UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40455 (f rev)

UNITED STATES
Appellee

v.

John D. KERSHAW
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Upon Further Review

Decided 27 March 2025

Military Judge: Brian C. Mason (motions); Dayle P. Percle;[1] Lance R. Smith (motions and arraignment); Shad R. Kidd (trial on the merits); Tiny L. Bowman (remand).

Sentence: Sentence adjudged on 16 December 2022 by GCM convened at Spangdahlem Air Base, Germany, and reconvened at Joint Base San Antonio-Fort Sam Houston, Texas. Sentence entered by military judge on 2 February 2023: Dishonorable discharge, confinement for 2 years, reduction to E-1, and a reprimand.

For Appellant: Lieutenant Colonel Kasey W. Hawkins, USAF; Major Frederick J. Johnson, USAF.

*For Appelle*e: Colonel Steven R. Kaufman, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Major Olivia B. Hoff, USAF; Major Adam S. Love, USAF; Captain Ashley K. Torkelson, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, ANNEXSTAD, and KEARLEY, *Appellate Military Judges*.

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[1] Pursuant to Article 30a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 830a.

Senior Judge ANNEXSTAD delivered the opinion of the court, in which Chief Judge JOHNSON joined. Judge KEARLEY filed a separate dissenting opinion.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

ANNEXSTAD, Senior Judge:

A general court-martial, consisting of officer and enlisted members, convicted Appellant, contrary to his pleas, of one specification of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b.[2,3] The military judge sentenced Appellant to a dishonorable discharge, confinement for two years, reduction to the grade of E-1, and a reprimand.

On 2 July 2024, Appellant filed his initial brief with this court raising six issues which we have reordered and reworded: (1) whether Appellant's conviction is factually sufficient; (2) whether the military judge erred when he refused to ask a question from a court member; (3) whether the military judge erred by appointing an Article 6b, UCMJ, 10 U.S.C. § 806b, representative for the minor victim; (4) whether the record of trial is substantially incomplete; (5) whether the convening authority impermissibly considered race and gender when detailing members to Appellant's court-martial; and (6) whether as applied to this case, reference to 18 U.S.C. § 922 in the staff judge advocate's indorsement to the entry of judgment is unconstitutional because the Government cannot demonstrate that barring Appellant's possession of firearms is "consistent with the nation's historical tradition of firearm regulation" under the standard set forth in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022), when he was not convicted of a violent offense.

On 26 August 2024, we remanded this case to the Chief Trial Judge, Air Force Trial Judiciary, to address Appellant's fourth issue. *United States v. Kershaw*, No. ACM 40455, 2024 CCA LEXIS 354, at *4–6 (A.F. Ct. Crim. App. 26 Aug. 2024). Specifically, we found that the record of trial was substantially incomplete because it was missing verbatim audio recordings of the open proceedings conducted on 25 April 2022, and closed Mil. R. Evid. 412 hearings

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[2] Unless otherwise noted, all references to the UCMJ, Military Rules of Evidence (Mil. R. Evid.), and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] Appellant was acquitted of one specification alleging sexual assault of the same child.

conducted on 13 December 2022. We deferred addressing Appellant's other issues until the record was returned to this court. The record of trial was redocketed with this court on 26 September 2024. We find this issue has been resolved because the record now contains the previously missing material and is complete.

On 28 October 2024, Appellant filed a supplemental brief with this court raising an additional issue: (7) whether the Government's submission of a record of trial that was missing required items tolls the calculation of post-trial delay.

After careful consideration of the first issue, we agree with Appellant and find the evidence in the record does not support factual sufficiency, and we set aside the conviction on the sole charge and specification. Therefore, we do not address the remaining issues.

I. BACKGROUND

A. General Background

Appellant entered the Air Force in December 2006. From approximately August 2011 to May 2016, Appellant was stationed at Joint Base (JB) San Antonio-Lackland, Texas, where he worked as a combat arms instructor. During this time, Appellant lived off base with his wife SK, their son, and—off and on—with a number of extended family members. These family members included SK's sister, KS, and her four children; SK's mother, JS; and several other adults and children. At one point, as many as 14 people lived in Appellant's single-family home, including six young children. Appellant, SK, and their son moved out of the house on 26 April 2016 and departed for Appellant's new overseas duty location on 1 May 2016.

The court-martial convicted Appellant of committing a lewd act by intentionally exposing his genitalia to KS's daughter, FA, in San Antonio between on or about 1 April 2016 and on or about 30 April 2016. The Government's case consisted primarily of testimony from FA, KS, and JS.

B. FA's Testimony

FA testified that at some point while she was living in Appellant's house outside of JB San Antonio-Lackland, her mother, KS, asked her to go upstairs and retrieve a clean pair of underwear for her younger sister.[4] According to FA, Appellant followed her to the bedroom, then closed and locked the door behind

[4] KS also confirmed that in two different pretrial interviews that she told investigators that her mother asked her to go upstairs in her room to get her a water bottle.

him. He dropped his pants and underwear to his ankles and exposed his erect penis to her.

FA testified Appellant then told her that he would get her ice cream if she touched and licked his penis. FA testified that she touched Appellant's penis and had it in her mouth. According to FA, after a few minutes, her mother "banged" on the door. FA explained that Appellant immediately "stopped [her] and he pulled up his pants." Appellant then unlocked the door and KS entered the room.

FA testified she immediately went with her mother into another bedroom and told her mother that Appellant exposed his penis to her and asked her to touch and lick it. FA did not, however, admit to touching, licking, or having Appellant's penis in her mouth during this initial conversation with her mother.

FA further testified that her mother kept her and her siblings away from Appellant in her mother's room for "[a]t least two weeks" before FA, her mother, and her siblings moved approximately four hours away to Bridge City, Texas, to live with her younger sister's grandmother. On cross-examination FA confirmed that they went to Bridge City to protect her from Appellant. FA estimated they lived in Bridge City for approximately one year and did not return to Appellant's house in San Antonio until after he moved overseas.

FA could not remember an exact date or year when the incident took place but stated during her testimony that she was around 6 or 7 years old when the incident happened.[5]

C. KS's Testimony

FA's mother, KS, testified to her own recollection of the alleged incident. According to KS, one evening while she was making dinner, she asked FA to get a clean pair of underwear for her youngest daughter. She described watching FA go up the stairs to retrieve the underwear and observed Appellant following KS upstairs approximately "a minute later." KS testified she decided to go upstairs to check on FA about "a minute, [to] a minute and [a] half" later because she did not like how Appellant had followed her daughter.

KS testified she found the door to FA's bedroom was closed so she "pounded" on the door and entered the room by opening the door, which was unlocked. KS stated that she saw Appellant facing the window and FA sitting on the bed. KS testified Appellant "darted" past her without saying anything when she entered the room.

[5] FA was born in 2008.

KS further testified FA looked "scared" and "confused" and did not appear to "understand what had happened." According to KS, she sat down on the bed and asked FA what had happened. FA then told her Appellant had closed the door, asked FA to sit on the bed, pulled his pants down, and asked FA to lick his penis. KS testified that FA did not tell her that she had licked his penis that night.

KS testified she then called her mother, JS, on the telephone and told her what had happened. According to KS, she then kept her children away from Appellant for a "few weeks" until she could "get [her children] out of [Appellant's house]." After a couple of weeks KS and her children moved to Bridge City, where they remained for about six months to a year. On cross-examination, KS again confirmed that they moved to Bridge City *after* the incident occurred and that they moved in part to protect her children from Appellant. KS then testified that about three to four months after they had moved to Bridge City, FA told her for the first time that Appellant's penis had been in FA's mouth. At no point either immediately after the incident or after this later conversation did KS report the incident to police. KS further testified she and her children did not return to Appellant's house until Appellant and his family moved overseas. When trial counsel asked why they moved back to Appellant's house, KS responded, "[b]ecause my sister and my nephew were leaving, and we wanted to say, bye;" on cross-examination, KS agreed she and her children moved back "shortly after" Appellant's family moved out. KS then described that after moving back to San Antonio from Bridge City that FA later disclosed the matter to a school counselor who reported it to law enforcement.

KS could not provide a specific date or year for when the alleged offense occurred.

D. JS's Testimony

KS's mother, JS, testified, *inter alia*, that she learned of the incident between Appellant and FA from her daughter, KS. JS could not recall when this conversation took place and she did not remember when the offense allegedly occurred. JS did confirm, however, that KS and her children remained at Appellant's home for only a "short time" following the incident before moving to Bridge City, Texas.

II. DISCUSSION

A. Law

This court may affirm only such findings of guilty as we find correct in law and fact and determine based on the entire record should be approved. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). In so doing, we cannot except or substi-

tute "language [in] a specification in such a way that creates a broader or different offense than the offense charged at trial." *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019) (citation omitted).

We review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). This court's assessment of "factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *Id.* (alterations in original) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

"In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

In order to convict Appellant of sexual abuse of a child as charged in this case, the Government was required to prove that between on or about 1 April 2016 and on or about 30 April 2016, at or near San Antonio, Texas, Appellant committed a lewd act upon FA, a child who had not attained the age of 16 years, by intentionally exposing his genitalia to her, with an intent to gratify his sexual desire. *See* 10 U.S.C. § 920b; *Manual for Courts-Martial, United States* (2019 ed.), App. 22, ¶ 45b.b(4)(c), at A22-16.

"The military is a notice pleading jurisdiction." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citation omitted). In a particular case, "an exact date need not be alleged" in the charge sheet "unless the date is an essential element of the offense[.]" *United States v. Williams*, 40 M.J. 379, 382 (C.M.A. 1994) (citing *Ledbetter v. United States*, 170 U.S. 606, 612 (1898)) (additional citations omitted). Accordingly, "'the [G]overnment is not required to prove the exact date [of an offense], if a date *reasonably near* is established.'" *United States v. Simmons*, 82 M.J. 134, 139 (C.A.A.F. 2022) (alteration in original) (quoting *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993)) (additional citations omitted). Our superior court has recognized "on or about" as "words of art" in a pleading. *Id.* (quoting *United States v. Brown*, 34 M.J. 105, 110 (C.M.A. 1992)). Such words may be used to "connote[ ] a range of days to weeks." *Id.* (citing *United States v. Barner*, 56 M.J. 131, 139 (C.A.A.F. 2001)) (involving "a difference of 'two to three days'"); *see also Hunt*, 37 M.J. at 346–

47 (involving a difference of three weeks); *United States v. Brown*, 34 M.J. 105, 106, 109 (C.M.A. 1992) (involving a difference of seven days).

In *United States v. Parker*, the Government charged the appellant with, *inter alia*, committing rape and adultery in February or March 1995. 59 M.J. 195, 197 (C.A.A.F. 2003). A deposition of the alleged victim that was introduced at trial indicated, however, that the offenses actually occurred in February or March 1993. *Id.* at 198–99. The court members found the appellant guilty by exceptions and substitutions of committing the rape and adultery between August 1993 and March 1995. *Id.* at 200. The Court of Appeals for the Armed Forces (CAAF) reversed the appellant's convictions and dismissed the two specifications. *Id.* at 201. The CAAF explained that the Government—having chosen not to withdraw the specifications in light of the discrepancy between the charged time frame and the time frame given in the alleged victim's deposition—"was required to prove in its case-in-chief that there was improper sexual activity between [a]ppellant and [the alleged victim] during the charged period in 1995." *Id.* "Proof of improper sexual activity in 1993, without more, did not demonstrate directly or by reasonable inference that [the a]ppellant engaged in sexual activity with [the alleged victim] in 1995." *Id.* The CAAF further opined that the Government's case was legally insufficient and the military judge should have granted the appellant's motion for a finding of not guilty. *Id.*; *see also* Rule for Courts-Martial 917 (where a "military judge . . . shall enter a finding of not guilty of one or more offenses charged . . . if the evidence is insufficient to sustain a conviction of the offense affected").

B. Analysis

Appellant contends the finding of guilty as to the specification of sexual abuse of a child is factually insufficient because the Government failed to prove the offense occurred "between on or about 1 April 2016 and on or about 30 April 2016[,]" as alleged in the charge sheet. The Government argues that we should review Appellant's contention as a variance claim. We agree with Appellant that the finding of guilty is not factually sufficient.

To convict Appellant of the specification as charged, the Government was required to prove beyond a reasonable doubt that the offense occurred "on or about" April 2016. As Appellant notes, the convincing evidence presented at trial indicates the offense in this case allegedly occurred several months before 1 April 2016. The essential question, then, is whether the Government proved the offense occurred "on or about" this date.

We begin our analysis by addressing the Government's argument that the proper way to analyze an issue with the charged timeframe is to utilize a variance standard of review. We disagree. Here, the members were given a variance instruction before deliberating on findings and subsequently made no

changes to the charged timeframe of the offense. Therefore, there is no variance issue for this court to consider. *Cf. English*, 79 M.J. at 121 ("Given that exceptions and substitutions may not be made at the appellate level . . . 'variance,' here, is a misnomer." (citations omitted)). We find this case is more appropriately analyzed utilizing the factual sufficiency standard. *See, e.g., United States v. Gilliam,* No. ARMY 20180209, 2020 CCA LEXIS 236, at *10–11 (A. Ct. Crim. App. July 15, 2020) (unpub. op.) (holding convictions are factually insufficient because evidence failed to prove the charged timeframe).

Utilizing the factual sufficiency standard, as noted *supra*, the Government primarily offered the testimony of three witnesses on this offense. Neither FA, KS, nor JS could remember the exact date or year the offense allegedly occurred. The alleged victim, FA, testified her mother kept her and her siblings secluded in her mother's bedroom after the incident for approximately two weeks before moving approximately four hours away to Bridge City. KS further testified she and her children remained in Bridge City for close to one year and did not return to the place of the alleged offense—San Antonio and specifically, Appellant's residence—until after Appellant moved overseas. The testimony of FA's mother, KS, further supports FA's recollection, including that they remained secluded in Appellant's house for around a week after the incident and then moved to Bridge City for approximately six months to a year. Finally, the testimony of KS's mother, JS, supports both FA and KS on the point that they remained in Appellant's residence for a "short time" before moving to Bridge City.

Considering all the testimony presented by the Government, perhaps the best estimate as to when the incident occurred is sometime between April 2015 and October 2015, placing the offense date six months to a year before the timeframe charged in the specification. This conclusion is consistent with the testimony of FA and KS, who both estimated that after the alleged incident they stayed at the residence for a week or two before moving to Bridge City for approximately six months to one year before returning to Appellant's house after he had moved overseas. Furthermore, KS's testimony indicated that they moved back to Appellant's house close in time to when Appellant and his family moved overseas. The date Appellant departed San Antonio for his overseas assignment—on or about 1 May 2016—is well established in the record.

As a different panel of this court recently stated, "The essential point is that in order to convict [the appellant], the Government was required to do more than prove the facts alleged in the specification *could* be true; it was required to prove the specification—including the alleged dates of the offense—true *beyond a reasonable doubt*." *United States v. Patterson,* No. ACM 40426, 2024 CCA LEXIS 399, at *44–45 (A.F. Ct. Crim. App. 27 Sep. 2024) (unpub. op.) (finding a conviction factually insufficient where testimony established

that offense was likely committed at least three months before the charged timeframe in the specification), *cert. filed*, __ M.J. __, No. 25-0073/AF, 2025 CAAF LEXIS 16 (C.A.A.F. 6 Jan. 2025).

Other decisions of military appellate courts support the conclusion that a discrepancy of six months to a year between the date range for the offense alleged in the charge sheet and the date range the witnesses described at trial is too substantial to support a finding of factual sufficiency. *See Simmons*, 82 M.J. at 139 (citation omitted) ("[T]his Court has held that 'on or about' connotes a range of days to weeks."); *cf. Gilliam*, unpub. op. at *8–11 ("Because the evidence reveals the distinct possibility that all of the acts of digital penetration could have happened approximately eleven months after the last date charged . . . we are not convinced beyond a reasonable doubt that they occurred within or even reasonably near to the timeframes charged by the [G]overnment.").

As a matter of factual sufficiency, we are not convinced the Government proved beyond a reasonable doubt that Appellant committed the convicted offense "between on or about 1 April 2016 and on or about 30 April 2016[,]" as alleged in the charge sheet. *Cf. Parker*, 59 M.J. at 201 (holding the Government's failure to prove the charged offense occurred during the charged time frame rendered the evidence legally insufficient to support conviction). Moreover, in performing our duty under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1), we cannot except or substitute "language [in] a specification in such a way that creates a broader or different offense than the offense charged at trial." *English*, 79 M.J. at 121. Accordingly, we must set aside the finding of guilty as to Specification 2 of the Charge as factually insufficient.

III. CONCLUSION

The findings of guilty and the sentence are **SET ASIDE**. The charge and its specification are **DISMISSED WITH PREJUDICE**. All rights, privileges, and property, of which Appellant has been deprived by virtue of the findings and sentence set aside by this decision, are ordered restored. *See* Articles 58b(c) and 75(a), UCMJ, 10 U.S.C. §§ 858b(c), 875(a).

KEARLEY, Judge (dissenting):

I am convinced the evidence proves Appellant's guilt beyond a reasonable doubt, therefore, I must respectfully dissent. *See United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). I write separately from the majority opinion for two reasons. First, I find the evidence in the record is factually sufficient to uphold Appellant's conviction. Further, I find that the majority's analysis of factual sufficiency is constrained by their decision to treat the charged dates

as an element, or equivalent of an element, for the offense instead of considering divergences between the charged timeframe and proof at trial as a mere variance under the specific facts of this case and then evaluating for prejudice.

I. ADDITIONAL BACKGROUND

Appellant's trial took place six and half years after the alleged offenses. FA was 7 years old when the offense took place and by the time she testified at trial she was 14 years old. There are additional facts discussed below, some of which are not in the majority opinion.

FA and KS and KS's other children moved from North Carolina to Texas when KS's sister and Appellant had their first child around January 2014. KS did not move to Appellant's house initially. Instead, KS and her children, to include FA, lived in Bridge City, Texas, with her youngest daughter's grandmother, and then moved to Appellant's house in San Antonio, Texas, around Christmas of 2014. Exactly when KS and her family lived with Appellant was explored through witness testimony at trial.

A. Testimony of KS

KS testified that she moved in with her sister and Appellant because her sister was "having a baby, her first, and she wanted family there." KS testified that once they moved to Appellant's house in San Antonio, KS and her children lived in Appellant's house approximately five or six years. Approximately three of those years were after Appellant moved to the Netherlands.

During direct examination, KS was asked if she ever moved from Appellant's house in San Antonio during the years they lived there. KS described one time when they moved out of Appellant's house.

> [Senior Trial Counsel (STC):] When you lived at that house, did you live in that house you said approximately five, six years-ish. Was there ever a point where you moved out of that house?
>
> [KS:] Yes.
>
> [STC:] Where did you move?
>
> [KS:] To Bridge City with my youngest's grandma.
>
> [STC:] You said your youngest's grandma?
>
> [KS:] Yes.
>
> [STC:] And where is Bridge City from San Antonio?
>
> [KS:] By Houston area. Right past Houston.
>
> [STC:] Okay. Was there a reason that you moved away?

> [KS:] She wanted to get to know her granddaughter.
>
> [STC:] All right. Was there ever a reason that you moved back?
>
> [KS:] She had a tragedy, and I thought all the kids there might be too much.

During direct examination, the senior trial counsel asked KS about the timeline between the offense and other events that KS would remember. Trial counsel asked what KS was going to do after she walked into the room and saw Appellant with KA on the day of the alleged offense.

> [STC:] So, what was your plan then, ma'am? What were you going to do?
>
> [KS:] We were going to move back to Bridge City.
>
> [STC:] Why?
>
> [KS:] To get my girls out of there.
>
> . . . .
>
> [STC:] Do you know exactly how long you were in the house before you moved?
>
> [KS:] I don't.
>
> [STC:] Did you leave for Bridge City, say, like the next day?
>
> [KS:] I want to say, within a week.
>
> [STC:] All right. So, for that week, what did you do?
>
> [KS:] When [Appellant] was at work, we would come out or when they had to go to school and mom would go with them from upstairs and directly out the door.
>
> [STC:] And what about when [Appellant] came home?
>
> [KS:] We would stay upstairs.
>
> [STC:] Do you remember at any point whether [Appellant] moved away? Do you have a memory of that?
>
> [KS:] Just when he left for the Netherlands.
>
> [STC:] Can you help me understand how does, if at all, does [Appellant] moving to the Netherlands relate in time to when this happened?
>
> [KS:] It wasn't long after it happened when he left.
>
> [STC:] Can you give me a calendar date as to what day this night with [FA], when that was?

> [KS:] I can't. I'm not sure.
>
> [STC:] What things were going on either with you or [Appellant] that might help someone figure out when it was?
>
> [KS:] When he left, but I don't know when they left.
>
> [STC:] Who's he?
>
> [KS:] [Appellant] . . . .
>
> [STC:] And left?
>
> [KS:] To go to the Netherlands. I can't be a 100 percent of when they left.
>
> [STC:] Do you remember how long you lived in Bridge City?
>
> [KS:] Six months to a year, roughly.
>
> [STC:] At any point did you move back to this house?
>
> [KS:] Yes.
>
> [STC:] Why did you move back?
>
> [KS:] Because my sister and my nephew were leaving, and we wanted to say, bye.

During cross-examination, trial defense counsel offered evidence of a photograph of KS's youngest daughter, NS, celebrating her second birthday in Appellant's house. NS's second birthday was at least one week prior to Appellant's departure for the Netherlands. Trial counsel did not object and the photo was admitted into evidence as Defense Exhibit A. In the photo, NS is smiling in front of the cake with a number "2" on it. FA is also in the photo. When NS celebrated her second birthday, FA was 7 years old. Trial defense counsel asked KS about the photo.

> [Trial Defense Counsel (TDC):] [KS], who do you see in this picture?
>
> [KS:] [FA], my mom, my youngest, and [my nephew].
>
> [TDC:] Okay. And just who is your youngest?
>
> [KS:] [NS].
>
> [TDC:] [NS]. Okay. And do you know what this is a photo of?
>
> [KS:] Her second birthday.
>
> [TDC:] And what year and month would her second birthday had been in?
>
> [KS:] April of 2016.

> [TDC:] And this would've been -- if it was 2016, this would've been at [Appellant's] house?
>
> [KS:] Yes.

KS further testified they were still living in Appellant's house when he departed for the Netherlands, and they continued to live there for another three years.

> [TDC:] Okay. When [Appellant] left, were you still living in that house?
>
> [KS:] Yes.
>
> [TDC:] Approximately how long would you say you lived in that house without [Appellant] there?
>
> [KS:] Three years, maybe, roughly.

KS confirmed she was staying with Appellant and her sister at the time the offense happened. She stated that she did not report the event right away because "[a]t the time, [she] didn't know that [she] had --- [they] had another place to go." KS repeated this sentiment when confirming that they were still living in the home when Appellant departed for the Netherlands. She said they lived there because they did not "[have] another place to go."

KS was asked on redirect by senior trial counsel, "[W]hat about when you moved? Why not report it then?" She answered that it was not affecting FA, and, "I didn't think about putting her through it if it wasn't affecting her."

B. Testimony of FA

FA testified she did not remember how old she was when she lived with Appellant. She testified about where she remembers living:

> [STC:] Okay. And what city do you live in, [FA]?
>
> [FA:] San Antonio.
>
> [STC:] San Antonio, Texas?
>
> [FA:] Yes.
>
> [STC:] Do you know how long you've lived in San Antonio?
>
> [FA:] No.
>
> [STC:] Do you remember living any other place other than San Antonio?
>
> [FA:] No.

During direct examination, senior trial counsel asked FA if she ever left Appellant's house in San Antonio.

> [STC:] Let me ask you, [FA]. Do you remember at any point Uncle Jack[1] leaving that house?
>
> [FA:] No.
>
> [STC:] Do you remember at point [sic] after this,[2] you left that house?
>
> [FA:] Yes.
>
> [STC:] Where did you go? Do you know?
>
> [FA:] Bridge City.
>
> [STC:] Bridge City. Who lives in Bridge City?
>
> [FA:] My sister's grandma.
>
> [STC:] Your sister's grandma. Did you live at that house a long time?
>
> [FA:] I think so.

During cross-examination, trial defense counsel asked FA about going to Bridge City after the incident:

> [TDC:] And you stayed in your mom's room for weeks, correct?
>
> [FA:] At least two weeks until he went somewhere. We're not sure and that's when we got in the car and went to Bridge City.
>
> . . . .
>
> [TDC:] And then you said you go to Bridge City. Bridge City, that's also in Texas?
>
> [FA:] I'm not sure.
>
> . . . .
>
> [TDC:] Okay. And, again, this fleeing to Bridge City, that's because you want to be protected from Uncle Jack?
>
> [FA:] Yes.
>
> [TDC:] And that's your mother's intent?
>
> [FA:] Yes.

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[1] FA and some other family members referred to Appellant as Uncle Jack.

[2] "[A]fter this" refers to the offense. The line of questioning in this quote follows FA's testimony about the offense.

> [TDC:] And then for being in Bridge City, it's you're [sic] understanding that you go to Bridge City, you're away from Uncle Jack and you stay there for close to a year, right?
>
> [FA:] Yes.
>
> [TDC:] And then at some point, Uncle Jack he leaves. He goes to the Netherlands, right?
>
> [FA:] Yes.
>
> [TDC:] And then when he leaves to go to the Netherlands, you guys all travel from Bridge City back to Uncle Jack's house?
>
> [FA:] Yes.

C. Testimony about FA

FA's grandmother, JS, testified to two incidents where she was with FA and FA compared kielbasa sausages to a penis.

> [Trial Counsel (TC):] Ma'am, was there something that happened a little later around food that concerned you?
>
> [JS:] Yes, there were two incidents. One, we were up at my mother-in-law's house. She made kielbasa. It was not [a] big deal. The kielbasa was laying on a plate on the table. We calmly sat down to eat. [FA] said, "Oh, that looks like butt." She called a penis a butt. "It looks like butt." We were shocked. We didn't say anything.
>
> The second one was [KS] and [FA] and I were walking through the grocery store and saw the kielbasa on the shelf. "That looks like butt." A six or seven-year-old shouldn't know what a penis looks like.
>
> [TC:] Let's kind of take those two instances together. When, in relation to the incident with her uncle, was [FA] making these comments?
>
> [JS:] Was she what?
>
> [TC:] When was she making these comments?
>
> [JS:] It had to be at least a few months later. I think it was like towards the summertime because we went to my mother-in-law's in the summertime.
>
> [TC:] Did you expect her to know what a penis was at that point?
>
> [JS:] No.

KS described a similar grocery store incident where FA said the sausages look like a boy's "front butt." KS testified that this grocery store conversation happened "two to three weeks after" the offense. The record shows that FA, KS, and JS were in the grocery store together for this conversation.

On direct examination, JS talked about where FA and KS went after the incident.

> [TC:] After the incident with Uncle Jack, did KS and FA stay at the house?
>
> [JS:] I don't know how long it was, but it was a short time. She went over to her youngest daughter's grandmother's house.
>
> [TS:] Did they come back?
>
> [JS:] They came back at some point. I think it was shortly before Jack went to the Netherlands. I don't remember the dates, but shortly before they left.

D. Testimony of Appellant's Wife

Appellant's wife (KS's sister) testified at trial as a defense witness. She did not recall a time when KS and her children moved out of the house for an extended period, and she did not remember if KS ever lived anywhere else in Texas.

E. Appellant's Single Unit Retrieval Format (SURF)

According to Appellant's SURF, Appellant entered his overseas assignment location (the Netherlands) on 2 May 2016.

F. R.C.M. 917 Motion

At the close of the Government's case, trial defense counsel moved for a finding of not guilty under Rule for Courts-Martial (R.C.M.) 917. Trial defense counsel argued their claim was "strictly based on the charging timeframe that the [G]overnment decided to charge [the] case with." Trial counsel argued there was sufficient evidence regarding the charged timeframe such that the motion should be denied. The military judge denied the motion, concluding that there was sufficient evidence within the charged timeframe.

G. Variance Instruction

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the military judge discussed with counsel the instructions he would give to the members. He discussed the elements of the two specifications. In regard to the specification of which Appellant was convicted, the military judge said he had three elements: "exposure, she wasn't 16, and it was to gratify his sexual desire." He

specifically asked counsel if they had any requests for additional instructions. Both trial counsel and trial defense counsel replied "no."

In discussing closing arguments, the military judge asked the parties their position on a variance instruction. The Government requested a variance instruction and trial defense counsel agreed. However, the trial defense counsel wanted the "on or about" language to be reflected as "days or weeks and not months or years." The Government opposed this portion of the instruction. The military judge said,

> As far as days and weeks versus months and years, I believe there are cases where variance has been found. I think the longest I can think of is like 20 months -- either variance or there is similar case law that does repeat a variance or major changes because the test is similar or the same.

The military judge then asked trial counsel if they had a position on "days or weeks, not months or years." Trial counsel opposed the Defense's position and agreed with the court's reading of *United States v. Simmons*, 82 M.J. 134 (C.A.A.F. 2022), which had a variance of 297 days. They went on to say that they had concerns about the court drawing a line that does not appear to be supported by case law.

Ultimately, the military judge gave the following instruction without objection:

> Variance. If you have doubt about the timeframe the alleged offenses occurred, but you are satisfied beyond a reasonable doubt that the offenses were committed at a time that differs slightly from the exact time in the specifications, you may make minor modifications in reaching your findings by changing the time described in the specification, provided that you do not change the nature or identity of the offense.

The panel found Appellant guilty without modifications to the charge and specification of sexual abuse of a child.[3]

II. DISCUSSION

The majority is setting aside the entire case based on Appellant's theory of a timeline where a key component is when FA lived in or stayed in Bridge City, Texas. I find FA and her mother stayed in Bridge City multiple times and for

[3] The panel found Appellant not guilty of a specification of sexual assault of a child (FA) by causing penetration of her mouth with his penis, alleged to have happened at the same time as the convicted offense.

varying durations. Looking at the facts presented at trial, to include multiple witnesses stating or implying that the sexual abuse happened *shortly before* Appellant left for the Netherlands, I find that it happened between on or about 1 April 2016 and on or about 30 April 2016, which is the month before Appellant departed for the Netherlands. Several factors led to me to this determination, discussed *infra*.

A. Law

Factfinders "are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial." *United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014) (first citing *United States v. Russell*, 47 M.J. 412, 413 (C.A.A.F. 1998); and then citing *United States v. Hargrove*, 25 M.J. 68, 71 (C.M.A. 1987)) (additional citation omitted). The Discussion to R.C.M. 918(c) instructs a finder of fact to use common sense and knowledge of human nature and weigh the credibility of witnesses.

The Government may meet its evidentiary burden through either direct or circumstantial evidence. *United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021) (quoting R.C.M. 918(c), and citing *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (holding that the "[G]overnment is free to meet its burden of proof with circumstantial evidence," and observing that "the ability to rely on circumstantial evidence is especially important in cases, such as here, where the offense is normally committed in private")); *see also Holland v. United States*, 348 U.S. 121, 140 (1954) (observing that circumstantial evidence is intrinsically no different from testimonial evidence).

"In considering the record, [Courts of Criminal Appeals] may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1).

B. Evidence

In conducting a de novo review of the evidence, I depart from the majority based on my view of the direct evidence, circumstantial evidence, and reliability of witnesses.

1. Direct Evidence

Appellant's military orders and other documents in evidence prove that Appellant departed San Antonio, Texas, for his overseas assignment in the Netherlands on or about 1 May 2016. Appellant was convicted of committing sexual abuse upon FA on or about the previous month, April 2016.

Appellant introduced photographic evidence in the form of a birthday photo of FA and her sister, NS, showing they were in Appellant's house in April of 2016. This photo demonstrates that Appellant had access to FA during the

charged timeframe. It also shows that FA was 7 years old when the offense happened consistent with her testimony that she was about "six or seven."

KS testified that Appellant committed the offense and it "wasn't long after it happened" that Appellant left for his overseas assignment to the Netherlands. Trial counsel asked KS to provide a calendar date. Although she could not provide a calendar date, KS stated that "when he left" might help someone figure out when the offense took place.

Additionally, FA testified on cross-examination that after the incident, she stayed in her mother's room for "at least two weeks until *he went somewhere*. We're not sure and that's when we got in the car and went to Bridge City." (Emphasis added). FA recalled Appellant "went somewhere" around the same time they went to Bridge City. If they stayed upstairs for two weeks until Appellant went to the Netherlands, the offense would fit directly in the charged timeframe.

2. Circumstantial Evidence

a. Terminology: "move," "lived," "stayed," "left for"

At trial, counsel or the witnesses used the words "moved," "left for," "went," "go," and "planned to go" without much explanation of what they meant. It seems the majority considered all those terms to imply a more permanent "move" for 6 to 12 months. However, the only *move* to Bridge City that KS testified to appears to be unrelated to Appellant's offense. Additionally, I find circumstantial evidence supports that they could mean shorter visits, which leads me to believe the offense happened in the timeline as charged.

I agree with the majority that multiple witnesses recounted that FA, KS, and KS's other children left for Bridge City shortly after the incident; however, none of these witnesses state they *moved* to Bridge City at this time. KS specifically said, "[T]hat's when we got in the car and *went* to Bridge City." (Emphasis added). JS testified that after the offense, KS and FA stayed in the house for a short time, then "went over to" KS's youngest daughter's grandmother's house, then "came back" shortly before Appellant went to the Netherlands. She never said that they were at the grandmother's house for any specific time. She also used the phrase "went over to" versus "moved to" and "came back" versus "moved back." There is a distinction between "moving" to a location, which implies a longer, more permanent stay, and "going to" a location, which describes something more temporary. KS also testified that while they were sheltering in the room in Appellant's home, she came up with a "plan" "to move back to Bridge City to get [her] girls out of there." She did not say she actually moved there on a more permanent basis at that point. Moreover, Bridge City is a several-hour drive from San Antonio, they have family there, and they lived there before moving to Appellant's house. It is reasonable to

think the family would go to Bridge City temporarily after the incident, return to San Antonio in time to "say goodbye" to KS's sister and nephew before their move to the Netherlands, then remain in Appellant's house for some period of time since he was no longer going to be in the house. This is also consistent with KS's testimony, responding "yes" to whether she was "still living in [Appellant's] house" when Appellant moved to the Netherlands, indicating any trip to Bridge City shortly after the incident, but before Appellant moved, may have been temporary.

On direct examination, KS testified about one particular incident where she *moved* out of Appellant's house to Bridge City. KS said the move was because her youngest child's grandmother wanted to "get to know" her granddaughter, implying a different move to Bridge City than a move to "get my girls out of there." That testimony, combined with KS's testimony indicating they only moved back to Bridge City one time, leads me to find their *move* to Bridge City had nothing to do with Appellant's offense. Perhaps they went there for a couple of weeks after the offense, but I am not as convinced that this was the six-month to one-year move that the majority relies on as taking place between the Appellant's offense and his departure for the Netherlands.

However, I acknowledge why the majority drew that conclusion. Trial defense counsel tried to create a timeline where KS and FA stayed in Bridge City and lived there for six months to a year between the incident and Appellant's departure. For example, in questioning FA, trial defense counsel stated:

> [TDC:] . . . [I]t's your understanding that you *go to* Bridge City, you're [sic] away from Uncle Jack and you stay there for close to a year, right?
>
> [FA:] Yes.
>
> [TDC:] And then after that happened your family moved to Bridge City?
>
> [FA:] Yes.
>
> [TDC:] . . . until [Appellant] left for the Netherlands?
>
> [FA:] Yes.

(Emphasis added).

Trial defense counsel took a similar approach in questioning KS:

> [TDC:] So, you *were in Bridge City* for quite a while?
>
> [KS:] Yes.
>
> [TDC:] At least a few months?
>
> [KS:] Yes.

> [TDC:] And you did not *come back* until [Appellant] and his family moved to the Netherlands?
>
> [KS:] Yes.
>
> [TDC:] Shortly after they moved to the Netherlands?
>
> [KS:] Yes.

(Emphasis added).

Meanwhile, in other testimony KS said that Appellant left for the Netherlands "not long after" the offense took place, and she described how she did not report the incident immediately after it happened because she did not know she had "another place to go." She also confirmed she lived at Appellant's home when he departed for the Netherlands because they did not "[have] another place to go." This can be more reasonably read to mean that she did not believe she had anywhere else to live or *move to* permanently.

Moreover, Appellant's wife did not recall a time when KS and her children *moved out* of the house. If KS and her children *moved out* of Appellant's house for six months to a year before Appellant's wife left for the Netherlands, it seems that would have been a memorable event, given that her sister, KS, was helping with meals and had four children living there to include the one closest in age to her own son. KS even testified that the reason they first moved into Appellant's house was because her sister was having her first baby and "she wanted family there." However, if the actual "move" to Bridge City referred to KS's original move to Texas, or a move that occurred after Appellant and his family left for the Netherlands, it makes sense that it would not have been memorable to Appellant's wife.

I find trial counsel's timeline more persuasive than trial defense counsel's proposed timeline. The testimony on cross-examination by trial defense counsel involved leading questions, went without needed clarification, and conflicted directly with other evidence previously provided regarding the timeline. The more persuasive evidence for me comes from the direct evidence, circumstantial evidence, and the testimony of KS and JS regarding the timeline.

b. Age of Children

The fact that NS was 2 years old during the charged timeframe is significant. When the incident happened, FA was asked to get underwear for her sister who, according to KS and JS, was potty training. The record provided precise ages of all siblings in the house. If FA was retrieving underwear in April 2016, it likely would have been for her youngest sibling, NS, who had just become 2 years old.

In closing argument, both trial counsel and trial defense counsel, in summarizing the facts, said FA was getting underwear for NS during the time of the alleged incident. If we move the timeline back as the majority does, it is unlikely that any of KS's children would be potty training as NS would have likely been too young (12–18 months).[4] AS, the next youngest daughter would have been around 4 years old. Using general knowledge and understanding of the ways of the world, 2 years old is the most likely time for a child to be potty training—12–18 months or 4–5 years old is not. *Frey*, 73 M.J. at 249–50; *see also* R.C.M. 918(c) (triers of fact are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial).

Additionally, and understandably, FA's memory of where she lived when she was 6 or 7 years old was poor. In her testimony, FA did not recall living anywhere other than San Antonio; perhaps this is because the relocations to Bridge City were not significant to her. If she *moved* there at age 6 or 7, being school-aged, and during the school year, it seems a new school would be a significant memory jogger.

c. Timeline

During trial, the Defense tried to argue a timeline where the incident occurred, FA moved to Bridge City for as much as a year, and returned to San Antonio as Appellant is moving to the Netherlands. However, there is additional confusion in drawing this timeline. FA and her family lived in Bridge City at least twice. Questions eliciting testimony from FA and KS about how long they lived in Bridge City are without clear context. For example, questions like "Do you remember how long you lived in Bridge City?" and "You were in Bridge City for quite a while?" do not clearly state which *move* or *visit* to Bridge City the question references. Questions about coming back to say goodbye to KS's sister and nephew are also not in context. The record indicates Appellant, and his family, temporarily returned to San Antonio during a Christmas holiday after they moved to the Netherlands. The record is unclear if KS and her children came back to say goodbye to her sister and nephew before their move to the Netherlands or to say goodbye before they returned to the Netherlands after visiting for the holidays. If it is the latter, then KS's move to Bridge City

[4] Both trial counsel and trial defense counsel lay out facts in closing argument that FA was getting underwear for her youngest sister, NS. However, trial defense counsel asked leading questions of KS on cross-examination which implied that FA was getting underwear for her second youngest daughter. For example, KS replied "yes," when trial defense counsel asked her: "And you sent [FA] upstairs to get underwear for [AS]?" However, In April 2016, AS would have been 4 years and 8 months old. Since four-to-five-year-olds are generally potty trained, it is most likely the underwear was for NS as stated in closing arguments by both counsel.

could have taken place *after* Appellant left for the Netherlands and therefore, not within the Defense's proposed timeline.

Furthermore, testimony at trial from JS, who by all accounts stayed in San Antonio after the incident, demonstrates that FA was more likely in San Antonio, and not Bridge City, in the weeks or months after the offense. JS testified that FA made the comment about the sausage in the grocery store at least a few months after the incident. KS testified about the same grocery store comment and claimed it took place "two, three weeks after" the incident. There was no evidence presented that JS moved to, or even visited, Bridge City after the incident. Therefore, it is most likely FA remained in, or returned to, San Antonio after the incident. Additionally, JS recalled FA making another similar comment about sausages at her mother-in-law's house. JS estimated this comment was made at least a few months after the incident, as they visit her mother-in-law in the summer. These facts support a timeline where the incident happened in April 2016, and FA made comments about the sausage weeks to a few months later in the summer of 2016.

d. Reliability of Witnesses

The strongest witness testimony relating to the date of the offense came not from FA but from FA's mother KS, who twice indicated during her testimony that the offense occurred *shortly before* Appellant moved to the Netherlands in 2016. KS said, "[I]t wasn't long after it happened when he left." And when asked if she could think of things that were going on with herself or Appellant that might help someone figure out when the offense took place, KS said, "[W]hen he left, but I don't know when they left." Appellant's military orders and other parts of the record prove that Appellant departed San Antonio, Texas, for his overseas assignment on or about 1 May 2016.

KS's memory of the offense being closely related to Appellant's overseas move is far more reliable than FA's memory. FA was only about 7 years old when the offense occurred. When she testified, she had doubled in age but was still young—only 14 years old. FA was asked to testify to a precise timeline of where she lived seven years prior as a 7-year-old child. It is not surprising that during cross-examination, FA may have agreed to a timeline that did not come from her memory: Appellant's house, then Bridge City for six months to a year, then returning to Appellant's home to say goodbye before the move to the Netherlands. However, earlier, in her own direct examination, FA could not remember a time that she lived anywhere other than San Antonio. As discussed *supra*, FA's testimony is further complicated by terms like "moved" versus "went to" and "stayed with." I depart from the majority by not placing as much emphasis on the timeline proposed by Appellant at trial which largely relied on FA's concurrence with trial defense counsel's timeline.

I find the Government proved beyond a reasonable doubt that the incident happened, and that it happened in April 2016. Given all the testimony elicited at trial, it is most reasonable to conclude that the offense took place, FA and her other siblings sheltered for about a week in a room in Appellant's house, went to Bridge City briefly, and returned to Appellant's home after he moved to the Netherlands. Given KS's testimony, who I find more credible than FA in relation to when and where they lived, the only time they move from Appellant's house to Bridge City was the single time they moved in with the grandmother of KS's youngest child because "she wanted to get to know her granddaughter." They *moved back* to Appellant's house after this move because the grandmother had "a tragedy, and [KS] thought all the kids there might be too much." This is a singular, clearly defined move from Appellant's house to Bridge City which appeared to have nothing to do with the offense for which Appellant was convicted. Therefore, any further "moves" to Bridge City from Appellant's house are likely shorter, temporary stays and not actual moves.

As such, I will not rely on testimony elicited from FA, agreeing to a timeline proposed to her during cross-examination to overturn the trial court's decision. Given FA's age at the time of the offense combined with her testimony being well over six years after the incident and not recalling living anywhere other than San Antonio, her memory of timelines associated to Bridge City is not as significant as her memory of the sexual abuse and its relation to Appellant leaving for the Netherlands.

C. Variance

My dissent is focused on factual sufficiency, and I find beyond a reasonable doubt that the offense happened sometime around April 2016. The majority also seems to find that the offense happened, but they do not find it happened around the timeframe charged—April 2016. Therefore, they find the convicted offense not factually sufficient. It appears the majority felt constrained in their analysis by treating the dates as an element of the offense that had to be proved beyond a reasonable doubt, vice treating the dates as an issue of variance.

There are two types of variance: (1) variance by the factfinder at the trial level (*e.g.*, findings by exceptions and substitutions), and (2) consideration of variance on appeal. The latter is when there is a variance between pleadings and proof which may or may not be fatal to the conviction (*e.g.*, when evidence shows the offense was committed outside the charged and convicted timeframe).[5] The majority recognizes only variance by the factfinder, and

[5] *See*, *e.g.*, *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001) (finding on appeal that the "appellant would be required to show how, if at all, he was prejudiced by this

rightly determines it does not apply to this case because the members did not apply the variance option in their findings. I follow the path of other military appellate courts that have analyzed this second category of variance, and address whether the alleged disconnect between the pleadings and proof is fatal in this case. I agree with the Government that it is not.

1. Law

In order to convict Appellant of sexual abuse of a child as charged in this case, the Government was required to prove that Appellant committed a lewd act upon FA, a child who had not attained the age of 16 years, by intentionally exposing his genitalia to her, with an intent to gratify his sexual desire. *See* 10 U.S.C. § 920b; *Manual for Courts-Martial, United States* (2019 ed.), App. 22, ¶ 45b.b.(4)(c), at A22-16.

"The military is a notice pleading jurisdiction." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citation omitted). In a particular case, "an exact date need not be alleged" in the charge sheet "unless the date is an essential element of the offense." *United States v. Williams*, 40 M.J. 379, 382 (C.M.A. 1994) (citing *Ledbetter v. United States*, 170 U.S. 606, 612 (1898)) (additional citations omitted). Accordingly, "the [G]overnment is not required to prove the exact date [of an offense], if a date *reasonably near* is established." *Simmons*, 82 M.J. at 139 (alteration in original) (quoting *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993)) (additional citations omitted). Our superior court has recognized "on or about" as "words of art" in a pleading. *Id.* (quoting *United States v. Brown*, 34 M.J. 105, 110 (C.M.A. 1992)). Such words may be used to "connote[ ] a range of days to weeks." *Id.* (first citing *United States v. Barner*, 56 M.J. 131, 139 (C.A.A.F. 2001) (involving "a difference of 'two to three days'" and further commenting that appellant "would be required to show how, if at all, he was prejudiced by this variance"); then citing *Hunt*, 37 M.J. at 346–47 (a difference of three weeks did not present an improper material variance); and then citing *United States v. Brown*, 34 M.J. 105, 106, 109 (C.M.A. 1992) (involving a difference of seven days)).

"To prevail on a fatal-variance claim, appellant must show that the variance was material and that it substantially prejudiced him." *Hunt*, 37 M.J. at 347 (citations omitted). The Court of Military Appeals (CMA) considered whether the military judge erred when he refused to dismiss a rape charge due

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variance" between the charged "on or about" date and the proof presented at trial.); *see also United States v. Marrie*, 39 M.J. 993, 1002 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 35 (C.A.A.F. 1995) (where this court recognized that not every variance is recognized by "exceptions and substitutions" at the trial court, and a variance between pleadings and proof may not be fatal to the prosecution; "[t]he primary consideration is one of due process").

to a fatal variance between the date of the alleged rape and the date proven by the Government at trial. *Id.* at 345. The CMA found the Government, which charged appellant with rape "on or about" a certain date, was not required to prove the exact date if a reasonably near date was established. *Id.* at 347. Ultimately, they found appellant failed "both prongs of this test" to show "the variance was material and that it substantially prejudiced him," and upheld the appellant's rape conviction. *Id.*

Even a material variance is not fatal if the accused was not prejudiced. *See id.* (citations omitted) (even "assuming a material variance occurred here as a matter of law," to prevail on a motion for a finding of not guilty the appellant was required to "show that he was prejudiced by the variance in this case").

"Considering the question of variance, it must be remembered that even where there is a variance in fact, the critical question is one of prejudice." *United States v. Lee*, 50 C.M.R. 161, 162 (C.M.A. 1975) (first citing *United States v. Craig*, 24 C.M.R. 28 (C.M.A. 1957); and then citing *United States v. Hopf*, 5 C.M.R. 12 (C.M.A. 1952)). In analyzing whether an appellant was prejudiced by a variance, the courts may look at the record to see if the appellant was "surprised at trial by the purported discrepancy in proof." *Id.* Our superior court found no surprise when the Government's proof was "readily apparent from witness testimony and other evidence presented at the pretrial investigation under Article 32, UCMJ, 10 U.S.C. § 832." *Id.*

The element of prejudice has been assessed by a dual test: (1) has the accused been misled to the extent that he has been unable adequately to prepare for trial; and (2) is the accused fully protected against another prosecution for the same offense. *Id.* (referring to *Craig* and *Hopf*, cited *supra).* "The primary consideration is one of due process." *United States v. Marrie*, 39 M.J. 993, 1002 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 35 (C.A.A.F. 1995) (citing *United States v. Wray*, 17 M.J. 375 (C.M.A. 1984)). "A variance is fatal when an accused is so misled as to be unable adequately to prepare for trial or is not fully protected against another prosecution for the same offense." *Id.* (citing *United States v. McCullah*, 8 M.J. 697 (A.F.C.M.R. 1980)).

"To prevail on a fatal variance claim, appellant must show that the variance was material and that it substantially prejudiced him." *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F. 2006) (quoting *Hunt*, 37 M.J. at 347). "A variance that is 'material' is one that, for instance, substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense." *Id.* (citing *United States v. Teffeau,* 58 M.J. 62, 66 (C.A.A.F. 2003); R.C.M. 918(a)(1)). When applying this two-part test, the United States Court of Appeals for the Armed Forces (CAAF) has placed an increased emphasis on the prejudice prong, noting that "[e]ven where there is a variance in fact, the critical question is one of prejudice." *Id.* (quoting *Lee,* 50

C.M.R. at 161) (additional citations omitted). In *Lee,* the United States Court of Military Appeals went further and broke down the prejudice prong into a two-part analysis: "(1) has the accused been misled to the extent that he has been unable adequately to prepare for trial; and (2) is the accused fully protected against another prosecution for the same offense." *Lee*, 50 C.M.R. at 162.

Variance can be in location. Our superior court has found a variance in location is not always fatal. *See Finch*, 64 M.J. at 122 (in analyzing whether the military judge's finding to except the words relating to the location of the offense created a material variance the court found, "location usually is not a substantial part of the offense of conspiracy"); *see also Teffeau*, 58 M.J. at 66 ("[M]inor variances, such as the location of the offense or the date upon which an offense is allegedly committed, do not necessarily change the nature of the offense and in turn are not necessarily fatal.").

Variance can be in a date. The date of an offense is generally only an ancillary fact (*i.e.*, relevant to jurisdiction over the offense and offender, but not itself an element) and need only be pleaded when it is an essential element of the offense (*i.e.*, when time is of the essence for the offense). *See Williams*, 40 M.J. at 382 (citations omitted). Not all material variances with regard to divergences in dates of the offense pleaded from the evidence at trial become reversible error. Relief is warranted "when the accused was misled by and then detrimentally relied upon the pleading's divergent dates such that he was materially inhibited from either: (a) presenting a relevant defense theory, (b) presenting his own evidence/witness(es), or (c) pursuing a relevant line of inquiry in cross-examining a government witness." *United States v. Patterson,* No. ACM 40426, 2024 CCA LEXIS 399, at *54 (A.F. Ct. Crim. App. 27 Sep. 2024) (unpub. op.) (Warren, J., concurring in part and in the judgment) (citing *Simmons*, 82 M.J. at 141), *cert. filed*, __ M.J. __, No. 25-0073/AF, 2025 CAAF LEXIS 16 (C.A.A.F. 6 Jan. 2025). Thus, a variance is fatal if the accused was prejudiced. *See Barner*, 56 M.J. at 137 (finding "appellant would be required to show how, if at all, he was prejudiced by this variance" between the charged "on or about" date and the proof presented at trial).

This court has recognized that not every variance is recognized by "exceptions and substitutions." *See Marrie*, 39 M.J. at 1002 ("*Where the court in making its findings does not alter the specification by exceptions and substitutions, a variance between pleadings and proof may or may not be fatal to the prosecution.* The primary consideration is one of due process." (emphasis added) (additional citation omitted)).

2. Analysis

If I agreed with the majority's determination of the facts regarding the date of the offense and their functional treatment of the date as an element of the

offense, I would likely find a 6-to-12-month difference between pleading and proof to be a material variance. But that is not the end of the story. Before we can find a variance to be fatal, it must be not only material but must have "substantially prejudiced" Appellant. *See Finch*, 64 M.J. at 121 (citations omitted) (describing two-part test for analyzing a variance to determine whether it is fatal, stating it must be (1) material and (2) substantially prejudicial).

The Government claims that Appellant's assignment of error regarding factual sufficiency should be viewed as a variance because Appellant's claim concerns when the offense occurred, not whether it occurred. The Government further argues that Appellant is not entitled to relief because he was not prejudiced by any potential variance. While I find Appellant's conviction factually sufficient in the first place, I agree with the Government's position on this issue.

a. No Bright Line

The majority did not squarely address the variance issue. However, they tried to draw a bright line as to how much variance is too much. The majority referenced decisions of other military appellate courts supporting their conclusion "that a discrepancy of six months to a year between the date range for the offense alleged in the charge sheet and the date range the witnesses described at trial is too substantial to support a finding of factual sufficiency." *See Simmons*, 82 M.J. at 139.

Our superior courts have not drawn a firm line on what level of a date differentiation is too great to be a lawful variance. I would argue that what is "reasonably near" has not been, and cannot be, defined because it is based on the totality of the circumstances with a view towards whether or not the appellant was prejudiced from any variance.

The majority relies on *Simmons*, a case which easily can be differentiated from the present case. In *Simmons*, the CAAF was reviewing R.C.M. 603's definitions of minor and major changes to the dates on the charge sheet. In that case, the appellant was facing four specifications of sexual assault of a child, one specification of extortion, and one specification of producing child pornography. At trial, the Government endeavored to amend the charge sheet after arraignment and over defense objection. The CAAF determined amending the charge sheet by adding 279 days was not "reasonably near" the originally charged dates. It held that "under the totality of the circumstances presented here, enlarging the charged time frame of one of the offenses by 279 days—after arraignment and over defense objection—was 'likely to mislead the accused as to the offenses charged.'" *Id.* at 136 (quoting R.C.M. 603(a)). But it is the CAAF's reason for doing so which provides the key distinction in this case. In *Simmons,* CAAF found the change in charged time frames was a "major

change" because it essentially increased the seriousness of the offenses with which Appellant was charged because it backdated Appellant's crimes to when the victim was under the age of 16. 82 M.J. at 140. In other words, the 279 days under the specific facts of *Simmons* was unfair for notice purposes, and was a major change, *id.* at 141, but it was not a determination that 279 days, in a general sense, is too great of a variance to sustain a conviction.

In my reading of *Simmons*, the CAAF did not intend the case to provide guidance that 279 days in one direction or the other is too great a period of time for the "on or about" language in all cases, nor did they intend to imply that "on or about" meant "days or weeks." The Court concluded by stating,

> In adopting this analytical approach, we wish to highlight two points. First, we note that our reliance on our material variance case law means that we are not providing a crisp delineation between a period of time that falls within the ambit of the "on or about" language and a period of time that falls outside the ambit of the "on or about" language. That is intentional. We decline to impose a rigid and arbitrary time line that appears nowhere in the rule.

Id. at 139.[6]

The lack of a "bright line" makes sense because the appellant must show he was prejudiced by the variance and of course, prejudice is determined on a case-by-case basis. *Barner*, 56 M.J. at 137 (stating that when a record supports a finding by a rational trier of fact that offenses occurred "on or about" a specific date, in order to be granted relief, the appellant would have to show how, if at all, he was prejudiced by a variance in dates). Therefore, instead of a bright line, we look at the prejudicial implications of a date variance. In Appellant's case, even if the majority was not convinced beyond a reasonable doubt that the offense happened between on or about 1 April 2016 and on or about 30 April 2016, they could have analyzed it as a variance, which requires a determination of prejudice. *See id.* (noting that when witnesses could not establish with absolute clarity the timing of the offense, yet court members concluded the offense happened reasonably near the charged date, "appellant would be

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[6] Furthermore, the military judge at Appellant's trial seemed to agree that *Simmons* did not establish a bright line that anything near or around 279 days was too much. In an Article 39(a), UCMJ, session, the military judge brought up the idea of a variance instruction. Trial defense counsel asked that any instruction be that the date can vary by "days or weeks, not months or years." Trial counsel opposed this language, expressing concerns about the trial court drawing a line that does not appear to be supported by case law. The military judge seemed to agree with trial counsel and chose not to offer a specific timeline for a variance.

required to how, if at all, he was prejudiced by this variance"). If the majority found the record supported a variance in dates, Appellant would need to show how he was prejudiced by this variance in order to prevail on appeal.

b. Prejudice Analysis for Fatal Variances

The majority states, "there is no variance issue for this court to consider" and, citing *English*, 79 M.J. at 121, continues, "Given that exceptions and substitutions may not be made at the appellate level . . . 'variance,' here, is a misnomer." I am not suggesting this court apply exceptions and substitutions at the appellate level by expanding the date range. However, I propose we must look to our superior court's handling of variance cases as a framework for whether a difference of a date range between the pleadings and findings on a de novo review would substantially change the nature of the offense and/or prejudice the appellant, therefore making appellant's conviction factually or legally insufficient.

We can look to variance cases to determine what variances may be fatal to the Prosecution's case. Using the reasoning in *Finch* and *Teffeau*, this court could determine that similar to a location, a date is not always a substantial part of the offense of abusive sexual contact. *See Finch*, 64 M.J. at 121 (military judge's exceptions and substitutions to the location and manner of the offense did not change the nature of the appellant's offense of conspiracy to violating a general order by wrongfully providing alcohol to a person in a delayed entry program). Even if I agreed with the majority's theory of the timeline, that the "best estimate as to when the incident occurred is sometime between April 2015 and October 2015, placing the offense date six months to a year before the timeframe charged in the specification," I would find the difference, or variance, between the charged date range and the date range established by their theory of the evidence was not a "fatal variance" in context of the specific facts of this case. The variance in dates did not change the "nature or the identity of the offense." *Teffeau*, 58 M.J. at 65. Appellant was convicted for a single offense of abusive sexual contact that occurred under a very specific set of alleged circumstances.

Furthermore, while the majority's variance of 6–12 months may have been material, the evidence of record does not show Appellant was prejudiced by a variance of the date range. Here, such a variance would not change notice to the Appellant. The specification revolved around one specific incident, not multiple offenses over an extended period of time as was the case in *Simmons*. Additionally, the variance in date would not mislead Appellant as to be unable to prepare for trial. It is unlikely the date variance would change Appellant's pleading or trial strategy as he appears to have had all the evidence provided and access to witnesses. Additionally, the dates would not likely change the

Government's theory, nor would the dates affect the age component of the specification.

c. Date not an Essential Element of Offense

To the extent the majority opinion implies that the date is an element of the offense that must be "proven beyond a reasonable doubt," I disagree. They state, "As a matter of factual sufficiency, we are not convinced the Government proved beyond a reasonable doubt that Appellant committed the offense 'between on or about 1 April 2016 and on or about 30 April 2016[,]' as alleged in the charge sheet." The majority appears to rely upon *United States v. Parker*, 59 M.J. 195 (C.A.A.F. 2003), to determine that a conviction is legally insufficient if the evidence does not prove the charged date. This in turn makes the date a functional equivalent of an element.

I find that in this case, given the evidence presented at trial, the date is not an essential element of the offense. *Cf. Williams*, 40 M.J. at 382 (providing support that "an exact date need not be alleged" in the charge sheet "unless the date is an essential element of the offense"). When reading *Williams* in line with *Simmons*, it appears that if the Government chooses to allege a date in the charge sheet, "the [G]overnment is not required to prove the exact date [of an offense], if a date *reasonably near* is established." *Simmons*, 82 M.J. at 139. As described above, what is "reasonably near" is not a bright line and depends on the totality of the circumstances. However, the majority does not conduct a totality of the circumstances review, instead implying that six months to a year is too great of a variance and therefore the conviction is factually insufficient.

Looking at the totality of the circumstances in Appellant's case, the date is not an essential element of the offense. Appellant was charged with one specification of sexual abuse of a child. The case did not involve multiple children, multiple locations, or multiple allegations across various timeframes.[7] Similar to the prejudice analysis above, any variation in date charged and ambiguity as to dates in the record would not likely mislead Appellant as to the offenses charged. Furthermore, enlarging the charged timeframe by 6–12 months would not make the alleged offense "absolutely more serious" that it could result in an enhanced sentence. *See id.* at 136–37.

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[7] Even though Appellant was acquitted of one specification alleging sexual assault of the same child, this allegation came from the same event. Additionally, Appellant was convicted of sexual abuse of a child by committing a lewd act upon FA, "a child who had not attained the age of 16 years." FA being under the age of 16 is an element of the offense, and it could make the date a more essential element to the offense, however, in this case it is not. FA was far from 16 years old when the alleged offense happened and she testified at trial, nearly seven years later, at 14 years of age.

The majority cites *Parker* for the proposition that failure to prove the charge timeframe rendered the evidence legally insufficient. They also seem to apply *Parker* to support that a 6-to-12-month difference between the date range charged and the date proved, is too much to be legally and factually sufficient. The circumstances in *Parker* are distinguishable in several significant ways.

First, *Parker* involved an R.C.M. 917 motion. The CAAF concluded the military judge erred in failing to grant the motion because *no evidence* was shown to support an offense happened in a particular timeframe. *Id.* at 201. Second, *Parker* involved multiple victims and multiple sexual offenses. *Id.* at 199. The error involving the R.C.M. 917 motion was in regard to one of the victims where testimony involved a relationship between the appellant and the victim that spanned several years and included consensual sex and allegations of non-consensual sex. *Id.* at 198. The CAAF even indicated, the case involved

> a closely contested trial, in which the members were required to make careful judgements about whether [a]ppellant crossed the line between permissible and impermissible social and professional interactions in a variety of different circumstances. In the context of this case, evidence concerning the time, place, and nature of the interactions between [a]ppellant and others was a major focus of the litigation.

Id. at 200. Third, in *Parker* the Government admitted evidence that clearly showed the events happened in 1993, not 1995. *Id.* Finally, in *Parker* the military judge, prior to trial, denied the Government's request to modify, over defense objection, the dates in the charge sheet from 1995 to 1993. *Id.* at 198. The military judge in that case based his ruling on "the prohibition against major changes in R.C.M. 603." *Id.* at 201. Since the charge sheet was not modified, the Government had to prove the offense happened in 1995. Our superior court found that "the evidence introduced by the prosecution as the close of the government's case was legally insufficient under R.C.M. 917 to prove Appellant [raped or committed adultery] with Ms. AL in the period between February and March 1995" the charged period and as such, the military judge erred by "not granting the motion to dismiss those specifications."

In Appellant's case, we do not have similar circumstances. Unlike *Parker*, where the court found "no evidence" of the offense during the charged time period, 59 M.J. at 200, here a good deal of evidence was presented that the offense may have happened during the charged timeframe. This evidence includes KS's testimony that the offense happened shortly before Appellant went to the Netherlands and we know the exact date Appellant went to the Netherlands. Furthermore, enough evidence was presented that the military judge denied Appellant's R.C.M. 917 motion and the members decided not to change

the date range in their findings despite being given a general variance instruction. Additionally, unlike *Parker*, which involved several years of sexual encounters, some of which were consensual, and some were alleged to be nonconsensual, Appellant was charged with offenses from one distinct encounter with FA. Therefore, the date was not an essential element of the offense as to put Appellant on notice as to a specific sexual abuse allegation. *See Williams*, 40 M.J. at 382 (providing support that "an exact date need not be alleged" in the charge sheet "unless the date is an essential element of the offense"); *see also Simmons*, 82 M.J. at 136, 141 (enlarging the charged timeframe by 279 days was "likely to mislead the accused as to the offenses charged" and unfair for notice purposes).

Furthermore, in *Parker*, the CAAF did not opine whether the members' decision to find appellant guilty by exceptions and substitutions that the rape and the adultery had occurred on dates between 1993 and 1995 was impermissible. As such, the CAAF did not analyze *Parker* as a "variance" case, instead CAAF analyzed it as an error by the military judge in applying R.C.M. 917, which only mandates a finding of not guilty prior to verdict "in the absence of some evidence which could reasonably tend to establish each and every essential element of an offense charged." *Parker*, 59 M.J. at 200.

In addition to those distinct differences, in *Simmons* the CAAF discussed its opinion in *Parker*. The CAAF highlighted that it focused on trial counsel's options after the military judge denied the request for a major change. The Government either could have proved that the offenses took place in the charged timeframe of 1995, or "the Government could have addressed the disconnect between pleading and proof through withdrawal of these charges and preferral of new charges for consideration in the present trial or in a separate trial." *Simmons,* 82 M.J. at 139 *(*citing R.C.M. 603(d)). The CAAF went on to explain, "Because the [G]overnment pursued neither of these options, this Court in *Parker* held that the military judge erred in denying the motion for a finding of not guilty under R.C.M. 917." *Id.*[8] The focus of *Simmons* and *Parker* was on the Government's election of options after a military judge denied a request to change dates on a charge sheet, not on the legal sufficiency of a

[8] In *Parker*, the military judge instructed the panel on variance and the members found the Appellant guilty by exceptions and substitutions of both specifications involving misconduct with one of the victims, Ms. AL. They expanded the timeline that the offense had occurred by moving the first "on or about date" approximately 20 months forward, similar to what the Government previously had sought. *Parker*, 59 M.J. at 200. The CAAF found reversible error with regards to the R.C.M. 917 motion. *Id*. at 201.

conviction where members did not need to vary the dates in their findings and trial counsel did not try to amend the charge sheet.

Next, the majority clearly relies on this court's recent decision in *Patterson*, unpub. op. at *44–45, where a different panel of this court found "a conviction factually insufficient where testimony established that the offense was likely committed at least three months before the charged timeframe in the specification." The majority used this case as a recent application of *Parker* and to stand for precedent that the Government "is required to prove the alleged dates of an offense in a specification beyond a reasonable doubt." In *Patterson* this court also seemed to apply a bright-line rule that three months outside the charged timeframe is a prejudicial variance without doing a prejudice analysis required by *Hunt* and *Barner*. As such, I do not find *Patterson* persuasive in this case. *Cf. Patterson*, unpub. op. at *52–53 (Warren, J., concurring in part and in the judgment) (expressing that the court was "compelled to set aside [a]ppellant's conviction" because of the CAAF's precedent in *United States v. English*, 79 M.J. 116 (C.A.A.F. 2019), and *Parker*).

III. CONCLUSION

I reiterate that I am convinced beyond a reasonable doubt that the date range alleged in the charge sheet corresponds with the strongest evidence introduced at trial and that Appellant committed the offense of which he was convicted. The members appear to have come to the same conclusion; they were given the variance instruction indicating that they could alter the dates of the alleged offense if they found it to have taken place outside the charged timeframe and they did not.

However, even assuming I was not convinced beyond a reasonable doubt as to the April 2016 timeframe and agreed with my colleagues that it was more likely the offense took place 6–12 months earlier, I would find that this variance in the dates did not prejudice Appellant and, therefore, he would not be entitled to relief. Given that the majority's factual sufficiency determination focuses on the dates of the offense, I submit that before the majority overturns the conviction, they should analyze the variance question for prejudice. Having myself conducted that analysis, I find that any variance in Appellant's case between the date charged and convicted and the evidence at trial was not fatal under the circumstances unique to Appellant's case.

Therefore, I would find Appellant's conviction factually sufficient and would continue review of Appellant's remaining assignments of error.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court