

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES¹
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class ROBERTO AIKANOFF, JR.
United States Army, Appellant

ARMY 20200423

Headquarters, Fort Drum
Grady J. Leupold, Military Judge
Lieutenant Colonel Travis W. Elms, Acting Staff Judge Advocate

For Appellant: Captain Andrew R. Britt, JA; Jonathan W. Crisp, Esquire (on brief);
Jonathan W. Crisp, Esquire (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J.
Schapira, JA; Major Mark T. Robinson, JA; Captain Cynthia A. Hunter, JA (on
brief).

15 June 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of seven specifications of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b (2019) [UCMJ]. The panel found appellant not guilty of four specifications of rape of a child, two specifications of sexual abuse of a child, and four specifications of attempted rape of a child, in violation of Articles 120b and 80, UCMJ. The panel sentenced appellant to a dishonorable discharge, confinement for twenty years, forfeiture of all pay and

¹ Judge Arguelles decided this case while on active duty.

allowances, and reduction to the grade of E-1, all of which were approved by the convening authority.

This case is now before us for review under Article 66, UCMJ. Appellant raises four assignments of error, two of which merit discussion but no relief.²

BACKGROUND

Appellant married the victim's mother in 2012 and subsequently adopted the victim and her older sister. Appellant and the victim's mother also had one daughter together, who was an infant at the time of the incidents in question. In December of 2016, the family moved to Fort Drum, and on two separate occasions in December of 2017 and October of 2018, appellant's sister moved into the residence with her three children. During the period when appellant's sister and her children were living with the family, the victim shared a room with one of her sisters.

The victim testified that appellant first started to sexually abuse her when his sister and her kids first moved in with the family in December of 2017. At that time, the victim was [REDACTED] or [REDACTED]-years-old and in the fourth grade. The victim testified that on several occasions appellant got into bed with her in the morning while she was still asleep and touched her buttocks, vagina, and chest. The victim also described how appellant made her touch his penis. After appellant's sister moved out in February of 2018, and the victim got her own room back, and appellant continued to climb into bed with her. Appellant started doing "new things," to include pulling down her underwear and shorts in order to place his penis in her buttocks, and touching her vagina with his hands. The victim also testified that appellant inserted his fingers into her vagina and unsuccessfully tried to place his penis in vagina, and "would make [her] still grab him and touch him, but he would make [her] move [her] hand on his [private area] like an up and down motion."

The abuse stopped when appellant's sister and her children returned to the residence in October of 2018, but started up again in January of 2019 when they moved out. The victim testified that after she moved back into her own room for the second time, the sexual abuse resumed with "mainly just the touching" on her chest, her private area, and her buttocks, and escalated to appellant putting his finger in her vagina and putting his penis on her buttocks in a "faster and harder" manner.

In June of 2019, the victim confronted appellant via text message, asking him "I still want to know why you did what you did." Appellant responded, "I told you I

² We have also given full and fair consideration to appellant's other assigned errors, as well as the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

was being dumb. So I'm sorry. Like I said it'll never happen again. I promise you that." In response to the victim's subsequent text "I still don't know if i should tell mom or not," appellant responded that "[telling will] be a very bad," and that "I will lose you, your sisters, my life, my job, everything . . . I am changing and acting different with all of you." The evidence at trial established that appellant deleted this particular portion of the text message string from his iPhone, although it still existed on his Apple Watch.

When asked at trial about the text message exchange, appellant testified that it was pertaining to a "wedgie" that he had given the victim earlier that morning. Appellant's wife, however, testified that he gave the girls wedgies all the time, and laughed as she said that she would never report appellant over a wedgie. Appellant admitted deleting the exchange on his phone, but claimed that he was just deleting old texts in order to save space. Notably, however, there were multiple messages sent both before and after that were not deleted, and even as it pertained to this text string, appellant only deleted that specific portion in which he implored the victim not to say anything to her mother.

Although he testified at trial that he only sat on the victim's bed for five to seven seconds each morning before he left to say goodbye, in his initial interview with U.S. Army Criminal Investigation Command (CID) agents, appellant described how he got in bed with her for five to ten minutes every morning. Appellant also told CID that sometimes when he got into bed with the victim he had an erection, which he referred to as "morning wood."

At trial, the government also called several of the victim's teachers, who testified that during the relevant time period they noticed a marked change in the victim's demeanor, and observed that she had started wearing more baggy clothes. Likewise, several of the victim's friends testified that over the course of the year her personality changed from outgoing and happy to withdrawn.

The victim also testified that she felt a liquid coming from appellant's body every time he came into her room after February of 2018. Although the victim's mother testified that she did not wash the sheets very often, there were no traces of semen evidence found on any of the victim's bedding.

LAW AND DISCUSSION

A. Appellant's Motion for Mistrial after the Military Judge's Substitution of a Panel Member

1. Additional Facts

Shortly after the government examined its last witness, one of the panel members fell ill and required immediate medical attention. After determining that the panel member would not be able to continue, and with the consent of both the government and the defense, the military judge excused the ill panel member for good cause under Rule for Courts-Martial (R.C.M.) 505(f).

As the excusal dropped the panel below the mandated one-third enlisted representation, defense counsel moved for a mistrial. Following extensive argument by the parties, the military judge denied the motion for mistrial and instead proceeded to impanel a new member detailed by the convening authority following the procedures set forth in Article 29, UCMJ, and R.C.M. 505, 805, and 912B.

Among other things, the military judge instructed the new member that he would recall any witnesses the member wished to question after hearing their testimony. Over the course of the next two days, and in the presence of the military judge, appellant and all counsel, the court reporter played the audio of the prior proceedings, and the new member viewed all of the previously admitted exhibits.³ After hearing the testimony of all of the government witnesses, the new member indicated that he had questions for the victim's mother and older sister, whom the military judge recalled for that purpose. After the military judge asked those questions in the presence of all the panel members, trial on the merits continued with the defense case.

Appellant now argues that because the new panel member was not able to observe the government witnesses as they testified, especially the victim, the military judge erred in denying his motion for a mistrial. Appellant does not directly address or raise a facial constitutional challenge to the statutory mechanisms that allow for the impaneling of a new member in the middle of trial. Given his focus on the Confrontation Clause, and his characterization of the trial as a “quintessential ‘he said, she said’ case involving alleged sexual abuse,” we understand this assignment of error to be an “as applied” challenge to the constitutionality of Article 29, UCMJ, and the relevant Rules for Courts-Martial. As we discuss below, this claim is without merit.

2. Analysis

In pertinent part, R.C.M. 912B states that if a panel member is excused, there are no alternate members, and the number of enlisted members is reduced below one-third of the panel, “the court-martial may not proceed until the convening authority

³ It is not clear from the record whether the new member also listened to the prior Article 39(a), UCMJ, sessions. Given that neither counsel objected during the playing of testimony, we need not address this issue.

details sufficient additional new members.” Likewise, R.C.M. 505(c)(2)(B) provides that if a member of the panel is excused for good cause, a new member may be detailed if the number of enlisted members is reduced below one-third of the total membership.

Once the new member is impaneled in the middle of the trial, R.C.M. 805(d) mandates that “trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to or played for the new member in the presence of the military judge, the accused, and counsel for both sides” Along the same lines, Article 29(f), UCMJ, provides that if new members are impaneled after the commencement of the trial, “the trial may proceed with the new members present after the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new members, the military judge, the accused, and counsel for both sides.”

As described above, appellant now asserts that the military judge erred in seating the new member, and instead should have declared a mistrial following the stipulated excusal of the original panel member for good cause. The Court of Appeals for the Armed Forces (CAAF), however, has repeatedly emphasized that a mistrial is “an unusual and disfavored remedy,” to be used only as a “last resort to protect the guarantee for a fair trial.” *See, e.g., United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003) (citing *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)). Accordingly, we will not reverse a military judge’s ruling on a mistrial “absent clear evidence of an abuse of discretion.” *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009) (citation omitted).

For the most part, appellant either ignores or gives short shrift to both the applicable rules and the seminal CAAF case on point, *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013), choosing instead to focus more broadly on the Confrontation Clause. While appellant is correct that one function of the Confrontation Clause is to ensure that “the finders of fact evaluate the demeanor of the witnesses,” *United States v. Anderson*, 51 M.J. 145, 149 (C.A.A.F. 1999), the Supreme Court has also consistently held that the rights expressed in the Confrontation Clause are not absolute. *See, e.g. Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (holding the confrontation clause does not guarantee “cross-examination that is effective in whatever way, and to whatever extent, the defense might wish”); *Cf. United States v. Beauge*, __ M.J. __, No. 21-0183, 2022 CAAF LEXIS 181, at *22–23 (C.A.A.F. 3 Mar. 2022) (“[O]nly rules which infringe upon a weighty interest of the accused *and* are arbitrary or disproportionate to the purposes they are designed to serve will be held to violate the right to present a complete defense.”) (citing *Holmes v. South Carolina*, 547 U.S. 319, 324–25 (2006) (emphasis in original) (internal quotation marks and alterations omitted)). Moreover, there is no dispute that appellant, through counsel, was able to thoroughly cross-examine each and every witness who testified

against him. *See Davis v. Alaska*, 415 U.S. 308, 315–16 (1974) (“The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*”) (citing 5 J. Wigmore, *Evidence* § 1395, p. 123 (3d ed. 1940)) (emphasis in original).

As noted above, the CAAF addressed a similar situation in *Vazquez*, another child sexual abuse case. In that case, after five of the six government witnesses (including the victim) testified, the dismissal of one of the panel members left the panel below the minimum required quorum. 72 M.J. at 15. After two new members were impaneled, the military judge had counsel read the transcripts of the testimony to them outside the presence of the other members. *Id.* at 16. Unlike defense counsel in the case at bar, however, defense counsel in *Vasquez* did not object to the seating of new members, and did not move for a mistrial. *Id.* at 15–16.

At the first level of appeal, the Air Force Court of Criminal Appeals held that the military judge erred by failing *sua sponte* to grant a mistrial on the grounds that the application of R.C.M. 805(d)(1) would result in a patently unfair trial. *Id.* Reversing the appellate court decision, the CAAF held:

[G]iven that Appellee fails to establish that the procedures Congress determined were appropriate when a court-martial drops below quorum mid-trial in Article 29(b), UCMJ, are unconstitutional as applied to him, the military judge did not err, let alone abuse his discretion, in following those procedures in this case.

Id. at 16. Among other things, the CAAF rejected the lower court’s determination that appellant had a “military due process” right to have panel members “who have all heard and seen the same material evidence,” or a Sixth Amendment right to have all members view a witness’s demeanor. *Id.* at 19.

In so ruling, the CAAF held that that “[t]he Weiss standard controls Appellee’s claim that Article 29(b), UCMJ, and the procedures to implement it set forth in R.C.M. 805(d)(1) are unconstitutional as applied to him,” and that “Appellee has the burden to demonstrate that Congress’ determination should not be followed.” *Id.* at 19. In *Weiss v. United States*, the Supreme Court held that when reviewing Congressional determinations involving “the framework of the Military Establishment, including regulations, procedures, and remedies relating to military discipline,” judicial deference “is at its apogee.” 510 U.S. 163, 176–77 (1994) (internal quotations omitted). As such, a petitioner seeking to challenge the military justice framework established by Congress must show that “the factors militating in favor of [the petitioner’s interest] are so extraordinarily weighty as to overcome the balance struck by Congress.” *Id.* at 177–78.

Although the CAAF in *Vasquez* based its decision on part on the fact that defense counsel had not objected to seating the new members, it also held on the record before it that appellant had failed to meet his burden to show that Article 29, UCMJ, and R.C.M. 805(d)(1) were unconstitutional as applied to him. In concluding that this framework “sufficiently satisfies the central concern of the Confrontation Clause,” the CAAF noted that: (1) each witness testified under oath and in the presence of four of the final panel members; (2) appellee had the opportunity to cross-examine each witness; (3) the verbatim transcript read to the two new panel members was subject “to rigorous testing in the context of an adversary proceeding”; and (4) the presentation of written witness testimony, to include the reading of a verbatim transcript, “without *any* of the members seeing the witness’s demeanor, is both an accepted practice and constitutionally unremarkable.” *Vasquez*, 72 M.J. at 20–21 (emphasis in original).

In this case, not only are the same factors relevant in *Vasquez* present, but appellant actually received more “process” than did the appellant in that case. For example, in this case the new panel member was able to listen to a recording of the testimony, as opposed to just hearing counsel read the transcript. Likewise, where four of the six panel members in *Vasquez* were able to see all of the witnesses testify, in this case seven of the eight members saw the whole trial. Moreover, unlike *Vasquez*, in this case the new panel member was also able to submit questions to the witnesses, in the presence of all of the other panel members, after hearing their recorded testimony.

Appellant, however, argues that because the new panel member was not able to observe the victim as she testified, the military judge should have granted a mistrial. Specifically, appellant asserts that because this was a “quintessential ‘he said, she said’ case,” the new panel member’s failure to observe the victim as she testified renders Article 29, UCMJ/R.C.M. 505(b) unconstitutional as applied to his case. We disagree.

First, *all* of the deliberating panel members were able to examine the incriminating text message string in which appellant told the victim that if she told her mother what happened he would “lose you, your sisters, my life, my job, everything.” In addition, all of the same panel members observed appellant’s testimony, including his dubious explanation of the text messages, his reasons for deleting them, and his admission that in the morning he would sometimes lie down with the victim in her bed while he had an erection. *See United States v. Nicola*, 78 M.J. 223, 227 (C.A.A.F. 2019) (“But one risk of testifying, recognized long ago, is that the trier of fact may disbelieve the accused’s testimony and then use the accused’s statements as substantive evidence of guilt ‘in connection with all the other circumstances of the case.’”) (citing *Wilson v. United States*, 162 U.S. 613, 620–21 (1896)).

In addition, all members of the panel that ultimately rendered guilty verdicts observed the government's rebuttal witnesses, to include a CID agent who testified that appellant admitted during his initial interview that he got in bed with the victim every morning for 5-10 minutes (impeaching his testimony at trial that it was only 5-7 seconds), and that he would sometimes go to her bed in just shorts or a robe after having sex with his wife. Finally, all of the panel members heard appellant's wife testify on rebuttal that she was aware that he gave his daughters wedgies, and saw her laughing as she stated that she would never report him for that conduct. Moreover, appellant's wife described how when she confronted appellant, he never said anything about a wedgie being the root cause of this incident.

As noted above, although we acknowledge that the holding in *Vasquez* relied in small measure on the fact that there was no objection at trial (which is not the case here), we nevertheless find that on balance, and for all of the reasons stated above, appellant has failed to show that the factors militating in favor of his interest "are so extraordinarily weighty" as to render the procedures and framework set forth in Article 29, UCMJ, and R.C.M. 805 unconstitutional as applied to his case. As such, because the military judge did not err in seating the new panel member, it follows that he also did not abuse his discretion in denying the defense request for a mistrial. *See Vasquez*, 72 M.J. at 16 ("[T]he military judge did not err, let alone abuse his discretion, in following those [Article 29(b), UCMJ] procedures in this case.").⁴

B. Military Rule of Evidence 412

1. Additional Facts

Prior to trial, the defense sought to introduce the following evidence pertaining to the victim's sexual behavior and predisposition under the "constitutional" exception of Military Rule of Evidence (Mil. R. Evid.) 412(b)(3): (1) she observed on her iPad an image of a naked male with an erection; and (2) an allegation that her fourth-grade classmate texted her a picture of his exposed penis. Appellant contended that this evidence would demonstrate that the victim "had a

⁴ We are cognizant that the standard of review for an alleged error depends on whether the appellant lodges an objection at trial. *Compare Vasquez*, 72 M.J. at 17 (stating the failure to object renders alleged error subject to plain error analysis) *with United States v. Tovarchavez*, 78 M.J. 458, 470 (C.A.A.F. 2019) ("[B]efore a federal constitutional error [for a preserved objection] can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt") (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Given our finding that the military judge did not err in the first instance, however, we need not decide whether the alleged error was harmless.

degree of understanding, engagement, and participation with sexual activity that may not be common for other children that are her age,” thus lending “support to the Defense’s theory that these allegations [were] fabricated.” The defense further argued that excluding the evidence would “prevent the Defense from dispelling the factfinder of any misconceptions they may have about children and sexual knowledge, and from being able to present a defense that [the victim] fabricated these allegations.”

In the first incident, while driving home from Arkansas, the victim’s mother found a link to a website on the victim’s iPad. The link appeared to be open to the welcome page of a pornographic website, which depicted a nude male with an erect penis. The victim acknowledged viewing the image, but said that her cousin used her iPad to access the page. As to this incident, the military judge denied the motion, ruling that “observation of a nude male image, alone, would not be material, i.e. favorable or vital, to a rebuttal to the Government’s theory particularly where the Defense materiality argument lacks further specificity.”

As to the second incident, the victim’s mother testified that she discovered text messages between the victim and a male, fourth-grade classmate in which the two used terms of endearment like “baby.” Both the victim and her mother testified at a pretrial hearing that they did not see any inappropriate images on the victim’s phone. Appellant’s sister, however, testified that the victim’s mother told her that she had found a “dick picture” on the victim’s phone sent by the victim’s fourth-grade “boyfriend.” Appellant’s sister did not, however, observe any such images on the victim’s phone herself, and the victim’s mother testified that she never told Appellant’s sister about any such pictures on her daughter’s phone.

In denying the motion to introduce evidence of the second incident, the trial court based its ruling solely on Mil. R. Evid. 401 relevance grounds:

A reasonable factfinder would not conclude that the alleged victim received a nude image or a “dick picture” from her classmate. The only testimony suggesting otherwise was elicited from the Accused’s sister.

In fact, [appellant’s sister] did not observe any such image but simply testified that [victim’s mother] had represented to her that such an image had been exchanged. Even if the Court accepted the veracity of [appellant’s sister’s] testimony, this evidence merely supports what [victim’s mother] may have told [appellant’s sister] but does not otherwise materially contradict the testimony of [victim’s mother] and [victim] that they did not observe such an image. [fn: To reach the necessary legal conclusion, the

Court need not resolve this apparent testimonial contradiction as to what precisely [victim's mother] told [appellant's sister].] Either way, the evidence does not support a finding that the alleged victim actually received a sexually explicit image from a classmate. Based upon this dearth of evidence, the Court need not consider the remaining prongs of the MRE 412 analysis.

2. Law

Appellant now asserts that the military judge erred in finding that evidence of the victim's exposure to the two pornographic images was not admissible under Mil. R. Evid. 412's constitutional exception. We review a military judge's Mil. R. Evid. 412 ruling for abuse of discretion. *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017). Military Rule of Evidence 412 limits the admissibility of specified forms of evidence in sexual offense cases. The rule serves "to protect victims of sexual offenses from the degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense." *United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004). Military Rule of Evidence 412 provides that evidence offered to prove that the alleged victim engaged in other sexual behavior is not admissible in any proceeding involving an alleged sexual offense unless it falls within the rule's enumerated exceptions: (1) evidence that someone other than the accused committed the assault; (2) evidence of other sexual behavior between the accused and the victim; or (3) exclusion of the evidence "would violate the accused's constitutional rights." Since Mil. R. Evid. 412 is a rule of exclusion, the party seeking to introduce such evidence has the burden of establishing by a preponderance of the evidence the exception under which the evidence is admissible. *Banker*, 60 M.J. at 223; *Erikson*, 76 M.J. at 235. In analyzing admissibility, the military judge must first determine whether the evidence is relevant under Mil. R. Evid. 401, and then apply the balancing test under Mil. R. Evid. 412(c)(3). See *Banker*, 60 M.J. at 222.

As the CAAF stated in *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011), "evidence must be admitted within the ambit of M.R.E. 412(b)(1)(C) when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." If the evidence is relevant and material, the military judge applies the Mil. R. Evid. 412 balancing test to determine if the evidence is "favorable" or "vital" to the defense. *Id.* at 323. The final consideration is whether the evidence in the record supports the inference that the moving party is relying on. *Ellerbrock*, 70 M.J. at 319; See also *United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011).

In *Banker*, the CAAF held that in applying the Mil. R. Evid. 412 balancing test the military judge "is not asked to make a determination if the proffered

evidence is true; it is for the members to weigh the evidence and determine veracity.” 60 M.J. at 224. In *United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010), the CAAF similarly held that the military judge abused his discretion and clearly erred in weighing and considering the credibility of the conflicting witnesses as part of his Mil. R. Evid. 412 balancing test. *See also United States v. Cuevas-Ibarra*, ARMY 20200146, 2021 CCA LEXIS 254, at *11 (Army Ct. Crim. App. 21 May 2021) (mem. op.) (finding error where “[t]he language of the military judge’s ruling makes it apparent that he precluded appellant from presenting evidence regarding complainant’s chlamydia because the military judge did not personally believe chlamydia was the source of complainant’s pain.”).

3. Analysis

With respect to the alleged image sent to the victim by her fourth-grade boyfriend, it appears that the military judge improperly considered witness credibility in conducting his Mil. R. Evid. 412 balancing test. Although the military judge’s ruling included a footnote indicating that he did not resolve the “apparent testimonial contradiction as to what precisely [victim’s mother] told [appellant’s sister],” the military judge expressly found that “[a] reasonable factfinder would not conclude that the alleged victim received a nude image or a ‘dick picture’ from her classmate,” and that “[e]ither way, the evidence does not support a finding that the alleged victim actually received a sexually explicit image from a classmate.”

Assuming that the military judge erred in erroneously weighing witness credibility, the evidence nevertheless did not rationally support the defense fabrication theory. As a result, the military judge correctly excluded the evidence. *See United States v. Norwood*, 81 M.J. 12, 18 (C.A.A.F. 2021) (“[W]e affirm a military judge’s ruling when ‘the military judge reached the correct result, albeit for the wrong reason.’”) (quoting *United States v. Bess*, 80 M.J. 1, 12 (C.A.A.F. 2020)). For the same reason, the military judge correctly excluded evidence that the victim observed an image of a nude male on her iPad.

As described above, appellant claims that, because both of the alleged incidents demonstrated the victim’s prior knowledge of the types of sexual encounters she claimed to have suffered, they supported a fabrication defense. First, it is worth nothing that appellant did not offer any evidence, or even a theory, as to why the victim would have a motive to fabricate. Moreover, as we have previously held, simply stating a theory of relevance is not sufficient to make the evidence admissible under Mil. R. Evid. 412. Rather, the “proponent must demonstrate that the proffered evidence rationally supports the theory, and that the theory is significant to the outcome of the case . . . [and] that the logical link between the proffered evidence and the conclusion the proponent wants the factfinder to draw is more than remote or speculative.” *United States v. Lauture*, 46 M.J. 794, 809 (Army Ct. Crim. App. 1997) (citations omitted); *See also Ellerbock*, 70 M.J. at 319 (holding

that the purported Mil. R. Evid. 412 evidence must support the inference on which the moving party is relying).

In this case, the fact that the victim may have seen one or two images of a naked adult male with an erection is far too speculative to support the premise that she had sufficient prior knowledge to fabricate her explicit descriptions of appellant's sexual assaults. Likewise, and for the same reason, this evidence does not rationally support the defense theory that the victim "had a degree of understanding, engagement, and participation with sexual activity that may not be common for other children that are her age." Finally, the evidence in question also fails to corroborate or otherwise make appellant's "wedgie" story more believable. *See United States v. Clarke*, NMCCA 201400416, 2015 CCA LEXIS 533, at *17 (N.M. Ct. Crim. App. 30 Nov. 2015) ("Although the appellant's claim that [the victim] orally sodomized him against his wishes is certainly incredible, evidence his teenage victim privately masturbated, had watched some unspecified pornography, or was sexually active, does nothing to make his story more believable.").

As such, because appellant failed to meet his burden to show that the proffered evidence was admissible under Mil. R. Evid. 412, we affirm the military judge's ruling excluding this evidence. *See Roberts*, 69 M.J. at 27-28 ("Although we assume that [] testimony was true, its speculative nature when combined with the improbability of the underlying purpose for the admission of the evidence, leads us to conclude that the proffered testimony had minimal probative value.").

CONCLUSION

Having considered the entire record, the findings and sentence are AFFIRMED.

Senior Judge BROOKHART and Judge PENLAND concur.

FOR THE COURT:



JAMES W. HERRING, JR.
Clerk of Court