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

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Raymond OLAFSON
Captain (O-6), Medical Corps, U. S. Naval Reserve

NMCCA 200001034 Decided 8 June 2006

Sentence adjudged 5 August 1999. Military Judge: C.A. Price. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region, Mid-Atlantic, Norfolk, VA.

LT REBECCA SNYDER, JAGC, USNR, Appellate Defense Counsel
LT STEPHEN C. REYES, JAGC, USNR, Appellate Defense Counsel
MARY T. HALL, Civilian Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel
LT CRAIG A. POULSON, JAGC, USNR, Appellate Government Counsel

GEISER, Judge:

Contrary to his pleas, a general court-martial composed of officer members found the appellant guilty of rape, indecent liberties with a female under the age of 16, and two specifications of indecent assault in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. He was sentenced to a dismissal, confinement for three years, and total forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged.

The appellant raised six assignments of error. He asserted that (1) the military judge erred in denying a motion to dismiss all charges for prosecutorial misconduct; (2) the military judge erred in denying a motion to suppress several statements made by the appellant to the Naval Criminal Investigative Service (NCIS); (3) the military judge erred in admitting two out-of-court victim statements under the residual hearsay rule; (4) the military judge erred when he instructed members that the penetration element of rape is satisfied if the external female genitalia are

penetrated; (5) the evidence was legally and factually insufficient to sustain a finding of guilty to Specification 2 of Charge I (rape) or to Specification 3 of Charge III (indecent assault); and (6) Specification 3 of Charge II (indecent assault) is multiplicious with Specification 2 of Charge I (rape). This court specified a seventh question related to the appellant's third assignment of error, to wit: whether the military judge erred by admitting victim statements under the residual hearsay rule in light of *Crawford v. Washington* where the exhibits provided necessary additional facts not admitted by the victims during their testimony?

We have carefully examined the record of trial, the appellant's assignments of error and the Government's responses. We have also considered the appellant's and the Government's responses to our specified question. We conclude that the findings and sentence are correct in law and fact and that following our corrective action no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant served as Executive Officer, Naval Hospital, Keflavik, Iceland, from late 1996 until he was relieved of his duties in October 1998. He occupied base quarters with his wife and three adopted daughters AM, aged 18; AB, aged 17; and V, aged 16. The couple also had three adult natural children living elsewhere. The appellant and his family were assigned to Naval Hospital, Pensacola, Florida between 1993 and 1996. The appellant and his family were practicing nudists within the confines of their quarters.

In October 1998, the Surgeon General of the Navy received an anonymous letter alleging, *inter alia*, that the appellant was sexually molesting one of his daughters. The letter was referred to the Naval Criminal Investigative Service (NCIS) office in Keflavik for action. NCIS initiated an investigation in coordination with the appellant's commanding officer, Captain (CAPT) Hooten, Medical Corps, U.S. Navy. On 19 Oct 1998, NCIS began a series of interviews with the appellant's wife and three adopted daughters. A female Family Service Center (FSC) staff member was generally present during interviews of the children. After initially denying both nudism and sexual impropriety, AM related a number of sexual events between herself and her father and signed/swore to a written statement. AB and the appellant's wife also related certain inappropriate sexual conduct by the appellant. The appellant provided a series of sworn statements to NCIS over the course of several days describing various instances of sexual abuse involving AM and AB.

Prior to trial, the prosecutor, Lieutenant (LT) P, was informed by NCIS that the appellant's wife might be trying to get AM and AB to back away from their initial statements to NCIS

regarding sexual abuse. LT P vigorously interviewed the appellant's wife and daughters but was unable to confirm the allegations.

Prosecutorial Misconduct

The appellant asserts that the prosecutor, LT P, violated several ethical canons during her interviews with the appellant's adopted daughters and spouse. Specifically, it is alleged that LT P lied to AM when she said there were charges pending against AM's mother for trying to influence the victims' testimony and when she told AB that AM had already acknowledged that their mother was trying to get AM to recant her testimony.[1] The appellant also alleges that LT P's "aggressive" manner of interviewing the appellant's wife and daughters when it appeared they might recant their prior NCIS statements was the functional equivalent of unlawfully attempting to dissuade a defense witness from testifying. Finally, the appellant avers that LT P's failure to promptly provide a relevant document to the defense during discovery violated the ethical rule mandating fairness to opposing party and counsel.[2] Appellant's Brief of 30 Jun 2003 at 17-19.

The appellant raised these issues in a motion to dismiss at trial. The military judge took evidence and issued findings of fact prior to denying the motion. Record at 178-81; Appellate Exhibit XLIII. In reviewing allegations of prosecutorial misconduct, we will not set aside a military judge's findings of fact unless they are clearly erroneous. *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). Whether facts found by the military judge constitute prosecutorial misconduct and whether such misconduct was prejudicial error are questions of law that we review de novo. *Id*. The touchstone of analysis is the fairness of the trial, not the personal culpability of the prosecutor. Our focus is on the impact, not the relative egregiousness of a prosecutor's actions. *United States v. Thompkins* 58 M.J. 43, 47 (C.A.A.F. 2003).

The military judge made, *inter alia*, the following findings of fact relevant to this issue:

> (1) AM testified that LT P exhibited a friendly demeanor throughout the interview;

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[1] Navy judge advocates are prohibited from knowingly making a false statement of material fact or law to a third person. Rule 4.1 (Truthfulness in Statements to Others), Judge Advocate General Instruction 5803.1A (Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General), dtd 13 Jul 1992, (hereinafter JAGINST 5803.1A). Further, Rule 8.4 (Misconduct) of JAGINST 5803.1A prohibits Navy judge advocates from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

[2] Rule 3.4 (Fairness to Opposing Party and Counsel), JAGINST 5803.1A.

(2) AM denied that her mother had been trying to influence her expected testimony;

(3) AM indicated that LT P explained that she had reason to believe that AM's mother had been trying to influence her based on a report from PO, a natural born son of the appellant. LT P made some reference to involvement by the U.S. Attorney and/or potential charges against Mrs. Olafson;

(4) The interview lasted about 75 minutes. Although, AM was uncomfortable during and after the interview, she was not influenced in her prospective testimony by LT P;

(5) LT P next met with AB. Ms. Smith was also present. This conversation lasted no more than about 20 minutes. LT P exhibited a friendly demeanor at the beginning of the conversation. After a few minutes of questioning, during which LT P suggested that Mrs. Olafson had tried to influence AB's prospective testimony in this case, AB refused to talk further. She emphatically stated that she knew her rights and didn't have to talk to LT P, or words to that effect. AB was upset at the conclusion of the interview;

(6) LT P insisted on interviewing Mrs. Olafson and bluntly confronted her with the accusation that Mrs. Olafson was trying to influence her daughters' testimony in this case. Mrs. Olafson responded that she was not obstructing justice, or words to that effect. During this brief interview, both LT P and Mrs. Olafson were agitated in their demeanor. After a few moments of acrimonious conversation, Mrs. Olafson mentioned that she had an attorney. This was the first notice to LT P that Mrs. Olafson was represented by counsel. The interview then ended.

(7) Sometime before the 18 February interviews above, LT P learned that AM had told PO that her mother was trying to influence her testimony. In fact, PO overheard AM's side of a telephone conversation with her mother where this was one of the topics of conversation.

Record at 178-80.

The military judge made the following conclusions of law:

(1) As of 18 February 1999, LT P had a reasonable basis to believe that Mrs. Olafson might have tried to influence the prospective testimony of crucial witnesses in this case. The information available to

her from Mrs. Olafson's own natural son constituted that basis;

(2) LT P was aggressive in her interviews with Mrs. Olafson and her daughters, but she did not cross the line of prosecutorial misconduct. As an officer of the court, it was well within her responsibilities to try to ascertain whether Mrs. Olafson was attempting to improperly influence her daughters' testimony against their father and ensure that the daughters and all other witnesses offered truthful testimony to the court; LT P's intentions were proper in her interviews of those prospective witnesses;

(4) LT P is not guilty of prosecutorial misconduct.

Record at 180.

Having carefully reviewed the record of trial, the appellant's brief and the Government response, we find that the military judge's findings of fact were not clearly erroneous and we adopt them as our own. After a de novo review of both the record of trial and the military judge's findings of fact, we find that LT P did not commit prosecutorial misconduct during her interviews with Mrs. Olafson and her daughters.

While LT P might have been blunt and somewhat insensitive during the several interviews, we find that she had a good faith basis for her inquiry. We find the appellant's speculative claims of prejudice unpersuasive particularly in light of the strength of the Government's case and the military judge's efforts on the record to assure the two young victims that no one could interfere with their right and duty to tell the truth. Record at 50, 75. This is further supported by AM's testimony that LT P exhibited a friendly demeanor during the interview and AB's statement to LT P that she knew her rights and wanted to terminate the interview. Whatever apprehension LT P's demeanor might theoretically have raised, it was clearly insufficient to overpower or otherwise affect the witnesses. In fact, each of the victim's testified on the motion that their testimony at trial would be truthful notwithstanding their unpleasant experience with LT P. LT P's alleged references to pending charges and to a corroborating statement by AM, if true, were harmless, as they had no prejudicial impact on the ultimate fairness of the appellant's trial.

We further find that there was no bad faith on the part of LT P with respect to her apparently inadvertent failure to turn over a document to the defense during discovery. In any case, the document was ultimately, albeit tardily, turned over to the defense and we find no resulting prejudice in the record.

Voluntariness of the Appellant's Confession

On the afternoon of 19 Oct 1998, Special Agent (S/A) Grebas drove the appellant to NCIS to interrogate him regarding alleged the sexual abuse of AM and AB. After being informed of his rights, the appellant was unsure whether he wanted to waive his rights. S/A Grebas told the appellant to go home and think about it and to come back if he wanted to make a statement. The appellant went home but returned of his own accord the following morning to speak with S/A Grebas. The appellant was again advised of his rights including a cleansing warning. The appellant was advised he could invoke his rights at any time and terminate the interview at any time. The appellant thereafter made the first of several formal inculpatory statements to NCIS. Record at 652-53, 669-70, 781-82.

At trial the defense filed a timely motion to suppress the statements made by the appellant to NCIS on 20, 22, and 24 Oct 1998. AE XXXIII. The appellant does not contest that S/A Grebas correctly informed him of his rights at the beginning of each interview. The gravamen of the assignment of error is that, after informing the appellant of his rights, the agent made "coercive" statements to the appellant that effectively discouraged him from actually exercising his rights. Appellant's Brief at 20.

The appellant states that after being informed of his rights by S/A Grebas, the agent told him that there were no attorneys on the island and that it would take approximately two weeks to physically get a defense attorney to Iceland. The agent also told him that if he wanted to talk to an attorney he could do so by phone but that in the agent's experience, the attorney would simply tell him not to talk to NCIS. The appellant further states that S/A Grebas then encouraged him to make an immediate statement without benefit of counsel by threatening that the Government could put his adopted children into safe houses on base for six months and "interrogate them every day to the point where NCIS 'can get the information we want from them.'" *Id.* Finally, the appellant states that S/A Grebas told him that he was suspected of indecent touching "with the inference that it wasn't any big deal and that appellant probably wouldn't even be charged with anything." *Id.* The appellant claims that he made the challenged statements to NCIS to eliminate the pressure on his family, to avoid their having to appear in court, and to "'decrease the likelihood that someone would take... the kids away.'" *Id.* at 21.

At trial, the Government has the burden of establishing by a preponderance of the evidence that the appellant's confession was voluntary. On appeal, we review the voluntariness of a confession *de novo*. MILITARY RULE OF EVIDENCE 304(e)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.); *see United States v. Benner*, 57 M.J. 210, 212 (C.A.A.F. 2002). It is uncontested that the appellant freely elected to go to the NCIS office to speak

with S/A Grebas on the morning of 20 October 1998. It is also uncontested that the appellant was advised of his rights, which he understood and expressly waived. While the appellant vacillated whether he wanted to waive his rights during the 19 October 1998 interview, he does not contend, and we do not find, that he ever requested counsel, either unequivocally or otherwise.

Except where a person is unconscious, drugged or otherwise lacks capacity for conscious choice, all incriminating statements are "voluntary" in the sense of representing a choice of alternatives. The Due Process Clause does not mandate that police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. A statement may be used against an accused if his will has not been overborne or his capacity for self-determination critically impaired. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973). In determining whether the statements ascribed to S/A Grebas were sufficient to overbear the appellant's will or critically impair his capacity for self-determination, we consider, *inter alia*, the characteristics of the appellant and the details of the interrogation.

On the date of the alleged statements, the appellant was a senior military officer with almost 20 years of service. He had extensive formal education and a broad variety of leadership experience within the Navy. At the time of the questioning, the appellant was successfully serving as executive officer of a naval hospital. Prior to making any statement, the appellant was given an opportunity to spend the night in his quarters to think and reflect on his options. The appellant freely elected to return to NCIS the morning of 20 October 1998 and make the first of three formal statements.

The appellant offered psychiatric evidence at trial documenting that at the time he made inculpatory statements to NCIS, he was suffering from alcoholism, a bipolar disorder, a learning disability, and the early stages of Parkinson's Disease. A defense expert, Dr. Brittain, testified that the appellant fit the criteria for those who give false confessions. The doctor further testified that the appellant had an "absolute morbid fear that he was going to somehow be taken away from his children, or they from him." Record at 728; Appellant's Brief at 23.

In *United States v. Ellis*, 54 M.J. 958 (N.M.Ct.Crim.App. 2001), *aff'd,* 57 M.J. 375 (C.A.A.F. 2002), this court held an appellant's confession voluntary, notwithstanding a claim that it was motivated by police threat to arrest him and his wife and to place their other children in foster care. *Id.* at 968. Ploys to mislead a suspect or lull him into a false sense of security do not render a statement involuntary. A statement is voluntary so long as it is the product of a suspect's own balancing of competing considerations. *United States v. Bubonics*, 40 M.J. 734 (N.M.C.M.R. 1994), *aff'd*, 45 M.J. 93 (C.A.A.F. 1996). In

Colorado v. Connelly, 479 U.S. 157 (1986), the court held that, while each confession case turns on its own set of factors, cases where a confession was held to be involuntary all contained a substantial element of coercive police conduct.

In the instant case, there was no physical maltreatment, no isolation, no systematic questioning over several days, no failure to act on a request for counsel, no "good-guy/bad-guy interrogation techniques, and no insistent demand for a confession. On the contrary, after initial questioning, the appellant was allowed to return to his quarters to think about his options with no requirement that he ever return to NCIS to make a statement. He freely elected to return on his own. The length of the interrogation was relatively short and the appellant was permitted to write out his statement as he saw fit. While NCIS requested that he clarify certain matters in the statement, the S/A did not dictate what, if anything, the appellant was to add or delete in response.

The appellant's case rests heavily on psychiatric testimony suggesting that the appellant was passive and dependent. The record also, however, demonstrates that the appellant was successfully functioning as executive officer of a complex military organization, that he was experienced in the way the Navy worked, and was highly educated. As an experienced Naval officer, the appellant did not need S/A Grebas to tell him that his family would probably have to testify at trial if he pled not guilty and made the Government prove the case against him. Further, he needed no prompting to understand that the Government would have less need to further question his family if he made a complete statement about what happened.

We do not doubt that the appellant was motivated to confess, at least in part, by his concern that his family not have to testify in open court and that he be reunited with them as soon as possible. S/A Grebas did not, however, create, exaggerate, or overly dramatize the situation that the appellant found himself in. That the appellant elected to confess when faced with choosing among several unpleasant competing alternatives of his own creation does not make his confession involuntary. We find, therefore, that the military judge did not err when he held the appellant's 20, 22, and 24 October 1998, statements to NCIS were voluntary.

Residual Hearsay

The Government moved to admit 13 statements made by AM, AB, and the appellant's wife. AE XIX. The military judge ultimately admitted AM's second statement to NCIS, AB's second statement to NCIS, and a portion of Mrs. Olafson's statement to NCIS. AE LXXXIII. These documents, all of which were statements taken by NCIS on 21 October 1998 were subsequently admitted under MIL. R. EVID. 803 (24) as prosecution exhibits 7, 11, and 14, respectively. We review a military judge's decision on the

admissibility of evidence under an abuse of discretion standard. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). His findings of fact are reviewed under a clearly erroneous standard. *United States v. Kelley*, 45 M.J. 275, 280 (C.A.A.F. 1996). There are three requirements for admission of a statement under the residual exception to the hearsay rule. The statement in question must be material, necessary, and reliable. *Id.* The appellant acknowledges that the statements were material but argues that they were neither necessary nor reliable. We disagree.

NCIS agents interviewed AM and AB on 19 October generating partial corroboration of the allegations. The military judge articulated the following findings of fact relevant to his decision to admit later more detailed statements by AM, AB and part of a statement by Mrs. Olafson made on 21 October.

> (1) On 20 October, the accused was interrogated and provided a 17-page statement in his own handwriting confessing to various forms of improper physical contact with AM and AB. In his statement, he provided much more detail about the family's practice of nudism and the physical contact than the girls had in their 19 October statements.
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> (2) Prompted by the 20 October statement by the accused, NCIS agents re-interviewed AM and AB on 21 October.
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> (3) SA Rogers met with AM on the 21st and confronted her with the fact of her father's detailed confession, suggesting that she had not been entirely truthful in her first interview. She acknowledged her untruthfulness and expressed great relief that there would not be any dispute between her father's statement and hers. Among other statements, she then provided many additional details about her straddling her father with his penis between her labia majora and about incidents of ejaculation. Prior to this interview, SA Rogers had not known of these details. During the interview, SA Rogers used both open-ended and leading questions. Leading questions were frequently used to clarify details. At the conclusion of the interview, SA Rogers typed a statement, offered AM a chance to review it, and administered an oath to her. AM then signed the statement.
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> (4) At the time of the interviews, AM and the accused had a very close relationship as father and daughter. She cared for him very much. Those feelings still exist.
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> (5) S/A Marushi met with AB on the 21st. At the time he only had reason to believe that the accused had

fondled her breast. He told her that he had more information about her father rubbing her breast. She then volunteered details about that and another incident of fondling her pubic hair that SA Marushi had not known of. After about two hours, SA Marushi typed a statement and offered her a chance to review it. She did so, took an oath and signed it.

(6) At no time on the 19th or 21st did NCIS agents use any threats or promises against AM or AB. Family Service Center advocates were present for both of AM's interviews and for at least part of AB's first interview. Both girls appeared to be in good physical and mental condition at the time.

(7) On 21 October, Mrs. Olafson voluntarily returned to NCIS for a second interview. This time, she met with S/A Grebas, who was the case agent (in charge of the entire investigation). Over the course of several hours, Mrs. Olafson described in narrative form her 32-year marriage to the accused, including many private details of their relationship. Mrs. Olafson provided most, if not all, of the details of this account. At the conclusion of the interview, SA Grebus told her he would need a written statement. Mrs. Olafson asked him to type it. They then went back through her account as he typed it. Towards the end of the conversation, she asked SA Grebus what might happen to her husband. He briefly described disciplinary and adverse administrative options, but emphasized that it was too early to discuss those matters in detail, or words to that effect. She then reviewed the statement, made several changes in her own handwriting, initialed each paragraph, took an oath and signed it.

(8) At no time did Mrs. Olafson or the girls complain about the NCIS agents, interviews or statements. At one point, AM told CAPT Hooton that she told NCIS the truth. In December, AM, AB and Mrs. Olafson were asked by a representative of the Florida Department of Children and Families if she told the truth to Navy investigators. They said yes. AM added that she realized then that what her father did was wrong.

(9) Mrs. Olafson has attempted to influence her daughters' prospective testimony so as to minimize the appellant's culpability. That influence was manifested in the demeanor and testimony of AM and AB on this motion. At key points in their testimony, both were hesitant and even evasive in their answers.

AE LXXXIV at ¶¶ 9-20.

The appellant does not assert and after a careful review of the record, we do not find that the military judge's findings of fact were clearly erroneous. We adopt them as our own.

The necessity prong is essentially a best evidence requirement. *Id.* The appellant argues that the best evidence of the information in the contested statements are the appellant's statements of 20 and 22 Oct 1998. While the appellant's statements are probative of many of the same issues contained in AM and AB's statements, they are not wholly cumulative. Further, it is important to note that the necessity requirement includes consideration of whether a particular statement may have value in evaluating other evidence to arrive at the truth.

In the instant case, the statements of the two young victims corroborated and in some respects expanded upon the appellant's confessional statements. We concur with the military judge that, in view of the victim's hesitant and evasive demeanor as witnesses and their mother's attempts to influence their testimony, the statements of all three family members were necessary. The necessity prong cannot be interpreted with the narrow cast iron rigidity suggested by the appellant. *See United States v. Shaw*, 824 F.2d 601 (8th Cir. 1987).

The reliability prong requires that the proffered statement have equivalent circumstantial guarantees of trustworthiness as the first 23 exceptions. *United States v. Giambra*, 33 M.J. 331, 334 (C.M.A. 1991)(citing *United States v. Jones*, 30 M.J. 127, 131 (1990)(Cox, J., concurring)). The appellant argues that the statements were unreliable because they were the result of "hours of 'station house' interviews by experienced interrogators." Appellant's Brief at 29. He correctly notes that statements to law enforcement officers, when offered under the residual hearsay rule, "'must always be viewed with suspicion.'" *United States v. Cabral*, 47 M.J. 268, 274 (C.A.A.F. 1997)(Effron, J., concurring in the result)(quoting *United States v. Casteel*, 45 M.J. 379, 382-83 (C.A.A.F. 1996).

While wary of statements taken by law enforcement personnel offered under the residual hearsay rule, we note that the military judge's factual findings regarding the conditions under which the statements were taken are compelling. The victims expressed relief at being able to speak freely after their father confessed to the abuse. Of particular note is the fact that both girls offered relevant details about which the interviewing agents were previously unaware. Finally, all three witnesses subsequently validated the truthfulness of their statements to person's outside NCIS. In fact, prior to leaving the island, Mrs. Olafson gratefully expressed that NCIS S/A Grebas was a person she felt was reliable and that she could count on. Record at 295. Considering the record as a whole we find that the military judge did not abuse his discretion when he admitted prosecution exhibits 7, 11, and 14.

With respect to our specified question regarding the impact, if any, of the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the appellant and the Government agree that the fact that all 3 witnesses testified under oath and were subject to cross examination makes *Crawford's* confrontation clause analysis inapplicable. We agree. When "the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 59.

Rape Instruction

We review the substance of an instruction *de novo*. We are unpersuaded by the appellant's statutory construction argument and do not find that the Military Judge's Bench Book's instruction on the penetration element of rape is impermissibly expansive. *See United States v. Knighten*, No. 9800040, 2000 CCA LEXIS 7 (N.M.Ct.Crim.App. 25 Jan 2000); *United States v. Tu*, 30 M.J. 587 (A.C.M.R. 1990); *United States v. Williams*, 25 M.J. 854 (A.F.C.M.R. 1988). We do not find that the military judge erred in instructing members that the elements of rape are satisfied if the members found that the appellant's penis penetrated the external female genitalia.

Legal and Factual Sufficiency

The appellant asserts that the evidence was legally and factually insufficient to support a finding of guilty to Specification 2 of Charge I (rape) and Specification 3 of Charge II (indecent assault). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

There are two elements to the offense of rape: (1) that the appellant committed an act of sexual intercourse and (2) that the act was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 45b(1). The offense of indecent assault has three elements: (1) that the appellant assaulted a certain person not his spouse in a certain manner; (2) the acts were done with the intent to gratify the lust or sexual desires of the appellant; and (3) that, under the circumstances, the conduct was to the prejudice of good order and

discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, Part IV, ¶ 63b.

The appellant's argument is twofold. First, he focuses on the definition of penetration underlying the term "sexual intercourse" in the rape charge. In view of our resolution of the assignment of error above, this need not detain us. While acknowledging that AM testified that she did not consent to the appellant's sexual acts, the appellant argues that AM did not manifest her lack of consent to any of the sexual acts charged in the two specifications. We disagree.

AM's 21 October 1998 statement to NCIS indicates that when the appellant placed her hand on his member she would pull her hand away only to have him reach over and put the hand back on his member. Prosecution Exhibit 7 at 6. The appellant confirms this in his statement of 20 October 1998, noting that AM did not respond to his "aggressive sexual touching." Prosecution Exhibit 9 at 10-11. He also indicated that he would place her hand on his member but she would withdraw her hand as quickly as she could. *Id*. at 12. During the sexual contact detailed in the rape charge, the appellant noted, "she was obviously nervous." *Id*. at 14. This court is convinced that a rational fact finder could have found the appellant guilty of these offenses. We, too, are convinced beyond a reasonable doubt of the appellant's guilt to Specification 2 of Charge I and Specification 3 of Charge II.

Multiplicity

The appellant argues that the underlying conduct alleged in Specification 2 of Charge I (rape) and Specification 3 of Charge II (indecent assault) make the specifications multiplicious.[3] He requests this court set aside the finding of guilt to Specification 2 of Charge I. The Government acknowledges that some but not all of the language reflected in Specification 3 of Charge II is the same conduct that was the basis for the appellant's rape conviction. We concur and will except the overlapping language in our decretal paragraph

Conclusion

The finding of guilty to the words "and genitals" and the words "and placing her buttocks upon his thighs and her legs around his body while both he and she were naked" in Specification 3 of Charge II is dismissed. The findings of guilty to the remainder of Specification 3 of Charge II and to the remaining charges and specifications are affirmed. We have reassessed the approved sentence. After reviewing the entire record, we specifically conclude that the approved sentence is

[3] R.C.M. 1003(b)(10)(a specification may be multiplicious with another if they describe substantially the same misconduct in two different ways).

appropriate for this offender and his offenses and it is affirmed. *United States v. Cook*, 48 M.J. 434 (C.A.A.F 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-8 (C.M.A. 1986).

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court