**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**
**WASHINGTON NAVY YARD**
**WASHINGTON, D.C.**

**BEFORE**

**W.L. RITTER** **K.K. THOMPSON** **J.F. FELTHAM**

**UNITED STATES**

**v.**

**Michael J. DUNN**
**Corporal (E-4), U. S. Marine Corps**

NMCCA 200201707 Decided 30 June 2006

Sentence adjudged 29 November 2001. Military Judge: J.S. Brady. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, Cherry Point, NC.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel



RITTER, Senior Judge:

Pursuant to his pleas, the appellant was convicted by a general court-martial, composed of a military judge alone, of assault consummated by a battery. Contrary to his pleas, he was convicted of indecent acts with a child on divers occasions. The appellant's offenses violated Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934. He was sentenced to a bad-conduct discharge, confinement for 36 months, forfeiture of $300.00 pay per month for twelve 12 months, and reduction to pay grade E-1.

The appellant was charged with sodomy of a child on divers occasions, but the military judge found him guilty of the lesser included offense of indecent acts with a child on divers occasions. The appellant claims that: (1) the evidence is factually insufficient to support the finding of guilty to the lesser included offense; (2) the military judge erred in announcing his findings by not providing a factual predicate upon which to base an appeal; and (3) a bad-conduct discharge is inappropriately severe.

After carefully considering the record of trial, the appellant's three assignments of error, and the Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.

**Ambiguity in Announced Findings**

We resolve the appellant's second contention first. In view of his assertion that the military judge erred in announcing the findings of guilty, we must determine whether any ambiguity in the military judge's findings undermines our ability to conduct a factual sufficiency review of the appellant's conviction. As our superior court noted in *United States v. Seider*, 60 M.J. 36, 38 (C.A.A.F. 2004)(quoting *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003)), the findings of guilty must disclose the conduct upon which they are based, for this court "'cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty.'" We conclude, based on our review of the record, that the military judge's findings are sufficiently clear to enable us to conduct a factual sufficiency review.

Facts

The appellant was charged with forcible sodomy of a child under the age of 12 on divers occasions. The military judge found him not guilty of forcible sodomy, but guilty of the lesser included offense of indecent acts with a child on divers occasions. The military judge's findings of guilty did not include exceptions and substitutions. Rather, he simply stated that the appellant was "[n]ot guilty of sodomy, a violation of Article 125[,] UCMJ, but guilty of the lesser included offense and charge of indecent acts with a child, a violation of Article 134, UCMJ." Record at 416. After a brief recess, the military judge stated:

> Just prior to going on the record, the defense wanted the court to clarify the findings that were announced because Charge I is drafted as a violation on divers occasions. My findings that I entered were to a lesser included offense, and counsel wanted a clarification as to whether or not the findings were to one occasion or on divers occasions. Because that was unclear apparently from the entry of my findings. The intent of the court was to make findings solely to a lesser included offense without exceptions and substitutions. So it to be clear [sic], a finding on divers occasions to the lesser included offense. Is that clear?

Record at 418. The appellant's civilian counsel responded "Yes, your Honor, thank you." *Id*. The military judge never stated specifically which acts of the appellant constituted the factual

basis for his findings of guilty to the offense of indecent acts upon a child on divers occasions.

Law

A service member has a statutory right to announcement of all findings in open court. Art. 53, UCMJ; *United States v. Dilday*, 47 C.M.R. 172 (A.C.M.R. 1973). A verdict must be certain and convey a definite meaning free from ambiguity, but a defect in form is not grounds for reversal if the findings "convey the manifest intention" of the court when viewed as a whole. *Dilday,* 47 C.M.R. at 173. Thus, if the intent of the military judge can be determined from the record, the finding can be affirmed on appeal and the appellant is afforded full protection against double jeopardy. *United States v. Perkins*, 56 M.J. 825, 827 (Army Ct.Crim.App. 2001).

Analysis

The appellant contends that, by failing to use exceptions and substitutions, the military judge's findings of guilty to the lesser included offense of indecent acts left the appellant unable to ascertain the acts he was found to have committed that constitute that offense. We disagree.

In this case, the military judge's intent is clear from the record. We note first that committing an indecent act with a child is a lesser included offense of sodomy with a child, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 51d, and all of the elements of the former offense are expressly or impliedly included within the latter. *United States v. Foster*, 40 M.J. 140, 147 (C.M.A. 1994). Second, the military judge expressly chose not to use exceptions and substitutions, thereby indicating that his findings did not change the acts charged except insofar as the evidence fell short of proving the greater offense of sodomy. Third, the military judge specifically found the appellant guilty of committing indecent acts on divers occasions. Thus, the findings included every incident of misconduct alleged by the specification's reference to divers offenses.

The appellant's stepdaughter testified that on numerous occasions he forced her to remove her clothes or covering, and then touched her naked buttocks with his exposed penis. At least once, during the incident leading up to the assault charge, the appellant also ejaculated onto her buttocks. The victim testified that he did these acts over a period of several years, and in at least three different locations within their home. While other types of conduct and logical subsets of these three actions might be charged as indecent acts offenses, such permutations were excluded during cross-examination of the victim. The victim explicitly stated that, during each incident, the appellant touched her buttocks with his penis, and did not touch her inappropriately anywhere else. Record at 334.

This is not a situation, such as in *Seider* and *Walters*, where the court found the evidence insufficient as to some of the incidents of misconduct, leaving appellate authorities in doubt as to which alleged offenses the appellant was found not guilty. Here, the appellant was found guilty of all charged offenses. The victim testified that on each occasion the appellant forced her to unclothe and then touched his naked penis to her buttocks. While she did not state whether he always ejaculated onto her buttocks, the acts she testified to meet the legal standard for indecency as to each of the divers offenses alleged. Likewise, the findings rule out the possibility that the military judge may have found some alleged offenses to have been factually unsubstantiated. Except for the last indecent acts offense, the Government's evidence of divers indecent acts depended entirely on the victim's testimony. The military judge's findings thus relied heavily on that testimony, and support our conclusion that he found the victim's testimony completely credible.

But the victim's testimony, as well as other evidence, strongly suggested that the appellant could not have physically inserted his penis inside the victim's anus. The appellant's wife testified that his penis was exceptionally large, approximately two and a half inches wide. Dr. Christian Jansen, who examined the victim, testified that there was no obvious evidence of trauma to the victim's anus, and Mr. Kris Whitman of the U.S. Army Crime Laboratory testified that no semen was found in the swabs taken of her anus. Finally, the victim was facing away from the appellant during the acts of sodomy and thus did not see all that happened. Describing what she felt, she said it was a "little hurt" and not a "big hurt." While we note that penetration, however slight, is sufficient to constitute anal sodomy, Article 125(a), UCMJ, we conclude that the military judge's findings reflect his view that the evidence was lacking only on the issue of penetration.

We thus find no ambiguity in the military judge's findings of guilty. He found the appellant not guilty of penetration, but clearly found him guilty of every other act of which the victim testified. In our view, the best practice would be for the military judge to specifically enumerate the acts that constitute a lesser included offense, but we are aware of no specific requirement to do so. More importantly, in this case, the findings "convey the manifest intention" of the military judge when viewed as a whole. *Dilday*, 47 C.M.R. at 173.

**Sufficiency of the Evidence**

The appellant contends that the evidence is legally and factually insufficient to support his conviction of the indecent acts offense. His argument, however, depends on a determination by this court that we cannot conduct a factual sufficiency review of the appellant's conviction on this charge and specification. Since we have found no ambiguity in the military judge's findings, this argument likewise fails.

Having viewed the evidence in the light most favorable to the Government, we find that a reasonable finder of fact could have found the appellant guilty of the indecent acts offense. *See United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Moreover, reviewing the evidence de novo, this court is convinced of the appellant's guilt beyond a reasonable doubt. We therefore find the evidence of indecent acts both legally and factually sufficient.

**Conclusion**

We have carefully considered the appellant's contention that the sentence is too severe for the assault charge alone. Our decision upholding the indecent acts offense undercuts this contention. Moreover, we specifically find that the sentence is appropriate for this offender and his offenses. *See United States v. Healey*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Judge THOMPSON and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court