations with both BZ and Appellant.[18] Later, she asked SSgt JS if BZ could stay with him alone in his hotel room to separate BZ from Appellant simply because BZ did not want to stay in Appellant's room. While LB's deposition would have allowed the Defense to rebut SSgt JS's testimony, LB's testimony would have carried minimal weight given the facts and circumstances discrediting her pretrial claims.

6. Failure to adequately investigate or utilize for potential impeachment other allegations of sexual abuse involving BZ and EP by others

Within the record of trial and Appellant's submissions are various claims about BZ and EP being sexually abused by other individuals, including two relatives. Some of that information was contained within child protective services records included within the record of trial.[19] Appellant also contended that he provided his defense counsel with specific documentation showing that both girls had made other claims of sexual abuse that were determined to be false. The record of trial and initial joint declarations by trial defense counsel were generally silent regarding these claims, so we ordered individual declarations from both trial defense counsel.[20]

In her declaration, Maj JW states Appellant and his wife both informed the Defense the two girls had previously made allegations that other relatives had sexually abused them, and that BZ had said a teacher sexually molested her. During the Defense's pretrial interviews with BZ, she told the Defense that she could not recall any specifics about the time she spent with relatives. She also said the incident involving the teacher consisted of a teacher trying to hold her hand. The Defense sought discovery into this specific matter and was informed that the school district had no record of any inappropriate incident while BZ was a student. Similarly, EP told defense counsel that she had no memory of being sexually assaulted by anyone other than Appellant. Given the lack of evidence that these

[18] These general concerns also resulted in LB contacting the hotel's front desk that same evening to make sure no disturbances between BZ and Appellant had been reported.

[19] Based on our review of the record of trial, it appears Appellant's trial defense counsel were provided with all pertinent records of sexual abuse specifically alleged by BZ and EP against Appellant. To the extent Appellant claims his counsel were deficient in failing to obtain records regarding the allegations against him personally, we find no deficient performance on the part of counsel.

[20] Appellant appears to allege his counsel were deficient for failing to obtain school records in which BZ allegedly accused a teacher of abuse. The Government attempted to secure records from this alleged incident, but was informed no records existed.

other sexual assaults occurred or that the girls had falsified such allegations, the defense counsel did not believe the information provided by Appellant and his wife could be used for impeachment of the girls during their testimony.[21]

Regarding abuse of BZ and EP by BZ's biological father, it does not appear from the materials submitted by Appellant that either BZ or EP were the source of any report of sexual abuse. Appellant states in one of his declarations that it was BZ's maternal grandmother who alleged BZ's biological father had engaged in inappropriate conduct by showering with BZ. Appellant later requested the court consider a letter from the grandmother that appears to corroborate Appellant's declaration as to the source of the report. Given that BZ was less than five years of age when this report was allegedly made to social services, we are confident the source of any report was not BZ or EP, and therefore trial defense counsel were not deficient for failing to bring evidence of this abuse before the panel members during their cross-examination of either witness.

Appellant also claims his counsel were ineffective for failing to investigate allegations that BZ and EP were sexually assaulted by BZ's maternal grandfather. While Appellant claims these allegations were made after BZ's maternal grandmother alleged sexual abuse by BZ's biological father, it appears based on various documents in the record of trial that these allegations were raised in May and June of 1998, prior to the maternal grandmother's report the following year. There is no evidence before the court the two social service cases, which were closed with "unknown" and "inconclusive" findings respectively, were the result of allegations specifically reported by either BZ or EP.

Trial defense counsel note in their declarations they had no evidence either BZ or EP falsely reported allegations against BZ's biological grandfather. As such, they did not believe they could use the alleged report to impeach BZ or EP during their testimony. Moreover, trial defense counsel were both cognizant any further attack on either BZ or EP's credibility would likely open the door to additional opportunities for the Government to admit uncharged misconduct. Maj JW also noted in her declaration the Defense's expert consultant cautioned against the use of this evidence, as abusers tend to seek out children who have been victimized in the past.

Even if we were to find trial defense counsel deficient for failing to further investigate the allegations of abuse lodged against BZ's maternal grandfather, we find Appellant has failed to show that but for this deficiency, there is a reasonable probability the outcome of his trial would have been different. As noted above, there is no evidence before this court supporting a finding that either BZ or EP, instead of another family member, filed a report against their maternal grandfather. Furthermore, given the

[21] Trial defense counsel also noted their concerns with asking the Government through discovery to pursue social service records involving Appellant or his children without knowing whether these records were harmful to Appellant's defense.

investigatory findings of "unknown" and "inconclusive," there is no evidence the allegations were deemed false.

Moreover, even assuming BZ and EP filed false reports when they were four and six years of age respectively, this evidence has minimal relevance to reports of abuse filed against Appellant when they were teenagers. This is not a case where it has been alleged by the Defense that the young ages of the victims may have resulted in their mistaken belief regarding the perpetrator or the specific events as alleged against Appellant. Absent this type of attack, the Defense would have been left with arguing pure veracity alone. We are not convinced that there is a reasonable probability that a general attack on the credibility of BZ and EP based on an earlier false report at young age would have been successful in changing the result of Appellant's trial.[22]

7. Failure to adequately investigate and use for potential impeachment allegations of sexual abuse by BZ

During their investigation of the case, the Defense learned about certain inappropriate sexual behavior BZ had engaged in with one of her siblings and the minor son of a neighbor. Appellant claims his counsel were ineffective for "hiding" this information from the court.

In evaluating whether to cross-examine BZ about these incidents, the trial defense counsel consulted with their expert consultant, who advised that this sort of behavior is not unusual for child victims of sexual abuse. Based on this consultation, the defense counsel elected not to introduce this information into evidence unless a witness testified in a manner that would permit its use as impeachment.

We find this tactical decision by trial defense counsel to be reasonable. In so holding, we would also note Appellant makes no attempt to explain how evidence of BZ's sexual predisposition would have been relevant and admissible under Mil. R. Evid. 412.

8. Failure to contact witnesses

Appellant alleges in various declarations that his trial defense counsel refused to contact individuals he identified as potential fact and character witnesses. The vast majority of the witnesses identified by Appellant would have testified solely to his positive character as a husband and father.

The failure to call witnesses during findings to testify about Appellant's good character was not deficient conduct by trial defense counsel. As previously noted, trial

[22] As previously noted, a general attack on BZ's credibility regarding reporting of sexual abuse may have also opened the door to evidence where she truthfully reported abuse.

defense counsels' strategy was to limit the admission of Appellant's extensive social service history. The testimony of character witnesses such as those proposed by Appellant would have provided additional opportunities for the Government to discuss Appellant's significant history of physical and emotional abuse of both his wife and children.

Appellant also alleges there were a number of potential fact witnesses not called by the Defense who could have impeached both of his stepdaughters who alleged sexual abuse. For example, Appellant submitted an affidavit from his son, DB, who would have testified that BZ and EP asked him to "join their case" against Appellant. DB also stated in his affidavit that BZ, EP, and an unknown Government attorney tried to coerce him into changing his testimony to support the prosecution of Appellant. DB provided no specifics regarding this coercion.

As noted in their initial affidavit to the court, trial defense counsel spoke with DB prior to trial and decided not to call him as a witness. Although they surmised DB had a financial motive to support Appellant, they were also concerned DB would serve as another avenue for admission of uncharged misconduct against Appellant.

We find Appellant has not shown his counsels' tactical decision regarding this witness amounted to deficient performance or was reasonably likely to have driven a different result. Given the lack of detail in DB's affidavit, it does not appear to us that his testimony was sufficiently favorable for the Defense to risk the additional admission of uncharged misconduct. DB also had the potential to provide testimony bolstering BZ's character for truthfulness as he was aware of a truthful report of sexual assault by BZ in the past.

Appellant also claims one of BZ's friends could have testified to inconsistent statements BZ made about Appellant's sexual assault. This witness, Appellant notes, would have testified BZ never reported to her that Appellant engaged in sexual intercourse with BZ while she visited him in Mississippi. In championing the relevance of this witness, however, Appellant ignores the full extent of this witness' testimony in which she noted BZ called her from Mississippi to report Appellant, among other misconduct, had assaulted her and tried to sleep with her. As trial defense counsel was able to obtain this impeachment evidence from their cross-examination of BZ without bolstering her claims with a contemporaneous report of abuse, we cannot fault trial defense counsel for failing to call this witness in its case-in-chief.[23]

[23] Trial defense counsel raised the absence of this witness during argument on findings, claiming the prosecution would have called the witness had her testimony corroborated BZ's testimony.

9. Proposal of matters in clemency

Appellant alleges his trial defense counsel were deficient in two aspects of post-trial processing. First, Appellant claims his trial defense counsel failed to include a letter from the Defense consultant as part of the clemency submissions. The cover memorandum for the clemency package stated the letter was attached to the submission and provided a brief summary of the consultant's opinion that the confinement time necessary to rehabilitate Appellant was far less than the 20 years adjudged at trial.[24] However, the letter was not submitted to the convening authority.

In their joint declaration, trial defense counsel explain that this reference in the cover memorandum was a typographical error, as the defense counsel had decided not to include the letter. This tactical decision was made after the defense counsel reviewed the expert's proposed submission and concluded its inclusion in the clemency package would likely make the expert available for questioning by the convening authority, which could then lead to the release of damaging prejudicial information about Appellant and his potential for rehabilitation.

"The military accused has the right to the effective assistance of counsel during the pretrial, trial, and post-trial stages" of his court-martial. *United States v. Hicks*, 47 M.J. 90, 92 (C.A.A.F. 1997) (citing *United States v. Carter*, 40 M.J. 102, 105 (C.M.A. 1994). When errors occur in the post-trial stage of a court-martial, the threshold for showing resulting prejudice is low "because of the highly discretionary nature of the convening authority's clemency power." *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999). Where such errors occur, "material prejudice to the substantial rights of an appellant [is shown] if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *Id*. (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

We do not find Appellant has met his "heavy" burden of establishing his counsel's performance to be deficient. *See United States v. Adams*, 59 M.J. 367 (C.A.A.F. 2004). Even during the post-trial phase of trial, we presume trial defense counsel are competent in their representation of their client. *Lee*, 52 M.J. at 52. The presumption of competence is only rebutted by a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms. *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Here, trial defense counsel made a tactical decision not to include the letter from the expert consultant. While we find it unlikely, given our collective experience, that the

[24] This letter is not listed as an attachment to the cover memorandum. The addendum to the staff judge advocate's recommendation did not note this discrepancy to the convening authority. The addendum did properly list the attachments noted on the cover memorandum as those required to be considered by the convening authority prior to taking action on Appellant's case.

convening authority would have contacted the Defense's expert consultant during clemency, we recognize counsel have wide latitude in making tactical decisions. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015). In fact, generally speaking, appellate courts will not second-guess these types of decisions by counsel. *Id*. at 387. We decline to do so in this case.

Given the seriousness of Appellant's offenses, his best opportunity for clemency came from a letter submitted by one of the court members recommending a reduction in Appellant's term of confinement. This letter was attached to the addendum and, therefore, reviewed by the convening authority before action. The expert's memorandum indirectly supported the court member's clemency recommendation by advising the convening authority that the formal treatment program for Appellant would normally only last two to four years in length. Trial defense counsel's summary of the expert's opinion noted that extended confinement was not necessary to properly rehabilitate Appellant. Thus, Appellant's personal plea for a shorter period of confinement was communicated to the convening authority along with the supporting justification. While the detailed defense counsel in this case could have been more direct in his presentation of Appellant's clemency materials, this is not the standard of review we apply to Appellant's claim.

Additionally, Appellant alleges one of his supporters, Ms. SW, provided a clemency submission suggesting the trial defense team was ineffective, but was instructed by Capt JW to remove any claims of ineffective assistance of counsel. In his individual declaration, Capt JW acknowledged Ms. SW's initial clemency submission was critical of both the defense team and the military justice system as a whole. He advised Ms. SW that her initial letter risked alienating the convening authority and assured her there would be a time for Appellant to raise issues about counsel's representation later on appeal if he decided to do so. Capt JW stated Ms. SW then modified her clemency letter, although the letter submitted claimed Appellant did not receive a fair trial and a chance to defend himself.

We do not believe it was deficient performance for counsel to discuss the content of clemency submission with Ms. SW. Trial defense counsel has the responsibility to make an "evaluative judgment" on what matters to submit during clemency. *See United States v. MacCulloch*, 40 M.J. 236, 239 (C.M.A. 1994). This judgment requires counsel to avoid submitting matters that may negatively impact an appellant's opportunity for clemency. *See United States v. Gilley*, 56 M.J. 113, 124–125 (C.A.A.F. 2001) (finding defense counsel's performance deficient for submitting scathing clemency letters from the appellant's family members). By limiting Ms. SW's attack on counsel and the military justice system, counsel attempted to best position Appellant for relief during clemency.

Still, we must examine whether Appellant should have been provided conflict-free counsel to represent him during post-trial processing. This examination is driven by Appellant's claim on appeal that Capt JW contacted him in confinement, presumably prior to the submission of clemency, and threatened to expose unfavorable information about

Appellant's case if he raised ineffective assistance of counsel allegations.[25] Appellant, however, does not state in his declaration that he specifically raised the issue of ineffective assistance of counsel with Capt JW. Furthermore, he did not raise any concerns about the quality of his counsel's representation within his clemency submission to the convening authority.

In response to this allegation, Capt JW noted Appellant at no time prior to this appeal expressed his dissatisfaction with either counsels' legal representation. Provided Appellant had done so during the clemency process, Capt JW recognized he would have been required to secure Appellant new counsel. Capt JW acknowledged he contacted Appellant while in confinement to discuss a phone call he received from Appellant's brother questioning the competency of Appellant's trial defense counsel. Capt JW stated he briefed Appellant on the content of the phone call and then explained to him the risk of him waiving his attorney-client privilege by discussing privileged matters with third parties. Capt JW advised Appellant acknowledged this risk and that stated that he regretted the actions of his brother.

Based on the appellate record before us, we do not find there was an unresolved conflict between Appellant and his counsel necessitating the appointment of a new defense counsel for the purposes of clemency. *See United States v. Cornelious*, 41 M.J. 397, 398 (C.A.A.F. 1995). While Appellant may have attempted to raise the issue of ineffective assistance of counsel through various proxies, it does not appear to us from the record of proceedings that Appellant ever personally raised his dissatisfaction of his counsel until his appeal before this court.

10. Cumulative error

We have also considered whether trial defense counsel's conduct, examined in its totality, constituted ineffective assistance of counsel even if individual oversights or missteps did not independently rise to that level. *Akbar*, 74 M.J. at 392. As noted above, we have found against Appellant regarding his individual ineffective assistance of counsel claims. While trial defense counsel did open the door to uncharged misconduct, we do not believe this action fell measurably below the performance ordinarily expected of fallible lawyers given the restrictions and limitations placed on the Defense from Appellant's history of abusive behavior to his wife and children. We would also note trial defense counsel effectively limited the Government's use of uncharged misconduct through its objections to BZ's testimony on redirect. Overall, trial defense counsel pursued a strategy to discredit the Government evidence, and this strategy was reasonable based on our review of the case *in toto*. While a different strategy or attack *might* have resulted in Appellant's full acquittal of the charged offenses, this is not the scope of our review. *See Lockhart* v. *Fretwell*, 506 U.S. 364, 372 (1993). For all of these reasons, we find Appellant's claims

[25] Appellant first raised this issue in two supplemental affidavits submitted four months after his initial brief and supporting declaration.

do not provide a basis for establishing ineffective assistance of counsel based on cumulative error. *Akbar*, 74 M.J. at 392; *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011); *see also United States v. Hall*, 455 F.3d 508, 520 (5th Cir. 2006) (stating that "ineffective assistance of counsel cannot be created from the accumulation of acceptable decisions and actions").

*Prosecutorial Misconduct*

Appellant personally raises a variety of prosecutorial misconduct issues. As he failed to object to these matters at trial, we review for plain error, only granting relief if he carries his burden of demonstrating: (1) there is error; (2) that is clear or obvious; and, (3) that materially prejudiced a substantial right. *Fletcher*, 62 M.J. at 179. We address his allegation of improper argument below. Having carefully considered the remainder, we conclude the other issues do not require further discussion as they do not rise to the level of plain error. *Matias*, 25 M.J. at 363.

Appellant contends trial counsel engaged in prosecutorial misconduct by making a variety of improper arguments during findings and sentencing arguments. "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Fletcher*, 62 M.J. at 179 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). "An accused is supposed to be tried and sentenced as an individual on the basis of the offense(s) charged and the legally and logically relevant evidence presented." *Schroder*, 65 M.J. at 58.

Counsel are to limit arguments to evidence in the record and reasonable inferences that can be drawn from that evidence. *United States v. Nelson*, 1 M.J. 235, 239–40 (C.M.A. 1975). While a trial counsel "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Fletcher*, 62 M.J. at 179 (quoting *Berger*, 295 U.S. at 88). "[I]t is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'" *Schroder*, 65 M.J. at 58 (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983) and citing R.C.M. 919(b)). Trial counsel are also prohibited from injecting into argument irrelevant matters, such as facts not in evidence or personal opinions about the truth or falsity of testimony or evidence. *Schroder*, 65 M.J. at 58; *Fletcher*, 62 M.J. at 179; R.C.M. 919(b) Discussion. To that end, courts have struggled to draw the "exceedingly fine line which distinguishes permissible advocacy from impermissible excess." *Fletcher*, 62 M.J. at 183 (citation and internal quotation marks omitted). Improper argument is a question of law that we review de novo. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011). When determining whether prosecutorial comment was improper, the statement "must be

examined in light of its context within the entire court-martial." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (citation omitted).

We initially address several contentions that we find do not amount to prosecutorial misconduct as they were reasonable inferences derived from the evidence. First is that during his findings argument, without evidence to support it, trial counsel improperly raised the concept of Appellant "grooming" BZ and EP. We disagree that this was plain error. As Appellant asserts, trial counsel indeed used that term several times during his argument and there was no expert testimony presented about grooming. However, expert testimony is not a prerequisite to this being a reasonable inference. Both BZ and EP testified to Appellant's sexual abuse escalating in severity over a period of years, beginning with fondling and ending with sexual intercourse. He singled both girls out to spend time alone with him and bought them lingerie, which he then asked them to model in front of him. The trial counsel never defined "grooming" for the panel when he used the term. Instead, he described Appellant as "groom[ing the girls] with gifts from Victoria's Secret" and giving them "special attention." Trial counsel also argued this "grooming" behavior was one of the tools Appellant used to accomplish the long-term sexual abuse of the two children, as it affected their perceptions of his criminal behavior and allowed him to progress to more serious abuse. The term "grooming," as argued in this case, was used as a non-scientific term and in a manner easily understood by a lay member.

Appellant also claims trial counsel improperly argued Appellant demonstrated consciousness of guilt when he moved his family as part of his efforts to escape responsibility for his misconduct. We disagree this argument was improper. The trial counsel's argument in this regard was that Appellant had sexually abused EP and then "cover[ed] it up by running away . . . . [H]e runs. He escapes responsibility." Appellant points out that he did not escape responsibility by running away after EP's allegations, as local law enforcement investigated those claims and the local district attorney elected not to prosecute Appellant. He also notes that he and his family moved on multiple occasions during timeframes that were unrelated to when BZ and EP raised their allegations. That evidence was before the members. So, however, was evidence that Appellant moved his family after both sets of allegations were raised, and that his children felt isolated and had difficulty making connections in their communities due to the family's frequent moves.

Appellant also contends trial counsel improperly argued to the panel that Appellant had encouraged EP to recant her allegations in 2006. We disagree that this was improper. In describing what happened after EP reported those allegations, the trial counsel argued Appellant and his wife "torture[d] her with the potential of being able to come back into [the] family if she'll just take back what she said." As Appellant notes, EP testified that it was her mother who offered several times to let her move back home if she "took back what [she] said." Evidence was also presented, however, that Appellant and his wife were acting in concert when they decided that the other children could no longer speak to EP after she raised her allegations, and family members were no longer allowed to use her

name in the home. Appellant also instructed his son to lie to EP on the telephone in a way that would make the son's life within the family sound better than it really was.

Appellant similarly argues that trial counsel's argument asserting Appellant "told his wife to get rid of [BZ's] phone" was improper because it was unsupported by any evidence in the record. We again disagree. BZ testified that after she returned to Arizona following the Mississippi trip, she showed her mother some of the inappropriate text messages Appellant had sent her. Her mother then refused to return the phone to her. After BZ found the phone in her mother's purse, she hid it from her mother. When BZ refused to return it, her mother called Appellant and put him on speakerphone, where BZ heard him direct her mother to get the phone back from BZ. BZ then gave the phone to her mother, which BZ never saw again.

Appellant next argues the trial counsel improperly discussed the process of sexual assault disclosures and used it to explain BZ's erroneous testimony about whether there were locks on the bathroom door in the Mississippi hotel where the sexual assaults took place. As an example, EP testified that her initial disclosures to civilian law enforcement were different than her trial testimony because she had self-esteem issues and was not well spoken, causing her to use terms like "down there" as she did not know how to describe what had happened to her and had difficulty with their questions. Appellant's argument is not persuasive. EP agreed that her testimony at trial eight years later was more detailed and specific. BZ similarly testified about the variance between her initial disclosures and her trial testimony, explaining in part that she had not felt comfortable with some of the individuals she was speaking to about the abuse. The trial counsel then argued:

> I'd also ask you to consider too, as a general proposition, the disclosure is not an event. It's a process. And what do I mean by that? When somebody comes forward and they tell you about what happened to them, it's not just here it is and here's everything and here's every part of it. Disclosure, when you're dealing with things like that, things that happen over the course of years, over a decade, sometimes are buried in time, those memories. It's a process of talking to people, of discovering things in your own memory, or becoming comfortable with your interviewer, and telling them what happened. We can't treat this like [it's] in a human enterprise or it's a robot and our computer, where you go, tell me exactly what happened, give me the report, and it prints out and says, this is how many we sold. It's not like that. They have to explore their own minds, things they've suppressed, things that they don't want remember, things they can't forget. So disclosure is a process, members. And we'd ask you to take that to heart and engage in the credibility of these witnesses.

The trial counsel also argued that BZ's incorrect statement that the hotel bathroom door did not have a lock was an understandable mistake in light of the long-term abuse she suffered. Due to the lack of expert testimony on this subject, Appellant contends this testimony constitutes an improper personal opinion by the trial counsel about abuse disclosures and memory. We disagree. EP and BZ both provided explanations for their inconsistent reporting of the abuse allegations.

Appellant also contends the trial counsel improperly argued BZ disclosed the sexual abuse because her mother was dying of cancer, claiming this argument was unsupported by evidence in the record. We disagree. BZ testified that she spoke to her mother by telephone after Appellant sexually abused her in Mississippi. Prior to that time, BZ had not told her mother about the years of sexual abuse because, in part, she was afraid of hurting her mother and concerned as to how her mother would react. During this call, BZ's mother reminded her daughter that she was dying and that BZ needed to tell her "what's going on" as she could tell something was wrong. According to BZ, this led her to tell her mother some of what was happening, until she was interrupted by Appellant. Her mother than arranged for her to spend the night away from Appellant and to return home. Appellant is correct that BZ also testified about her mother's disbelief and lack of support once she returned home, and that BZ did not immediately report her allegations to law enforcement. This, however, does not make trial counsel's argument about her initial disclosure improper.

Appellant further claims trial counsel improperly argued that a certain incident in BZ's childhood had affected her and her failure to disclose Appellant's abuse in a timely manner. The trial counsel referred to BZ's testimony about a visit to her home by child protective services who were investigating the sexual abuse allegations recently raised by EP. BZ testified that she and the other children followed her mother's order to hide as investigators searched the house, thus avoiding being questioned by the authorities. The trial counsel then argued that this incident was an explanation for BZ's fear and her knowledge that she would lose her mother if she did not have definitive proof of Appellant's abuse. Appellant contends this argument was improper as there was no evidence this incident affected BZ and the timing of her abuse allegation, and there was no evidence that her delay in reporting the abuse was linked to her fear of Appellant. We do not agree. BZ testified she was generally afraid of Appellant, and did not initially report the abuse because she was scared. The rest was argument based on fair inferences drawn from the evidence.

Finally, Appellant complains the assistant trial counsel erred during sentencing argument by repeating the suggestion that Appellant attempted to "groom" his stepdaughter for sexual activity. Appellant also claims counsel committed prejudicial error when she insinuated that Appellant, after sexually assaulting his stepdaughter, sent her from Mississippi to her home in Arizona on a Greyhound bus with no money for food or other necessities. BZ had testified during findings that after disclosing some of Appellant's

misconduct, her mother directed her to return home from her visit with Appellant immediately. Even if it was not Appellant's idea to have BZ return home, it was a fair argument that it was his misconduct that directly resulted in her short-notice, cross-country trip back to Arizona. *See* R.C.M. 1001(b)(4).

When considered in the context of the entire record, we find all the above arguments did not inject personal opinions or irrelevant matters, but instead constituted permissible argument based on reasonable inferences fairly derived from the evidence. *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013). We thus find no error—plain, obvious, or otherwise.

We now, however, turn to two assertions of error that are more problematic. First, in arguing that the totality of the evidence proved that Appellant communicated a threat to Mrs. DL, trial counsel argued:

> It's not just a convenient explanation, it's what happened because every other piece of evidence, all of it, something that a psychologist, if they got up here and they talked to you about it, we call convergent validity. Everything points in the same direction. So you can take that to the bank. All of those other details tell you it's that voice, it's him, and it's the only person in this world who [sic] would make sense to be.

This argument was impermissible given there was no evidence presented at trial to support this concept.

Second, in rebuttal argument, trial counsel responded to the Defense argument about giving Appellant the benefit of the doubt by stating "we gave him the benefit of the doubt, it's why he got this many days in court." This was improper—the length of a litigated trial is not a relevant factor for a panel to consider in determining whether the Government has met its burden of proving an accused guilty beyond a reasonable doubt.

Both of these two errors were plain or obvious. We thus turn to the third prong of the plain error test: prejudice. In assessing prejudice in this context, "we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Fletcher*, 62 M.J. at 184. We apply a three-factor balancing test to determine the impact of prosecutorial misconduct in findings argument: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. *Id.*

Here, the severity of the misconduct was relatively low. The trial counsel's errors were far from pervasive and instead were isolated and of short duration in the context of the entire argument. Further, the weight of the evidence supporting Appellant's

convictions is strong. Thus, despite the lack of corrective measures taken at trial, we find that these relatively isolated missteps do not, taken as a whole, shake our confidence that the members convicted Appellant on the basis of the evidence alone. *See Id.*

*Factual and Legal Sufficiency*

Pursuant to *Grostefon*, Appellant contends the evidence is factually and legally insufficient to support his convictions in this case. 12 M.J. at 431. We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Lane*, 64 M.J. 1, 4 (C.A.A.F. 2006). Article 66(c), UCMJ, requires that we approve only those findings of guilty that we determine to be correct in both law and fact. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, a reasonable fact finder could have found Appellant guilty of all elements of the offense, beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). "[I]n resolving questions of legal sufficiency, [this court is] bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this court is convinced of Appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The evidence in this case was compelling. BZ's testimony regarding the sexual and physical abuse in Mississippi was corroborated in certain critical aspects by other witnesses. Trial defense counsel attempted to discredit this corroboration; however, this task was difficult given the complex scheme required for BZ to actually generate this alleged false or misleading evidence against Appellant. Additionally, BZ's testimony was aided by the propensity evidence from her stepsister, EP. The similarities between Appellant's conduct with both of his stepdaughters further promoted BZ's credibility and supported the findings as adjudged by the panel members in this case. For these reasons, we conclude that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt, and we ourselves, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, are convinced of Appellant's guilt beyond a reasonable doubt.

*Sentence Appropriateness*

Pursuant to *Grostefon*, 12 M.J. 431, Appellant argues his sentence to 20 years of confinement is inappropriately severe. In support of this claim, Appellant submitted with this court's approval a court-martial order from another sexual assault prosecution where the accused received a sentence that included 16 years confinement, claiming the case is closely related to his case.

This court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

In reviewing for sentence appropriateness, "[t]he Courts of Criminal Appeals are required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). An appellant bears the burden of demonstrating that the cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id.* If the appellant meets this burden, the Government "must show that there is a rational basis for the disparity." *Id.* But "[s]entence comparison does not require sentence equation." *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001) (citations omitted).

Appellant has not met his burden of showing the case submitted for this court's review is closely related. There is no evidence the other military member was a co-actor or involved in a common scheme with Appellant, or any direct nexus which permits this court to engage in sentence comparison.

Turning to the facts and circumstances of Appellant's case, we do not find the approved sentence inappropriately severe. Appellant attempted to engage in a consensual sexual relationship with his 17-year old stepdaughter by sending her inappropriate text messages and exposing himself to her on multiple occasions. When the victim declined his repeated advances, Appellant sexually assaulted her. Appellant then physically assaulted the victim by hitting her in the face when she reported some of his misconduct to her mother. He also threatened the dependent wife of an active duty member after the family agreed to allow Appellant's stepdaughter to live with them after the sexual abuse

was disclosed. Having fully considered this particular Appellant, the nature and seriousness of his offenses, his record of service, and all matters contained in the record of trial, we find the sentence appropriate.

*Cruel and Unusual Punishment*

Appellant claims he was subjected to cruel and unusual punishment under the Eighth Amendment[26] and Article 55, UCMJ, 10 U.S.C. § 855, when he was prohibited from having personal contact with his terminally ill wife due to an order issued by his chain of command.

We review de novo allegations of cruel and unusual punishment. *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001). "[T]he Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976)).

Having reviewed the record, we find Appellant has not met his burden of proving this constitutional deprivation.[27] Appellant fails to provide any evidence that the no-contact order was somehow overbroad, or failed to address a valid military purpose. Moreover, Appellant's claim in his brief that the no-contact order "presumably remained in place throughout the investigation" is contradicted by his own sworn declaration that he was granted leave to care for his wife prior to her death, as well as his trial defense counsels' statements that this order was not in place during the entirety of their representation of Appellant.

*Addendum to the Staff Judge Advocate's Recommendation*

Appellant asserts the addendum to the staff judge advocate's recommendation (SJAR) contained new matter, thereby entitling him to an additional round of post-trial processing. The new matter, Appellant argues, consisted of Appellant's active duty orders and amendments that were listed as an attachment to the addendum.[28]

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[26] U.S. CONST. amend. VIII.

[27] We have also examined Appellant's assignment of error under Article 13, UCMJ, 10 U.S.C. § 813. Appellant's failure to assert illegal pretrial punishment at trial forfeits the issue in the absence of plain error. *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003). We do not find plain error here given the absence of evidence showing an intent to punish. This finding is consistent with Appellant's declaration at trial that he had not been subjected to any illegal pretrial punishment.

[28] As previously noted, Appellant's orders and amendments were not located in the original record of trial filed with this court. It is therefore unclear whether the convening authority actually considered these documents prior to taking

"Whether matters contained in an addendum to the SJAR constitute 'new matter' that must be served upon an accused is a question of law that is reviewed de novo." *United States v. Scott*, 66 M.J. 1, 3 (C.A.A.F. 2008) (citing *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)).

Once it is determined an addendum contains new matter, the appellant must still show prejudice. *See United States v. Frederickson*, 63 M.J. 55, 56 (C.A.A.F. 2006). "The burden is on an appellant to 'demonstrate prejudice by stating what, if anything, would have been submitted to deny, counter, or explain the new matter.'" *Id.* at 57 (quoting *Chatman*, 46 M.J. at 323). "'[I]f an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt and we will not speculate on what the convening authority might have done if defense counsel had been given an opportunity to comment.'" *Id.* at 56–57 (alteration in original) (quoting *United States v. Catalani*, 46 M.J. 325, 327 (C.A.A.F. 1997)).

We question whether the attachment of Appellant's active duty orders and amendments—documents drawn from his personnel records—would amount to new matter necessitating service on Appellant. *See United States v. Harris*, 56 M.J. 480, 483 (C.A.A.F. 2003). However, we need not resolve this issue today given Appellant has made no colorable showing of possible prejudice based on this court's prior acceptance of orders showing Appellant was on active duty at the time he was sentenced. Appellant provides no evidence the orders and amendments now contained in the record of trial were erroneous in any way. Without more, Appellant cannot show the matter considered by the convening authority somehow prejudiced Appellant's opportunity for relief during clemency.

*Post-Trial Processing Delays*

Finally, Appellant asserts this court should grant him meaningful relief in light of the 123 days that elapsed between the completion of trial and the convening authority's action. Under *Moreno*, courts apply a presumption of unreasonable delay "where the action of the convening authority is not taken within 120 days of the completion of trial." 63 M.J. at 142. The appellant does not assert any prejudice, but argues the court should nonetheless grant relief under *United States v. Tardif*, 57 M.J. 219, 223–24 (C.A.A.F. 2002).

This court set out a non-exhaustive list of factors we consider when evaluating the appropriateness of *Tardif* relief in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd* 75 M.J. 264 (C.A.A.F. 2016). Those factors include how long the delay exceeded appellate review standards, the reasons noted by the government for the delay, whether the Government acted with bad faith or gross indifference, evidence of

action. For purposes of our analysis, given this issue was caused by the Government's post-trial processing practices, we will presume the convening authority considered the missing attachment.

institutional neglect, harm to Appellant or the institution, the goals of justice and good order and discipline, and, finally, whether the court can provide any meaningful relief given the passage of time. *Id*. No single factor is dispositive and we may consider other factors as appropriate. *Id*.

On the whole, we find the delay, although presumptively unreasonable, to be justified upon application of the *Gay* factors. The length of the delay only exceeded the *Moreno* standard by three days. The 21-volume record of trial was substantial, exceeding 1,900 pages of transcript. We also find no evidence of bad faith or gross negligence on the part of the Government for the delay. For these reasons, we conclude no *Tardif* relief is warranted.

*Timely Appellate Review*

Although not initially raised by Appellant, we review de novo "[w]hether an appellant has been denied [his] due process right to a speedy post-trial review . . . and whether [any] constitutional error is harmless beyond a reasonable doubt." *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed before this Court. *Moreno*, 63 M.J. at 142. The *Moreno* standards continue to apply as a case remains in the appellate process. *United States v. Mackie*, 72 M.J. 135, 135–36 (C.A.A.F. 2013). When a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors elucidated in *Barker v. Wingo*, 407 U.S. 514 (1972), and *Moreno*. *See United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011). Those factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005); *see also Barker*, 407 U.S. at 530.

This case was originally docketed with the court on 2 September 2014. As such, the delay in releasing our decision is facially unreasonable. However, in analyzing the *Barker* factors for the delay leading up to this decision, we find no due process violation resulted from the appellate delay. Regarding the reasons for the delay, we note Appellant's voluminous brief was not filed until 3 September 2015, 12 months after the case was docketed with this court. The government's answer was filed on 23 December 2015. Due to multiple declarations and filings submitted by Appellant after the submission of briefs, the court found it necessary to order two sets of declarations from trial defense counsel to adequately address most of Appellant's ineffective assistance of counsel claims. Finally, the processing of the case was delayed when one of the panel judges was reassigned from the court in July 2016. This action required the assignment of a new panel judge, as well as designating a new author judge to fully review the case and render the opinion.

We also find no prejudice to Appellant resulting from the delay in the issuance of this opinion. When there is no showing of prejudice under the fourth factor, "we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). That is not the case here.

We have also considered whether Appellant is due *Tardif* relief because of the violation of the *Moreno* standards in this case. Applying the factors noted above, we find Appellant is not entitled to relief.

*Appellant's Mental Competency*

Appellant alleges in his initial declaration that he was under the influence of prescription medication and alcohol leading up to and during his trial. Appellant claims his voluntary intoxication resulted in his inability to remember significant portions of his trial. He does not, however, allege he was unable to understand the proceedings against him or otherwise cooperate in his defense. Although not raised as an assignment of error, we are compelled to address Appellant's suggestion now that he was mentally incompetent to stand trial.

An accused is presumed to have the capacity to stand trial. R.C.M. 909(b). After referral of charges, a trial may proceed unless it is established by a preponderance of the evidence the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or cooperate intelligently in the defense of the case. R.C.M. 909(c)(2). When this question is evaluated for the first time on appeal, an appellate court considers whether further inquiry as to the mental condition of the accused is required in the interests of justice. *See United States v. Thomas*, 32 C.M.R. 163, 169 (C.M.A. 1962). The burden to show additional inquiry is necessary always falls on the appellant.

We have examined the record of trial and conclude no further inquiry into Appellant's mental competency is required. Appellant testified during motion practice regarding the facts and circumstances surrounding the social service investigation of EP. Appellant appeared to intelligently respond to questions posed to him by both trial defense counsel and trial counsel. Moreover, at trial, none of the parties raised questions regarding Appellant's ability to follow the proceedings or participate in his defense. In fact, trial counsel noted on the record there was no debate between the parties about Appellant's fitness to stand trial—a statement which went unrebutted by Appellant and his trial defense counsel.

Additionally, in his various declarations, Appellant provides significant details about the proceedings themselves, as well as conversations he had with his counsel during

the pretrial, trial, and post-trial phases of his court-martial. Trial defense counsel also describe in their post-trial declarations ordered by this court Appellant's extensive interactions with them during the trial proceedings. Neither counsel noticed any behavior from Appellant consistent with him being under the influence of any intoxicating substance, nor did counsel observe that he was otherwise unable to appreciate the significance of his court-martial proceedings or assist in his defense.

Given all of these facts, we find the appellate filings and the record as a whole "compellingly demonstrate" the improbability of this belated allegation as raised by Appellant. *Ginn*, 47 M.J. at 248. We find no basis to question whether the military judge should have inquired into Appellant's mental competency, or his trial defense counsel should have sought a mental competency examination.

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are **AFFIRMED**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of Court