UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant BUDDY J. GERHARDT
United States Air Force

ACM 37946

14 August 2013

Sentence adjudged 03 March 2011 by GCM convened at McConnell Air Force Base, Kansas. Military Judge: Scott E. Harding.

Approved Sentence: Dishonorable discharge, confinement for 3 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz and Major Ja Rai A. Williams.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel C. Taylor Smith; Major Lauren N. DiDomenico; and Gerald R. Bruce, Esquire.

Before

ROAN, HELGET, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

Contrary to his pleas, a general court-martial composed of officer and enlisted members convicted the appellant of three specifications of indecent acts, one specification of child endangerment, and one specification of making a false official statement, in violation of Articles 120, 134 and 107, UCMJ, 10 U.S.C. §§ 920, 934, 907. Consistent with his pleas, the appellant was found guilty of one specification of making a false official statement, in violation of Article 107, UCMJ. The members sentenced the appellant to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and

allowances, and reduction to E-1. The convening authority disapproved the findings of guilty for child endangerment and accordingly dismissed Charge II and its Specification. The convening authority approved the remaining findings of guilty and approved only so much of the adjudged sentence as provided for a dishonorable discharge, confinement for 3 years, and reduction to the grade of E-1.[1]

Before this Court, the appellant raises six assignments of error: (1) Whether the evidence is factually insufficient for conviction of indecent acts in violation of Article 120, UCMJ, where there is significant evidence of misidentification by the witnesses and insufficient evidence of an indecent act with respect to Specification 3 of Charge I; (2) Whether the military judge erred when he instructed the members that evidence from Charge I and its specifications could be considered for the purposes of establishing identity pursuant to Mil. R. Evid. 404(b); (3) Whether the military judge erred when he failed to instruct the members that the specifications for the Additional Charge were merged for sentencing; (4) Whether the appellant's sentence is overly severe; (5) Whether the military judge committed plain error when he allowed the trial counsel to characterize the appellant as a sexual predator who preyed on young girls in his sentencing argument; and (6) Whether it was plain error for the military judge to fail to dismiss the Additional Charge and its specifications for the false official statements when the statements had already been considered in an Article 15, UCMJ, 10 U.S.C. § 815, proceeding.[2] Although not raised as an issue by the appellant, we will also address whether or not the appellant's post-trial processing rights were violated as it has been longer than 540 days from the date this case was docketed with this Court. Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

There are three alleged victims in this case: HS, who was 17 years old at the time of her alleged encounter with the appellant; KR, who was 16 years old at the time of her alleged encounter with the appellant; and Ms. BA, who was 25 years old at the time of her alleged encounter with the appellant.

On Saturday, 24 July 2010, at approximately 1200, HS was walking down Rock Road in Derby, Kansas, heading north. After walking past a Sonic Drive-In and a Fidelity Bank, she approached the south entrance to the old Dillon's parking lot, where she noticed a silver Sports Utility Vehicle (SUV) parked in the Dillon's lot. HS thought this was unusual because the Dillon's store had been closed so there are usually no cars

[1] Pursuant to Article 57(a)(2), UCMJ, 10 U.S.C. § 857(a)(2), all of the adjudged forfeitures were deferred from 18 March 2011 until the date of action. Pursuant to Article 58b(b), UCMJ, 10 U.S.C. § 858b(b), all of the mandatory forfeitures were waived for a period of six months, or release from confinement, or until the expiration of term of service, whichever is sooner, with the waiver commencing on 18 March 2011.
[2] Issues 4-6 were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

parked in its parking lot. HS was familiar with this parking lot because she had either walked or driven by it on numerous occasions.

When she was about 6-7 feet from the south entrance of the Dillon's parking lot, she noticed that the vehicle had moved and stopped in the middle of the entrance. HS described the driver as a white male with light colored hair. HS walked behind the vehicle and continued heading north on Rock Road. HS saw the same vehicle a second time when she noticed it was stopped in the middle of the north entrance to the Dillon's parking lot. HS again walked behind the vehicle and kept walking until she reached the intersection of Rock Road and Madison Avenue which was only a short distance away.

At the intersection of Rock Road and Madison Avenue, HS turned around and started heading home. When she reached the Fidelity Bank and Sonic area, she saw the same SUV stopped next to her in the turning lane. She was approximately 1-2 feet away from the vehicle. HS turned to look at the vehicle, and the driver said something inaudible to her. HS took off her earphones, moved closer to the vehicle, and said, "What'd you say?" The passenger window of the vehicle was down. When HS looked into the vehicle, she could see the driver from the knees up. He was wearing a dark-colored collared shirt. His shorts and underwear were pulled down to his knees. HS also observed that his hand was wrapped around his penis. According to HS, the driver had a "creepy" smile on his face. She told him, "You're disgusting," and walked away.

Afraid that the driver would kidnap or kill her, HS ran to a Pizza Hut, located just south of Sonic, and locked herself in the bathroom. She called her friend who came and took her home. She then called 9-1-1 and Master Police Officer Stephen George with the Derby Police Department responded. HS ultimately went to the police station and tried to identify the driver of the vehicle. A photo lineup was conducted wherein HS identified a picture of someone who looked the most similar to the man in the SUV, although she indicated it was not the same person. Officer George also attempted to draw a composite of the suspect based on HS's description. However, this composite never left the Derby Police Department case file. Concerning the vehicle description, HS typed in "Toyota silver SUVs" into Google and found a picture of a silver-colored Toyota RAV4 on the internet which she felt looked like the vehicle the suspect was driving.

In October 2010, HS was contacted by Detective Chad Carson, Derby Police Department, and went to the Derby police station to conduct another photo lineup where she instantly identified the appellant as the driver of the vehicle. At trial, HS also positively identified the appellant as the driver of the SUV.

On Thursday, 7 October 2010, 16-year-old KR drove to the Target store in the Derby marketplace off Rock Road in Derby, KS, and parked in the lot near the south side of Target. She went into the store and returned to her vehicle approximately five minutes

later. She noticed a light colored 4-door SUV parked on the left side of her vehicle. Both vehicles were facing north.

While trying to unlock her door, the driver of the SUV greeted KR and asked her how she was doing. KR immediately turned around and faced the passenger door of the SUV. The passenger window was down. KR noticed that the driver was only wearing a T-shirt and was naked from the waist down. He had his hand wrapped around his penis moving it up and down. KR was disgusted and said, "eeeewww." She immediately got into her vehicle and drove away. KR continued to watch the SUV and noticed that the SUV had moved from its parking spot. KR observed that there was an "H" on the front of the SUV indicating it was a Honda. KR called the police as soon as she returned home and participated in a photo lineup a couple of weeks later. During the lineup, KR immediately identified the appellant. At trial, KR again positively identified the appellant as the driver of the SUV.

On Saturday, 16 October 2010, at approximately 1320, Ms. BA, a manager at a store in the Derby Marketplace on Rock Road in Derby, KS, was returning to work from a lunch break. She exited her vehicle and started walking towards her store. A 4-door silver SUV pulled up and stopped beside her. She was right next to the passenger side of the SUV and noticed that the passenger window was down. Ms. BA looked into the vehicle and noticed that the driver was looking at her, smiling. He did not have any pants on and had both hands on his penis, "jacking off." Ms. BA could not see his genitalia but it appeared he was gripping an object between his legs. Ms. BA could not believe it was happening and said, "Are you F-ing kidding me?" She then called the police and reported the vehicle's license plate number which was registered to the appellant. Ms. BA also noticed a small female child in a car seat in the back of the vehicle who appeared to be awake and attentive.

In response to the 9-1-1 call, Master Police Officer George responded to the appellant's residence. The appellant indicated that he drove a silver-colored Honda Pilot. He admitted to being in the Derby Marketplace parking lot that day as he was driving around so his daughter could take a nap. He stated that he had been wearing a pair of blue parachute pants but took them off because he was hot from driving around for a long period of time. The appellant was then voluntarily taken to the Derby police station for questioning.

Later that day, Ms. BA went to the Derby police station and positively identified the appellant during a show-up. At trial, Ms. BA likewise positively identified the appellant as the driver of the said SUV.

Concerning the two Article 107, UCMJ, specifications, on 18 September 2009, the appellant received nonjudicial punishment under Article 15, UCMJ, for having inappropriate relationships with Captain (Capt) Elizabeth Cherney and Capt Gia Witmer

while he was deployed to Al Udeid AB, Qatar. In his response to the Article 15, UCMJ, proceeding, the appellant specifically denied having the said inappropriate relationships, and those denials became the bases for Charge III in this case. During the middle of the trial, the appellant decided to plead guilty to the second Article 107, UCMJ, specification with regards to his relationship with Capt Witmer.

Capt Cherney testified during the trial that she deployed to Al Udeid AB in May 2009 and was in the same maintenance squadron as the appellant. She served as the operations officer and the appellant was a flight chief. During one week in July, they engaged in sexual intercourse three times in her quarters. Capt Cherney testified under immunity as she had previously received only a letter of reprimand for her misconduct and was initially concerned about being subject to discipline a second time if she testified. Technical Sergeant Stephanie Anderson, who was also deployed to Al Udeid AB with the appellant and Capt Cherney, testified that the appellant had informed her that he was "seeing" Capt Cherney and that she (Capt Cherney) had messy quarters.

Factual Sufficiency

The appellant asserts that the evidence was factually insufficient to support his conviction of indecent acts in violation of Article 120, UCMJ.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). 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, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *United States* v.*Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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).

In support of his position, the appellant argues that substantial evidence of misidentification was presented in this case which calls into the question the findings of guilt for the three Article 120, UCMJ, specifications. Through cross-examination, the defense presented evidence of some minor inconsistencies the witnesses had in identifying the driver's race, appearance, and clothing, as well as the description of his vehicle and the age of the appellant's child. Additionally, in an effort to challenge the procedures used by the Derby Police Department for the various lineups, the defense presented the testimony of Dr. Robert W. Shomer, who was recognized as an expert in perception, memory, and eyewitness identification. Dr. Shomer emphasized the importance of training in the creation of lineups and composites. He warned of the dangers in using composites and six-pack photographic lineups which were both used in

this case with respect to HS and KR. He also testified that the procedures used by the Derby Police Department in conducting the photo lineups were "obsolete and fallacious."

In determining the admissibility of eyewitness identification, this Court looks to Mil. R. Evid. 321(a)(1), (a)(2)(B), and (d)(2), which codify the two-part test established by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). *See United States v. Baker*, 70 M.J. 283, 288 (C.A.A.F. 2011). This test determines whether the pretrial identification was unnecessarily suggestive, and if so, whether it was conducive to a substantial likelihood of misidentification. The second inquiry focuses on the reliability of the identification using the five *Biggers* factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and confrontation. *See Biggers*, 409 U.S. at 199-200.

We note that the trial defense counsel did not object under Mil. R. Evid. 321 that the lineups and the show-up were inadmissible as unnecessarily suggestive in nature. Rather, the defense attempted to use the alleged improper identification procedures to show that the Government failed to meet its burden of proof. Likewise, on appeal, the appellant argues that the evidence of misidentification in this case calls into question the findings of guilt for the three indecent acts. We disagree.

Under the particular circumstances of this case, we do not find the photo lineups and show-up to be unnecessarily suggestive. Although the procedures used by the Derby Police Department could arguably have been better, all three of the alleged victims instantly identified the appellant and were all confident in their identification. Even if the procedures used were unnecessarily suggestive, in applying the *Biggers* factors, we find they were not conducive to a substantial likelihood of misidentification.

In this case, all three of the alleged victims had ample opportunity to view the appellant at the time the crimes were committed. Each stood next to the vehicle, made eye contact with the appellant, and was able to observe his actions. Also, their degree of attentiveness was high. All of the victims were shocked and disturbed by what they saw and immediately contacted the authorities. Additionally, although there were some minor inconsistencies between how the victims initially described the appellant and the vehicle he was driving, we find these inconsistencies do not affect the legitimacy of the identifications.

Although HS thought the appellant's vehicle was a Toyota instead of a Honda, her description of a silver colored SUV was accurate. KR initially described the driver as a Hispanic man with a full beard, but she clarified this description at trial to mean that he had short stubble all over his face, not a full beard. BA thought the appellant's daughter appeared to be only two to three years old when she was actually five years old, but it is

clear from BA's testimony that she was focusing more on the appellant than his daughter in the back seat. Further, it is clear from the testimony of the three victims that they were positively certain in their identification of the appellant, either during the lineups, the show-up, or at trial. Finally, there was not a substantial lapse of time between the crime and the confrontation. For BA it was the same day, it was within a couple of weeks for KR, and although it was almost three months later for HS, she instantly identified the appellant when she saw his photo.

The appellant further alleges that the evidence was insufficient to establish that he was masturbating, as alleged in Specification 3 of Charge I. We disagree. BA testified that the driver had no pants on and had both hands on his penis, "jacking off." Although BA could not see his genitalia, she could see his thighs, legs, and hands, one on top of the other, gripping an object between his legs. She further testified that she saw movement with his hands, consistent with someone masturbating.

We have made allowances for not having personally observed the witnesses. Having paid particular attention to the matters raised by appellant, we find the evidence is factually sufficient to support his conviction for indecent acts. We are convinced beyond a reasonable doubt that the appellant is guilty of the indecent acts for which he was convicted.

Military Rule of Evidence 404(b)

The appellant asserts that the military judge erred when he instructed the members that evidence from Charge I and its specifications could be considered for the purposes of establishing identity pursuant to Mil. R. Evid. 404(b).

We review a military judge's ruling on the admission of evidence for an abuse of discretion. *United States v. Harris*, 55 M.J. 433, 438 (C.A.A.F. 2001) (citations omitted). "The question of whether a jury was properly instructed [is] a question of law, and thus, our review is de novo." *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007) (alteration in original) (citations omitted).

"The Government may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as [Mil. R. Evid.] 404." *United States v. Burton*, 67 M.J. 150, 152-53 (C.A.A.F. 2009) (citing *United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000)).

Mil. R. Evid. 404(b) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, *identity*, or absence of mistake or accident …." (Emphasis added).

In *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989), our superior court set out the test for admissibility under Mil. R. Evid. 404(b), as follows:

> [The] sole test under Mil. R. Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses.

Id. At 150. (citing *United States v. Haimson*, 17 C.M.R. 208, 226, n.4 (C.M.A. 1954)). *See also United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997). To prevent unfair surprise to the defense, however, Mil. R. Evid. 404(b) provides "that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

At trial, the military judge gave the following instruction:

> Now, I just instructed you that you may not infer the accused is guilty of one offense because his guilt may have been proven on another offense, and that you must keep the evidence with respect to each offense separate. However, there has been some evidence presented with respect to each specification as alleged in Charge I that also may be considered for a limited purpose with respect to the other two specifications of Charge I. This evidence, the possible similarities of the witnesses' descriptions of the time, place and manner of the alleged offenses and the witness identifications of the accused may be considered for the limited purpose of their tendency, if any, to identify the accused as a person who committed each of the alleged offenses in the specifications of Charge I. However, you may not consider this evidence for any other purpose and you may not conclude or infer from this evidence that the accused is a bad person or has criminal tendencies, and that therefore he committed any of the other offenses alleged.

The trial defense counsel had previously objected to this instruction asserting that the Government failed to comply with the Mil. R. Evid. 404(b) notice requirements.

On appeal, the appellant alleges that the military judge erred by not making any determination as to the Mil. R. Evid. 404(b) notice and failed to address whether good cause was shown prior to giving the instruction at issue. However, this issue was initially

addressed at an Article 39(a), UCMJ, 10 U.S.C. § 839(a) session during voir dire. During a discussion on the issue with the trial defense counsel, the military judge stated the following:

> But with regard to the notice aspect, Defense Counsel, that point is well-taken. However, in this particular case given that all the evidence is going to come in the case regardless--at least the information was already there, I think as I look at the notice aspect, it's really getting into the opportunity to meet that evidence; otherwise, rebut it. In other words if there was--if you had a case where something totally unrelated to the charges and the evidence that was brought forward, then certainly the defense will get the opportunity to look at that, explore it and rebut it if possible. Here I don't necessarily see where that's the same issue since this is already evidence that you have to meet and rebut. Now, it's just being able to frame it and comment on how it's properly used by the court members.

Subsequently, the military judge offered the defense additional time to prepare to meet the Mil. R. Evid. 404(b) evidence but the trial defense counsel declined stating, "We are prepared to meet the evidence." The military judge ultimately concluded this issue by stating the following:

> I just wanted to bring it up with both sides that I did see this as an issue and I did not see it in the [Mil. R. Evid.] 404(b) notice. Technically that should have been there, Government, but understanding that the information's in front of the defense counsel; they've got it and it's going to be part of the case anyway, I do find good cause to relieve you of that responsibility of that notice so long as defense tells me that they don't need additional time to prepare for that and they've told me so.

We concur with the military judge that good cause was shown in this case to relieve the Government of its Mil. R. Evid. 404(b) notice requirement as the defense was already aware of the evidence due to the three separate indecent acts specifications. Further, although the defense declined the opportunity, it was afforded additional time to prepare to meet the evidence. Additionally, we find that the members were properly instructed on this issue. Accordingly, this issue is without merit.

Sentencing Instructions

The third assignment of error is whether the military judge erred when he failed to instruct the members that the specifications of the Additional Charge were merged for sentencing.

"The question of whether a jury was properly instructed [is] a question of law, and thus, our review is de novo." *Schroder*, 65 M.J. at 54 (alteration in original) (citations omitted). Failure to object to sentencing instructions results in forfeiture of the issue absent plain error. Rule for Courts-Martial (R.C.M.) 920(f); *United States v. Simpson*, 58 M.J. 368, 378 (C.A.A.F. 2003) (citing *United States v. Glover*, 50 M.J. 476, 478 (C.A.A.F. 1999)). In the context of a plain error analysis, the appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citing *United States v. Powell*, 49 M.J. 406, 463-65 (C.A.A.F. 1998)).

Prior to sentencing, the trial defense counsel noted: "Your Honor, I would also note that we had a brief [R.C.M.] 802 session pertaining to the Additional Charge, Specifications 1 and 2. They arose out of the same response and the [G]overnment agrees that this should be considered as one offense for sentencing purposes." The prosecution concurred. During sentencing instructions, the military judge instructed the members that the maximum sentence consisted of confinement for 21 years, which took into consideration the merger of the specifications of the Additional Charge under Article 107, UCMJ. However, the military judge failed to instruct the members that the specifications for the Additional Charge had been merged for sentencing purposes. The trial defense counsel did not object to the sentencing instructions.

Although the military judge should have informed the members that the two specifications of the Additional Charge had been merged for sentencing, he did instruct the members that the maximum period of confinement was 21 years, which reflected the merger of the two Article 107, UCMJ, specifications, for sentencing. Additionally, the Government only argued for six years and focused primarily on the indecent acts in Charge I as the most aggravating and serious aspects of this case. Accordingly, we find that the error did not materially prejudice the appellant's substantial rights in this case.

Sentence Appropriateness

The appellant asserts that his sentence is overly harsh in comparison with other similar cases of indecent acts or exposure.

In reviewing sentence appropriateness, we "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). We examine disparate sentences in closely related cases when: (1) there is a direct

correlation between each of the accused's and their respective offenses; (2) the sentences are highly disparate; and (3) there are no good and cogent reasons for the differences in punishment. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *Id*. Applying these standards to the present case, we do not find the sentence inappropriately severe.

We do not concur with the appellant that the cases cited in support of his position are closely related. Moreover, having considered the nature and seriousness of the offenses, to include that there were three victims, two of whom were under 18 years of age, and that the three separate indecent acts occurred in a public parking lot, as well as the appellant's record of service, and all matters contained in the record of trial, we do not find the sentence is inappropriately severe.

Sentencing Argument

The appellant's next assignment of error is whether the military judge committed plain error when he allowed the trial counsel to characterize the appellant as a "sex predator" and "lurker" who preyed on young girls in his sentencing argument.

"Improper argument is a question of law that we review de novo." *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (citing *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011)). "When no objection is made during the trial, a counsel's arguments are reviewed for plain error." *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (citing *Schroder*, 65 M.J. at 57-58). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing *United States v. Rodriguez*, 60 M.J. 87, 88-89 (C.A.A.F. 2004)).

The appellant asserts that the military judge committed plain error because he had a *sua sponte* duty to interrupt trial counsel's allegedly improper argument and take corrective action, but failed to do so. In the trial counsel's sentencing argument, he stated:

> This is a person who's lurking, a stalker. Now we have someone stalking kids on our streets, public streets. This is a serial, a hunter of high school girls, a sex predator … I'd like to point you to some of the aggravating factors in this case. First, the victims of this case, and the predatory nature which must have occurred for these victims … And because he has no ability to control himself, we need to protect society from him, from this predator, this lurker.

In *Berger v. United States*, 295 U.S. 78 (1935), the Supreme Court announced the following rule concerning the boundaries a prosecutor should follow in argument:

> [A prosecutor] may prosecute with earnestness and vigor-indeed, he should do so. But, while he 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.

Id. at 88.

Under the particular circumstances of this case, we find that the disputed comments were within the bounds of proper argument. The appellant followed a 17-year-old female in a vacant parking lot to find an opportune time to expose himself masturbating; a couple of months later, he called a 16-year-old female over to his vehicle to again expose himself; and shortly thereafter he drove up next to a young female adult, called her over to his vehicle, and masturbated in front of her. Accordingly, based on a reasonable inference of the evidence, the trial counsel's use of the terms "predator" and "lurking" were not improper. Further, even if the trial counsel overstepped his bounds, the appellant has not shown his rights were materially prejudiced by the trial counsel's argument.

False Official Statements

In the appellant's final assignment of error, he alleges that the military judge committed plain error by not dismissing the two false official statements in violation of Article 107, UCMJ, regarding the appellant's response to his Article 15, UCMJ, proceeding when his response had already been considered by the appellant's commanding officer during issuance of punishment.

The appellant was charged with two specifications of making false official statements in violation of Article 107, UCMJ. The statements were made to his commanding officer in his written response, dated 13 September 2009, pursuant to nonjudicial punishment proceedings, under Article 15, UCMJ. In his response, the appellant stated that he did not fail to maintain professional relations with both Capt Cherney and Capt Witmer. At trial, the appellant pled guilty to the specification concerning Capt Witmer and was found guilty concerning the specification regarding Capt Cherney. No objection was made concerning the propriety of these two specifications.

A commanding officer may impose designated "disciplinary punishments for minor offenses without the intervention of a court-martial." Article 15(b), UCMJ. If a servicemember has received nonjudicial punishment for a minor offense, and the offense

is later referred for trial by court-martial, the accused may move to dismiss the charge on the grounds of former punishment for a minor offense. R.C.M. 907(b)(2)(D)(iv).

We do not find error in this case, plain or otherwise. The appellant was originally offered nonjudical punishment under Article 15, UCMJ, due to his alleged unprofessional relationships with Capt Cherney and Capt Witmer. The two false official statements were made in his written response to the Article 15, UCMJ, proceeding, wherein he specifically stated he did not visit Capt Cherney's sleeping quarters, that he maintained a professional relationship with her, and that he also maintained a professional relationship with Capt Witmer. Although his commander may have considered the appellant's false statements in deciding an appropriate punishment, the appellant was not actually charged with the said false official statements as part of the said or any subsequent nonjudicial punishment proceedings. Accordingly, the decision to refer these specifications to trial was proper and the military judge's failure to dismiss them *sua sponte* was not plain error.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court