UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CHRISTOPHER W. MAJOR
United States Air Force

ACM 36304

8 June 2007

Sentence adjudged 18 March 2005 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Nancy J. Paul.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for Appellant: Captain Anthony D. Ortiz (argued), Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Captain Jefferson E. McBride (argued), Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Matthew S. Ward.

Before

BROWN, MATHEWS, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SCHOLZ, Senior Judge:

The appellant was convicted, contrary to his pleas, of committing indecent acts upon a female under the age of 16[1] and on divers occasions orally communicating

[1] The members excepted the words "on divers occasions" and "by kissing the neck; and" of Specification 1 of the Charge. We note that the court-martial promulgating order does not correctly reflect the court member's findings of guilty by exceptions; specifically to include the excepted words "by kissing the neck; *and*" in Specification1 of the Charge. As a result of the omission of the word "*and*", we order a new court-martial promulgating order be executed to correctly reflect the findings of the members in this case.

indecent language to a female under the age of 16 in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was acquitted of the Article 134 offense of taking indecent liberties with this same child. A general court-martial consisting of officer and enlisted members sentenced the appellant to a bad-conduct discharge, confinement for 30 days and a reduction to E-1. The convening authority approved the findings and sentence as adjudged, deferring the automatic forfeitures until the date action was taken.

The appellant asserts four assignments of error before this Court: (1) the appellant was denied meaningful cross-examination of government witnesses in violation of his Sixth Amendment right of confrontation when the military judge prevented trial defense counsel from confronting the victim, MBP, and other witnesses with impeachment evidence admissible under Mil. R. Evid. 608 and constitutionally required under Mil. R. Evid. 412; (2) *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule for Courts-Martial (R.C.M.) 701 required the government to find and disclose the identity of DS, another person MBP had made an allegation against; (3) the military judge erred[2] by failing to properly instruct the members in findings and by ordering the members to conduct "special findings" as to which occasion they found the appellant guilty of committing indecent acts; and (4) the evidence is legally and factually insufficient. After reviewing the record of trial, the appellate briefs, and hearing oral argument on the first two assignments of error,[3] we find that the assignments of error have no merit and affirm both the findings and the sentence.

Background

This case involved an 11-year-old victim, MBP, who was a friend of the appellant's daughter. MBP, who was mentally retarded[4] and emotionally disturbed,[5] testified that the appellant had touched her inappropriately on three occasions and talked to her on more than one occasion about using a vibrator and masturbating. The appellant admitted to putting his hand on and "using the first digit of his finger on" MBP's vagina one time. The appellant also admitted to telling her "she can take care of her issues by herself by using a vibrator" and that she can please herself without the need for boys by masturbating.

One year and nine months prior to MBP's reporting the appellant's offenses, while MBP was living in Georgia, the Georgia Bureau of Investigation (GBI) opened an investigation based on a report of sexual abuse made by MBP against several family members. MBP had alleged that her uncle had molested her. During the course of the

[2] Appellant moved to file this supplemental assignment of error after oral argument was heard in the case, and this Court granted the motion.
[3] Oral argument was heard in this case on 22 February 2007 at Lackland Air Force Base, Texas, as part of this Court's Project Outreach program.
[4] MBP has an IQ of 68 and functions cognitively as a 6-9 year old.
[5] MBP was diagnosed with Type II Bipolar Disorder and Attention Deficit and Hyperactivity Disorder.

investigation MBP further alleged her step-grandfather, her brother, and her aunt had also sexually molested her. Subsequently, at various times she told several family members that her allegations were not true. The GBI investigation was closed 13 months later when the investigator discovered that MBP had moved with her family to Mountain Home Air Force Base, Idaho. Prior to this court-martial, MBP again stated she had in fact been molested previously by her relatives in Georgia.

Issue I

Where the Sixth Amendment's right to confrontation is allegedly violated by a military judge's evidentiary ruling, the ruling is reviewed for an abuse of discretion. *See United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005). To constitute an abuse of discretion, a challenged action must be found to be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (quoting *United States v. Yoakum*, 8 M.J. 763, 768 (A.C.M.R. 1980)); *United States v. Glenn*, 473 F.2d 191, 196 (D.C. Cir. 1972). "A defendant's right under the Sixth Amendment to cross-examine witnesses is violated if the military judge precludes a defendant from exploring an entire relevant area of cross-examination." *Israel*, 60 M.J. at 486 (citing *United States v. Gray*, 40 M.J. 77, 81 (C.M.A. 1994)).

In cases of sexual misconduct, Mil. R. Evid. 412(a) bars admission of "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" and "[e]vidence offered to prove any alleged victim's sexual predisposition." Mil. R. Evid. 412(a)(1)-(2). However, Mil. R. Evid. 412(b) provides a short list of specific exceptions to the general prohibitions of Mil. R. Evid. 412(a). The exception at issue here falls under Mil. R. Evid. 412(b)(1)(c), which instructs military judges to receive evidence when its exclusion "would violate the constitutional rights of the accused." *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983). *See also United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983); *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983); *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983). Primarily, Mil. R. Evid. 412 is a rule of relevance, specifically concerned with the relevance of the victim's sexual past in a trial for a sex offense. *See Colon-Angueira*, 16 M.J. at 29.

In *United States v. Banker*, 60 M.J. 216 (C.A.A.F.), our superior court reiterated the principle laid down in the Court's earlier decisions that, in order to defeat the exclusionary function of Mil. R. Evid. 412, the appellant must "demonstrat[e] why the general prohibition in [Mil. R. Evid.] 412 should be lifted to admit evidence of the sexual behavior of the victim[.]" *Banker*, 60 M.J. at 222 (quoting *United States v. Moulton*, 47 M.J. 227, 228 (C.A.A.F. 1997)). The Court further stated that the burden is on the proponent of the evidence to show that the evidence fits one of the enumerated exceptions. *Id*.

Considering the evidence during a closed hearing at which the victim has a right to be present, the military judge applies the two-prong test contained in Mil. R. Evid. 412(c)(3) to determine admissibility. The first part of the test is relevance, whether the evidence has "any tendency to make the existence of any fact" more or less probable than that fact would be without the evidence. Mil. R. Evid. 401. If the evidence is relevant, the military judge must then determine whether "the probative value of such evidence outweighs the danger of unfair prejudice[.]" Mil. R. Evid. 412(c)(3).

Although this two-part relevance-balance analysis is applicable to all of the enumerated exceptions in Mil. R. Evid. 412(a), evidence offered under the constitutionally required exception is also subject to additional analysis. Under Mil. R. Evid. 412(b)(1)(C), the accused has the right to present evidence that is "relevant, material, and favorable to his defense." *Dorsey*, 16 M.J. at 5 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)). While the relevancy portion of this test is the same as that employed for the other two exceptions of the rule, *if the evidence is relevant*, the military judge must then decide if the evidence offered under the constitutionally required exception is material and favorable to the accused's defense, and thus whether it is "necessary." *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993) (Gierke, J., concurring) (emphasis added.).

"[B]ased on the analytic structure of Mil. R. Evid. 412, in ruling on relevancy the military judge [is] not also required to address the constitutional exception or the application of the balancing test. Therefore, without more, it [is] within the discretion of the military judge to conclude that the offered testimony [is] not relevant." *Banker*, 60 M.J. at 225.

Mil. R. Evid. 608(b) permits the admission of evidence of relevant character traits, e.g. truthfulness of a victim or witness through the use of reputation or opinion evidence, and allows for evidence to show bias, prejudice, or any motive to misrepresent through the examination of witnesses or use of extrinsic evidence. *United States v. Bahr*, 33 M.J. 228, 23 (C.M.A. 1991) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). Our superior court has held that rules of evidence should be read to allow liberal admission of bias-type evidence. *United States v. Williams*, 40 M.J. 216, 218 (C.M.A. 1994). When a military judge excludes evidence of bias, the exclusion raises issues regarding the accused's Sixth Amendment right to confrontation. *United States v. Bins*, 43 M.J. 79, 84 (C.A.A.F. 1995). The use of extrinsic evidence can be limited if it is collateral to an important trial issue or its relevance is not established. *United States v. Gonzalez*, 16 M.J. 423, 425 (C.M.A. 1983); *United States v. Hunter*, 17 M.J. 738, 739 (A.C.M.R. 1983).

Before trial the government submitted a motion to suppress any evidence from MBP's prior report of sexual abuse and the subsequent investigation conducted by the

GBI,[6] and the defense submitted a motion to compel witnesses and admit Mil. R. Evid. 412 evidence, specifically the facts and circumstances of MBP's prior allegations and information from the investigation conducted by GBI. The judge granted the government's motion in limine, in part, and denied the defense's motion to compel. The military judge ruled that the alleged sexual activity between MBP and other family members and the specific details of MPB's allegations of molestation by several family members were not relevant or material. The military judge further stated any minimally probative value of this evidence was substantially outweighed by the danger of unfair prejudice and would lead to confusion of the members. The military judge also ruled that evidence that MBP made these allegations and then recanted as well as opinion testimony as to MBP's truthfulness, or lack thereof, could be presented to the fact finder to assess MBP's credibility. The military judge found that the probative value of this testimony outweighed the danger of any possible unfair prejudice.

Subsequent to this ruling but before trial, the defense submitted another motion pursuant to Mil. R. Evid. 608(b)-(c), 404(b) and 412,[7] asking to be allowed to cross-examine MBP about information and statements contained in her medical and mental health records as well as information contained in the GBI report. This motion contained 34 paragraphs of facts about which the trial defense counsel requested to be able to cross-examine MBP and 47 attachments, which the defense wanted to introduce as extrinsic evidence. The defense argued these areas would show MBP's motive and intent to fabricate the allegations in this case, the source of her knowledge and sexualized behavior, and her character for untruthfulness.

The military judge had three closed hearings in accordance with Mil. R. Evid. 412 during the course of the trial. In the first hearing, she asked for and received a more specific list consisting of 31 paragraphs containing statements and matters on which the defense desired to cross examine MBP, heard argument from each side, and thoroughly considered each area of evidence offered by the defense. The trial judge reiterated her pretrial ruling and allowed general testimony regarding previous allegations of sex abuse made by MBP. The judge held the specific details of these allegations were irrelevant and any minimally probative value was substantially outweighed by the danger of unfair prejudice and confusion of the members. Citing Mil. R. Evid. 607, 608, 404 and 412, and relying primarily on *Dorsey*, *Banker, Moulton and Hurst*,[8] the military judge allowed the trial defense counsel to cross-examine MBP on the vast majority of the areas it requested. *Dorsey*, 16 M.J. at 5; *Banker*, 60 M.J. at 225; *Moulton* 47 M.J. at 228; *United States v. Hurst*, 29 M.J. 477, 481 (C.M.A. 1990).

[6] Made pursuant to Mil. R. Evid. 401, 403, 404(a)(2), 405, and 608(a).
[7] The defense stated in this motion that it did not believe Mil. R. Evid. 412 applied but addressed it out of "an abundance of caution."
[8] "The ruling by the military judge merely prevented unwarranted questions about specific acts not at issue in this case . . . . Relevant questioning was permitted, while inflammatory, demeaning, and irrelevant questions were excluded." *United States v. Hurst*, 29 M.J. 477, 481 (C.A.A.F. 1990)).

The next closed hearing took place during MBP's testimony, when the defense again asked to get into specifics of the prior molestation allegations, arguing that the government opened the door on redirect by asking MBP about how she knew about sex before meeting the appellant. The military judge again ruled that she would allow general questions about where MBP's sexual knowledge came from but not allow the defense to get into specifics about her allegations against her uncle, her grandfather, her aunt and brother. The military judge held that the specific details were not relevant, and even if they were the probative value did not outweigh the prejudice.

The third hearing resulted from the late receipt of additional documentation from the GBI investigation. Based on this new information, the trial defense counsel asked to question MBP about specifics of the allegations she had made against her uncle. The military judge allowed the defense to cross examine MBP about her having previously reported that her uncle grabbed her hand and put it on his privates. The military judge ruled that the probative value of this incident was not outweighed by the risk of prejudice because the appellant had said in a statement that MBP had grabbed his hand and put it on her privates.[9] The military judge noted that this was "kind of a converse act," but she allowed testimony with regard to this allegation as it was similar to what the appellant had claimed. As to the other specifics, the military judge held they were inadmissible under Mil. R. Evid. 412, because "they've got limited relevancy, and any relevance that they do have is outweighed by the prejudice."

Looking at the record as a whole, it is clear that the military judge properly allowed the defense to effectively cross-examine the witnesses using relevant evidence while protecting the legitimate privacy rights of the victim in this case. *See United States v. Saipaia*, 24 M.J. 172, 175 (C.M.A. 1987) (finding that the judge "correctly walked the line of relevance," prohibiting the defense from embarrassing or humiliating the victim, yet allowing the accused all reasonable opportunity to establish his defense). Like in *Banker*, we find that while excluding evidence on relevancy grounds, the military judge was not required to address the constitutional exception or whether or not the appellant had met his burden to demonstrate why the general prohibition in Mil. R. Evid. 412 should be lifted to admit evidence of the sexual behavior of the victim. We find that the military judge did not abuse her discretion when she ruled that the excluded testimony was not relevant. Further we agree with the trial judge that any possible relevance to the excluded evidence was substantially outweighed by the danger of unfair prejudice, confusion, or misleading the members. Mil. R. Evid. 403.

With regard to the appellant's argument that he was denied his constitutional right to confrontation by the military judge not allowing introduction of impeachment evidence

[9] In the trial transcript, it appears as though the military judge misspoke and stated that the probative value "is outweighed" by the risk of prejudice. However, it is clear from the judge's ruling allowing this testimony that she meant the probative value was *not* outweighed by any prejudicial value.

under Mil. R. Evid. 608, the defense at trial argued it wanted to impeach MBP's character for truthfulness with Mil. R. Evid. 608(b) evidence; exposing her motive to misrepresent with extrinsic evidence under Mil. R. Evid. 608(c). On appeal, the appellant specifically relies on *United States v. Moss*, 63 M.J. 233 (C.A.A.F. 2006). In *Moss*, the court found the military judge's exclusion of evidence proffered under Mil. R. Evid. 608(c) denied the appellant his fundamental right of confrontation and cross-examination. *Id.* at 236. The defense in *Moss* was denied the opportunity to cross-examine the victim on her prior alcohol and drug use, her suicide attempts and other general acts of disobedience. *Id.* at 235. The Court found that this deprived the appellant of his best defense, which was to show bias and to meaningfully challenge the credibility of the prosecutrix. *Id*.

In this case the appellant was permitted to cross examine MBP extensively about her previous molestation allegations, her inappropriate behavior at school, her strange behavior at the three mental institutions she went to subsequent to the appellant's abuse, her saying and thinking that she was a witch, her hearing voices, her temper, her anger toward her parents, and about how she would feel better about the previous abuse by her family members if the appellant went to jail. The amount of impeachment evidence permitted was overwhelming.

Moreover, the military judge's evidentiary rulings did not prevent the defense from exploring relevant lines of questioning. In fact, the defense mounted a strong defense through both cross examination of MBP and the testimony of other witnesses. The military judge did allow the defense to ask generally about each previous allegation of molestation, and to point out the fact that MBP had vacillated about whether or not they were true.[10] She properly limited the scope of cross-examination by not allowing the defense to go into irrelevant, overly prejudicial, or potentially confusing details. The defense effectively attacked MBP's character for truthfulness, while showing that she had prior sexual knowledge, lacked sexual boundaries, was experienced beyond her years, and that her perception of events could be skewed. Therefore we find the appellant was not denied his constitutional right of confrontation.

Even if we assume the military judge abused her discretion in making her evidentiary rulings, we find that the appellant was not materially prejudiced by the error. The appellant's cross-examination of MBP was powerful, and the appellant was only found guilty of the acts to which he admitted in his written statements which were properly before the members. Thus, we are convinced that had the excluded evidence been admitted, the result would not have been different.

Furthermore, despite the appellant's contention that the military judge's evidentiary rulings deprived him of his right to confrontation under the Sixth

[10] On cross-examination, the defense asked MBP whether she remembered stating during a pretrial interview that her brother had not molested her. MBP's response was, "Yea, but then I told you he did."

Amendment, we are satisfied beyond a reasonable doubt that, even if there was error in those rulings, it was harmless. *See Van Arsdall*, 475 U.S. at 681 ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.").

Issue II

"The right of an accused to obtain favorable evidence is established in Article 46, UCMJ, 10 U.S.C. § 846[]." *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). R.C.M. 701 implements this statute and "details the liberal discovery practice in courts-martial." *Id*. The military discovery rules seek to provide equal access to evidence to aid the defense in preparing its case and to "enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial." *Id*.

R.C.M. 701(a) requires the trial counsel, as soon as practicable, "to disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt of the accused of an offense charged, or reduce the punishment." R.C.M. 701(a)(6)(A)-(C). This rule implements the Supreme Court's decision in *Brady*, 373 U.S. 83, where it was held that due process is violated when the prosecution withholds information requested by the defense that is material to the issue of guilt or sentence. *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999). "As a general matter, evidence that could be used to impeach a government witness is subject to discovery." *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)). When the information is "of a type that is discoverable under R.C.M. 701 and *Brady*, the threshold question is whether the information at issue was located within the parameters of the files that the prosecution must review for exculpatory material." *Id*.

A review of discovery or disclosure issues requires a two-step analysis: first, it must be determined whether the information at issue was subject to disclosure or discovery; and second, if the information was not disclosed, then the effect of that nondisclosure on the appellant's trial must be tested. *Roberts*, 59 M.J. at 325. In those instances of erroneous nondisclosure of discoverable evidence, our superior court has adopted two tests for determining materiality. *Id*. at 326 (citing *United States v. Hart*, 29 M.J. 407,410 (C.M.A. 1990)). The first test applies to cases in which the defense either did not make a discovery request or made only a general request for discovery. *Roberts*, 59 M.J. at 326. "Once the appellant demonstrates wrongful nondisclosure under those circumstances, the appellant will be entitled to relief only by showing that there is a 'reasonable probability' of a different result at trial if the evidence had been disclosed." *Id*. at 326-27 (quoting *Bagley*, 473 U.S. at 682). However, when an appellant is able to show that the government failed to disclose discoverable evidence after receiving a specific request or as the result of prosecutorial misconduct, the appellant will be entitled

to relief unless the government can demonstrate the nondisclosure was harmless beyond a reasonable doubt. *Id*. at 327 (quoting *Hart*, 29 M.J. at 410).

The standard this Court applies to the nondisclosure of discoverable evidence and the materiality of such evidence is de novo. *Roberts*, 59 M.J. at 327.

In this case, pursuant to the trial defense counsel's motion to compel, the military judge ordered the government to release to trial defense counsel all known military and civilian medical, mental health and family advocacy records of the alleged victim, MBP, from the charged time period to the date of the ruling (1 September 2003 – 9 March 2005). Such records were provided to the defense six days prior to the trial. Contained in MBP's family advocacy records were approximately six pages with references to an individual named "Don" or "Done" – these documents were notes written by MBP to her elementary school teacher between 24 February and 30 March 2004, in which MBP made allegations against the individual. Two days before the trial began, the defense conducted an interview of MBP's biological mother, during which it inquired into the identity of "Don." MBP's mother indicated that the person in question was a friend of their neighbor, and he had moved away due to a permanent change of station. At some point after the trial commenced, the defense learned of its own volition that "Don" was possibly DS, an active duty Air Force member still assigned to appellant's squadron. Approximately one month after the trial was completed, trial defense counsel spoke with DS, who said he was aware that MBP had made allegations against him, but after consulting with an area defense counsel, did not want to provide further information.

On appeal, appellant asserts that the government had a duty to disclose the identity of DS prior to trial and that the identity of DS would have been material to the preparation of a defense. Appellant also asserts that the trial counsel had a duty to discover the identity of this individual, who was discussed within the records of a main prosecution witness. We disagree.

There is no indication in the record that the government knew of the identity of DS from the alleged victim's family advocacy records, nor do we find that the government failed to respond to a specific defense request for such information or engaged in any prosecutorial misconduct. While the defense did submit a general request for discovery seeking "[a]ny known evidence tending to diminish credibility of witnesses" and "[a]ny and all evidence in the possession of the government or otherwise known, or that should be known, to trial counsel which reasonably may tend to negate the guilt of the accused," at no point after receiving MBP's family advocacy records did the defense request the government discover the identity of the individual in question.

Additionally, at no point did trial defense counsel ask the military judge to compel the government to discover or disclose the identity of DS, nor did the defense seek a delay in the trial to further inquire into DS's identity. We note that although it appears

MBP's mother was mistaken when she told trial defense counsel prior to trial that "Don" had moved away due to a permanent change of duty station, there is no evidence that she was acting as an agent of the government for such purposes. Thus, any of her knowledge pertaining to DS's identity cannot be attributed to the government. We find that no *Brady* violation occurred. *See Brady*, 373 U.S. 83.

Furthermore, even if we assume that the government's actions amounted to an erroneous nondisclosure of information, we find that the appellant was not materially prejudiced by the error. As with the first issue raised in this case, the appellant's cross examination of MBP was powerful and thus the appellant was found guilty only of the acts he admitted to in his written statements which were properly before the members.[11] Thus, we are convinced beyond a reasonable doubt that any nondisclosure was harmless and that had the identity of DS been made known to the defense, the result of the trial would not have been different. *See Roberts*, 59 M.J. at 326-27.

Issue III

If an announced finding is ambiguous, "the military judge should seek clarification." R.C.M. 922(b), Discussion. When the announced findings are ambiguous because the fact finder has excepted out the words "on divers occasions" without further substitutions, the military judge *must* seek clarification. *United States v. Walters*, 58 M.J. 391, 397 (C.A.A.F. 2003) (emphasis added.). When the findings of guilty "do not disclose the conduct upon which each [finding] was based, [a] Court of Criminal Appeals cannot conduct a factual sufficiency review" of an appellant's conviction pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c). *United States v. Seider*, 60 M.J. 36, 38 (C.A.A.F. 2004). An announced finding is sufficiently certain, definite, and free of ambiguity if it enables the court to "base judgment thereon and to protect against subsequent prosecution for the same offense." *United States v. Darden*, 1 M.J. 574, 575 (A.C.M.R. 1975) (citing *United States v. Dilday*, 47 M.J. 172 (A.C.M.R 1973)).

We find we can do so in this case. We are not persuaded by the appellant's argument that the military judge erred when she asked the members to clarify their ambiguous finding after the president had announced the findings. We further conclude that the military judge's action to clarify the finding in this case was not a proceeding in revision pursuant to R.C.M. 1102(b)(1). The members found the appellant guilty as to Specification 1, committing indecent acts upon MBP, except the words "on divers occasions" and "by kissing the neck; and." While we do think the military judge's findings instructions with regard to the option of excepting out the "divers occasions"

[11] We also note that, despite the military judge's ruling that any mention of an individual named "Don" was inadmissible, the defense asked MBP on cross-examination, "Do you remember talking about being molested by a friend of your father?" MBP responded, "No." The defense then asked, "Do you remember the friend of your father's, the name? Donny, does that sound familiar?" MBP's response was, "My father didn't have no . . ." before being interrupted by an appropriate objection from the trial counsel.

language, if the appellant was found guilty of only one occasion of indecent acts, were not as complete as they should have been, her actions to clarify this finding were proper.

At the trial counsel's request and shortly after findings were announced, the military judge asked the president of the court to specify which occasion[12] resulted in the finding of guilty in Specification 1.[13] The president responded, "Ma'am, I'm pretty sure which one it is, but I would like to talk with the rest of the members prior to . . . ." While the judge "recessed the members for deliberations" it is clear from the record they did not reconsider any findings.[14] They returned in three minutes, and the president announced, "Ma'am, we thought we had evidence for the occasion on the couch." This clarification at trial, as to the factual basis of this finding, renders it possible for this Court to conduct a factual sufficiency review in accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c). *Walters*, 58 M.J. at 395; *United States v. King*, 50 M.J. 686 (A.F. Ct. Crim. App. 1999).

Based upon the entire record, we are satisfied that the appellant has suffered no prejudice and that the verdict is sufficiently certain to protect the appellant from subsequent prosecution for the same offenses. *United States v.Timmerman*, 28 M.J. 531, 537 (A.F.C.M.R. 1989); *Darden*, 1 M.J. at 575. Thus, reviewing the matter de novo, we conclude the findings are not ambiguous and hold the military judge did not err when she asked for clarification of the findings as to Specification 1.

Issue IV

We have considered the remaining assignment of error, relating to appellant's claim that his conviction was legally and factually insufficient, resolving it adversely to the appellant. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

Conclusion

[12] While MBP did not testify as to specific dates, she did testify as to three different locations at which she said the appellant touched her on her vagina: on a counter, on a couch, and in a truck.

[13] The military judge asked the trial defense counsel whether or not he concurred with trial counsel's request for clarification of the finding. The defense counsel responded, "we're not sure that it's necessary, but we don't see what harm it can do."

[14] While R.C.M. 922, Discussion, indicates that the military judge can seek clarification of ambiguous findings after announcement, this type of verdict involves a dual finding of guilty and not guilty. Once announced, the latter aspect of the verdict clearly becomes final and cannot be reconsidered. *See United States v. Boswell*, 23 C.M.R. 373, 377 (C.M.A. 1957); *see also* R.C.M. 924(a). In order to avoid any uncertainty as to when post-announcement "clarification" under R.C.M. 922 crosses the line into prohibited "reconsideration" under R.C.M. 924, ambiguities in this type of verdict *should* be resolved prior to announcement. *Walters*, 58 M.J. at 396 (emphasis added.).

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). Accordingly, the approved findings and sentence are

AFFIRMED.

Senior Judge MATHEWS participated prior to his retirement.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator