

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
W.L. RITTER, J.W. ROLPH, J.F. FELTHAM
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**THALESE GORDON
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200600942
GENERAL COURT-MARTIAL**

Sentence Adjudged: 17 May 2005.
Military Judge: CDR L.T. Booker, Jr., JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic,
Norfolk, VA.
Staff Judge Advocate's Recommendation: CAPT E.S. White,
JAGC, USN.
For Appellant: LT William Stoebner, JAGC, USN.
For Appellee: Capt Roger Mattioli, USMC.

27 September 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920.¹ The convening authority approved the adjudged sentence of confinement of 54 months, reduction to pay grade E-1, and a bad-conduct discharge, but suspended all confinement in excess of 48 months in accordance with a pretrial agreement.

¹ The appellant pleaded guilty to the lesser included offense of indecent assault, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. In the pretrial agreement, the Government reserved the right to proceed on the greater offense of rape. After the military judge completed the providence inquiry into the appellant's plea to indecent assault, the Government went forward on the greater offense of rape and the military judge convicted the appellant of that offense.

The appellant raises three assignments of error, claiming: (1) the military judge abused his discretion when he denied the appellant's motion to admit evidence of past sexual intercourse between the alleged rape victim and the appellant, offered to prove consent or mistake of fact with respect to consent; (2) the evidence was legally and factually insufficient to support the appellant's rape conviction; and (3) the appellant was denied due process where 420 days elapsed from the date of trial until the case was docketed at this court.

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

Background

Hospitalman Second Class (HM2 or Petty Officer) G, the victim, was the only eyewitness to testify about the rape, which occurred on board USS SAIPAN (LHA 2) during the early morning hours of 11 June 2004. At trial, pursuant to MILITARY RULE OF EVIDENCE 412(b)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), the defense moved to admit evidence of specific instances of sexual behavior by the alleged victim with respect to the appellant for the purpose of showing consent, and, pursuant to MIL. R. EVID. 412(b)(1)(C), asserting that the exclusion of this evidence would violate the appellant's constitutional right to confront his accuser. *See* Appellate Exhibit XVI. The Government opposed the motion.

The military judge conducted a closed session, pursuant to MIL. R. EVID. 412(c)(2), to receive evidence and hear the parties' positions. Petty Officer G was the only witness at this hearing. She testified that she had consensual sexual intercourse with the appellant during the Summer of 2003, while their ship was deployed to the Arabian Gulf.

The nature of the deployment was such that members of the crew could not take liberty ashore. Therefore, in accordance with Department of the Navy regulations, the ship observed three "beer days" while on station in the Gulf. *See* Secretary of the Navy Instruction 1700.11C, at ¶ 11f. The consensual sexual intercourse between HM2 G and the appellant occurred on the third of the three "beer days," after the SAIPAN had been at sea for 149 days. At that time, HM2 G and the appellant had known each other for about six months. HM2 G testified that the intercourse took place in May or June of 2003, although she could not recall the exact date.

The third "beer day" included not only the issuing of a ration of two 12-ounce cans of beer to each member of the ship's

crew, but also a so-called "steel beach" picnic, featuring athletic activities and free food, in the ship's aircraft hangar.

HM2 G testified that she attended the picnic in uniform. At some point, she, the appellant, and several other members of the ship's medical department ended up in the Preventive Medicine Technicians' (PMT) office on the 01 level of the ship. HM2 G testified that, by this time, she had consumed her ration of two 12-ounce cans of beer, but was not intoxicated.

The other members of the medical department gradually drifted away, leaving HM2 G and the appellant alone in the PMT office. HM2 G testified that she and the appellant then began kissing. She eventually removed her uniform coveralls and panties, and sat astride the appellant who was sitting on a chair. They then engaged in sexual intercourse for about 10 minutes. Shortly after they finished and dressed, another corpsman entered the PMT space.

Petty Officer G testified that she knew the appellant was married at the time they had sex. She also testified that she did not flirt with him after this encounter, and did not have any sort of social relationship with him afterward.

The rape comprised the second act of sexual intercourse involving HM2 G and the appellant. It occurred approximately one year after their consensual intercourse, in June 2004, when USS SAIPAN stopped for a brief port visit in Mayport, Florida. During the preceding two weeks, the ship and its crew had participated in operational training with Marine Corps forces off the North Carolina coast. Afterward, the ship sailed south to Mayport. There, the ship's Morale, Welfare, and Recreation Officer arranged for "liberty buses" to transport members of the crew to local attractions, including bars.

Petty Officer G testified that she went to a bar in Jacksonville Beach. She was dressed in liberty attire, consisting of shorts and a top. She encountered the appellant at the bar, and testified that they discussed what they planned to do during their period of shore liberty, but that she spent no more than a few moments with the appellant before they went their separate ways. HM2 G testified that she drank about 10 beers and two shots of hard liquor over the course of the evening, and that this amount of alcohol affected her much more than the two beers she had on the "beer day" in May or June of 2003.

At some point, HM2 G took a "liberty bus" back to the ship, and went to her office to check her e-mail. She testified that the appellant walked in and asked if she had a moment. She told him she did, and accompanied him to the ship's medical department. There, she testified that the appellant tried to kiss her and that she turned her head to prevent his kissing her on the lips. She said he continued trying to kiss her, and eventually gave her a "hickey" on the side of her neck beneath

her right ear. Although she did not tell the appellant to stop at this point, she testified that she tried to resist his advances by turning her mouth away from his kisses and trying to keep him from pulling her closer to him.

HM2 G testified that the appellant then grabbed her wrist and pulled her from her office through the operating room into a scrub room. She tried to resist by leaning backward in the direction opposite the one in which the appellant was trying to take her, but said he pulled her from the scrub room into a storage room.

Once in the storage room, HM2 G testified that the appellant again tried to kiss her on the lips, and that she again tried to resist by turning her head to the side. She said she reminded the appellant he was married, and that what he was trying to do was not a good idea. Despite this, she testified that the appellant continued trying to kiss her and began putting his hands up her shirt to feel her breasts. She said he then pushed her to the floor, causing her to hit her head on a set of shelves, pinned her down, and tried to remove her shirt.

The appellant then tried unsuccessfully to put his penis in HM2 G's mouth, followed by an attempt to lift up her shirt. They struggled over her shorts, and she testified that the appellant eventually succeeded in removing them along with her underwear. HM2 G then turned her back to the appellant, grabbed the shelves on which she had bumped her head, and tried to pull herself up from the floor. This movement exposed her vagina from the rear. While she was in this position, the appellant penetrated her vagina with his penis, and engaged in sexual intercourse with her, from behind, despite her verbal protests for him to stop.

The appellant's guilty plea to the lesser included offense of indecent assault was supported, in part, by a stipulation of fact. In the stipulation, he admitted that "during the course of the sexual penetration, HM2 [G] told me to stop the sexual penetration on more than one occasion and she tried to wiggle away from me, however, I did not stop and continued with the sexual penetration until I climaxed." Prosecution Exhibit 1 at 1. The stipulation further stated that "HM2 [G] did not consent to the continued sexual penetration after she told me to stop." *Id.*

Consistent with the stipulation of fact, the appellant indicated during the providence inquiry into his plea of guilty to indecent assault that at some point during his sexual intercourse with HM2 G, it became clear to him, through her words and actions, that she no longer wished to engage in intercourse with him. He informed the military judge that, at that point, he continued to have intercourse with her, against her will and without her consent, and that his conduct from that point forward constituted the offense of indecent assault. Record at 249-50. Following the acceptance of the appellant's plea of guilty to

indecent assault, the Government went forward on the greater offense of rape.

Denial of Evidence of Prior Sexual Relationship

The appellant contends the military judge abused his discretion by refusing to admit evidence pertaining to the appellant's prior sexual relationship with HM2 G. We agree.

MIL. R. EVID. 412, sometimes known as the "rape shield law," was intended to safeguard the alleged victim against the invasion of privacy and potential embarrassment associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process. It is a rule of exclusion, designed to protect alleged victims of sexual offenses from undue examination and cross-examination of their sexual history. *United States v. Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). It is often invoked to prevent the accused from introducing evidence of the sexual history of the alleged victim, but its general rape-shield provisions are applicable to both parties. *Id.* at 223.

MIL. R. EVID. 412 is not an absolute prohibition, however, because it provides for three exceptions. Evidence of specific instances of sexual behavior by the alleged victim is admissible to prove that a person other than the accused was the source of the semen, injury, or other physical evidence. MIL. R. EVID. 412(B)(1)(A). Evidence of specific instances of sexual behavior by the alleged victim with the accused may be offered by the accused to prove consent, or by the prosecution. MIL. R. EVID. 412(b)(1)(B). Finally, evidence the exclusion of which would violate the constitutional rights of the accused is also admissible. MIL. R. EVID. 412(b)(1)(C).

"In order to overcome the exclusionary purpose of M.R.E. 412, an accused must 'demonstrate why the general prohibition in [M.R.E.] 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 burden is on the proponent to "demonstrate how the evidence fits within one of the exceptions to the rule." *Id.* at 222. "In light of the important and potentially competing constitutional and privacy claims incumbent in M.R.E. 412, the rule requires a closed hearing to consider the admission of the evidence. Among other things 'the victim must be afforded a reasonable opportunity to attend and be heard' at this closed hearing." *Id.* (citing MIL. R. EVID. 412(c)(2)).

When a party offers evidence under one of these exceptions, "the military judge applies a two-part process of review to determine if the evidence is admissible." *Id.* First, the military judge determines if the evidence is relevant under MIL. R. EVID. 401. *Id.* Second, if the military judge determines the evidence is relevant, the military judge then applies a balancing

test to determine whether its probative value outweighs the danger of unfair prejudice. MIL. R. EVID. 412(c)(2) and (3). See *Banker*, 60 M.J. at 222.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). The test for nonconstitutional error is whether the error had a substantial influence on the findings. *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001). We determine prejudice from an erroneous evidentiary ruling using a four-part test: (1) the strength of the prosecution case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence at issue. *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985).

1. Consent Exception to MIL. R. EVID. 412.

In the instant case, the appellant sought to introduce evidence that, approximately one year prior to the 11 June 2004 incident that gave rise to the charge of rape, he and Petty Officer G had consensual sexual intercourse under conditions he claims were similar to those that existed at the time of the alleged rape. The appellant argued that both acts of intercourse occurred on board USS SAIPAN, in the ship's medical spaces, and that neither was preceded by a discussion of sexual intercourse or explicit consent. Rather, according to the appellant, in both cases, there was a progression of non-verbal activity that ultimately resulted in sexual intercourse.

Upon the appellant's motion to admit this evidence, on the basis of the "consent" exception in MIL. R. EVID. 412(b)(1)(B) and the "constitutional" exception in MIL. R. EVID. 412(b)(1)(C), the military judge heard evidence on the earlier incident of consensual sexual intercourse and a sufficient description of the acts that gave rise to the rape charge to compare the two encounters. He concluded that Petty Officer G did not demonstrate actual consent to sexual intercourse on the second occasion. Therefore, he found it necessary to determine whether there was "sufficient similarity" between the two instances to "set out an honest and reasonable mistake of fact with regard to consent[]" on the second occasion. Appellate Exhibit XXVI at 3.

The military judge determined that there were significant differences between the two incidents, and that the evidence did not establish a sufficient nexus between them to make the earlier incident relevant. Specifically, the military judge found the incidents dissimilar in that the consensual sexual intercourse took place on station in the Arabian Gulf after the ship had been at sea for 149 days, the behavior of both individuals on that occasion indicated mutual attraction, and HM2 G was not under the

influence of alcohol. In addition, HM2 G facilitated the first act of intercourse by removing her clothing and underwear.

The second incident, the one that gave rise to the rape charge, occurred while the ship was in a liberty port in the continental United States after less than two weeks at sea. HM2 G was under the influence of approximately 10 beers and two shots of liquor, and had to be led, over her protest, into a store room to engage in the activity. She testified that the appellant attempted to force her to perform oral sodomy on him, something which had not been part of their earlier consensual encounter. She also testified that she did not participate in removing her clothes on this occasion, and that the appellant forcibly removed them.

The appellant sought to introduce evidence of sexual behavior and banter in the workplace during the time between the two incidents in the hope that this might support a reasonable mistake of fact as to consent, and to draw a connection between the two incidents by suggesting an ongoing relationship between himself and HM2 G. Although less than professional, this behavior apparently involved most of the members of the medical department, and was an ongoing custom when HM2 G first reported there. In large part, the behavior consisted of members of the medical department slapping each other on their fully clothed buttocks whenever one of them bent over in the workplace. HM2 G denied engaging in this behavior with the appellant, and also denied engaging him in sexual banter. The military judge found that nothing in the practice of slapping co-workers' buttocks could "reasonably be construed as sexual for purposes of [MIL. R. EVID.] 412." AE XXVI at 4.

The military judge found the evidence of banter and horseplay within the workplace relevant on the sexual harassment issue, and ruled that evidence adduced at the closed hearing could be used to defend against that charge. AE XXVI at 5. However, he found the evidence of sexual intercourse between the appellant and Petty Officer G in the summer of 2003 irrelevant to the issue of consent in 2004, and further found that its admission was not constitutionally required. *Id.*

We disagree with the military judge, and conclude that evidence of Petty Officer G's sexual activity with the appellant in the summer of 2003 should have been admitted under MIL. R. EVID. 412(b)(1)(B), for the purpose of showing a reasonable mistake of fact as to consent, and, under MIL. R. EVID. 412(b)(1)(C), because excluding this evidence violated the appellant's right to confront his accuser.

Although the two incidents were separated by approximately a year, and there was no convincing evidence of a continuing relationship between HM2 G and the appellant that suggested actual consent to sexual intercourse on 11 June 2004, there were sufficient similarities between the two acts of intercourse to

make the first act relevant evidence tending to show an honest and reasonable mistake of fact as to consent with regard to the second. There are several aspects of the sexual activity involving the appellant and HM2 G in the summer of 2003 and the charged conduct on 11 June 2004 that are similar: (1) both acts of intercourse took place in an isolated area of the ship's medical spaces, when HM2 G and the appellant were alone; (2) the sexual activity took place while both parties were off duty, and immediately after they had participated in social and/or recreational activities; (3) on both occasions, HM2 G had consumed alcohol prior to the sexual activity; (4) there was no evidence of a prior ongoing relationship between HM2 and the appellant on either occasion; and (5) on both occasions, the sexual behavior proceeded from kissing to intercourse without HM2 G stating that she consented.

We find the evidence of the prior consensual intercourse between the appellant and HM2 G relevant. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MIL R. EVID. 401.

Had the evidence of the 2003 intercourse been admitted, it might have negated an important part of the Government's case. Evidence that HM2 G considered the appellant attractive enough to have willingly had spontaneous sex with him on a previous occasion could have given rise to an honest and reasonable belief on his part that she would again consent to have sex with him under similar circumstances. Here, the relevance of the prior activity is increased because of its similarity to the charged conduct. Based on both the similarity of the facts and the sexual behavior itself, we find that the excluded evidence was more similar to the charged conduct than dissimilar. Therefore, we find that it was relevant, and had a high probative value with regard to the issue of consent or mistake of fact as to consent. "Relevance of prior sexual activity between an accused and an alleged victim is increased by the degree of its similarity to the charged conduct, and whether the sexual activity is distinctive and unusual." *United States v. Andreozzi*, 60 M.J. 727, 739 (Army Ct.Crim.App. 2004), *rev. denied*, 62 M.J. 309 (C.A.A.F. 2005)(citing *United States v. Velez*, 48 M.J. 220, 226-27 (C.A.A.F. 1998)).

Additionally, we disagree with the decision to exclude the evidence of prior consensual intercourse between HM2 G and the appellant. We find that the MIL. R. EVID. 412(c)(3) balancing test required its admission because "the probative value of [this] evidence outweighs the danger of unfair prejudice[.]" *Banker*, 60 M.J. at 222; MIL. R. EVID. 412(c)(3).

Despite their rebuttability, these inferences from consensual intercourse nevertheless carry substantial probative value. Moreover, evidence of prior consensual

intercourse with the defendant is much less likely to embarrass or humiliate the complainant or unfairly prejudice the prosecution, than would, for example, evidence of general promiscuity. In many communities, an affair between an unmarried woman and an unmarried man no longer carries the social disgrace of a generation ago. Thus there may be less reason to exclude such evidence.

Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH U.L. REV. 711, 741-42 (1995).

2. Constitutional Exception to MIL. R. EVID. 412.

In addition to the above, we also find that the evidence of prior consensual sex between HM2 G and the appellant should have been admitted under the "constitutionally required" exception to MIL. R. EVID. 412. Although the two-part relevance-balance analysis applies to all three of the exceptions under MIL. R. EVID. 412, "evidence offered under the constitutionally required exception is subject to distinct analysis." *Banker*, 60 M.J. at 222. "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.'" *Id.* (quoting *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993)(Gierke, J., concurring)).

"In determining whether evidence is material, the military judge looks at 'the importance of the issue for which the evidence was offered in relation to the other issues in [the] case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue.'" *Banker*, 60 M.J. at 222 (quoting *United States v. Colon-Angueira*, 16 M.J. 20, 26 (C.M.A. 1983)).

"After determining whether the evidence offered by the accused is relevant and material, the judge employs the M.R.E. 412 balancing test in determining whether the evidence is favorable to the accused's defense." *Id.* Our superior court believes that the term "favorable," when used in this context, is synonymous with "vital." *Id.*

There are a number of instances where the evidence [of prior sexual behavior of the victim] would be constitutionally required, *e.g.*, when the victim's sexual history shows a motive to fabricate the charge; or when 'the rape charge might be used by the victim to explain her pregnancy, injury or, in the case of a minor, her absence from her home." Or, . . . evidence may be constitutionally required when the victim has a motive to testify falsely to explain to her boyfriend why she

was with another individual

United States v. Sanchez, 44 M.J. 174, 179 (C.A.A.F. 1996) (internal citations omitted). "Likewise, where the sexual conduct is so particularly unusual and distinctive as to verify the defendant's version, there will be a constitutional requirement to admit the evidence." *Id.* at 179-80 (citing *Winfield v. Commonwealth*, 301 S.E.2d 15, 19 (Va. 1983)).

We conclude that cross-examination of the victim about her prior consensual sexual intercourse with the appellant would have been relevant, material, and favorable to the appellant. The evidence was relevant because it may have undermined HM2 G's credibility by exposing one or more reasons for her: (1) having lied to the NCIS agent who interviewed her when she initially denied the existence of this relationship; and/or (2) testifying on the merits that she had not discussed the issue of a second penetration with the trial counsel before trial, when, in fact, she had. *Cf. Olden v. Kentucky*, 488 U.S. 227 (1988) (denial of cross-examination intended to establish bias on the part of a prosecuting rape victim violates the Confrontation Clause of the Sixth Amendment); *United States v. Dorsey*, 16 M.J. 1, 7 (C.M.A. 1983) (evidence showing witness bias when the "critical issue in this case was the credibility of the prosecutrix and appellant[]" constitutionally required to be admitted). Because HM2 G was the Government's central, indeed only, witness to the charged conduct, the excluded evidence was also material, as it could have affected the judgment of the trier of fact.

Having concluded that the military judge committed constitutional error, we must test that error for prejudice. "If the military judge's error was not of constitutional dimension, the appropriate standard is whether the court-martial's findings of guilty were substantially influenced by the error." *United States v. McAllister*, 64 M.J. 248, 250-51 (C.A.A.F. 2007). "On the other hand, '[i]f the military judge commits constitutional error by depriving an accused of his right to present a defense, the test for prejudice on appellate review is whether the appellate court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *Id.* (quoting *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996)).

For the following reasons, we hold that the military judge's exclusion of the evidence of the prior incident of sexual intercourse between the victim and the appellant was harmless beyond a reasonable doubt. First, the Government's central witness, HM2 G, never wavered from her assertion that the appellant forced her to have nonconsensual sex with him in June 2004. She testified that she tried to resist the appellant's advances, reminded him he was married, fought back as he tried to remove her clothing, hit her head on a set of shelves in the room where the sexual activity occurred, and was penetrated from behind while trying to pull herself up from the floor. Photographs of the scene, which were identified by HM2 G in

court, depict evidence of a struggle, including an overturned chair and medical supplies strewn on the floor in front of a set of metal shelves. Prosecution Exhibits 5 and 6; Record at 375-78.

Second, although the defense challenged HM2 G's credibility with regard to her NCIS interview and pretrial preparation with the trial counsel, and she admitted initially lying to NCIS about having had consensual sex with the appellant in 2003, she consistently maintained that her second act of sexual intercourse with the appellant was rape. Her testimony in this regard was consistent with her earlier testimony during the MIL. R. EVID. 412(c)(2) hearing.

Finally, although the military judge ruled that evidence of the 2003 intercourse was not relevant to the issue of consent in 2004, and not constitutionally required to be admitted, the appellant's civilian defense counsel was nonetheless allowed to introduce evidence of the prior sexual relationship by cross-examining HM2 G and NCIS Special Agent Jeffrey A. Henson as to whether HM2 G was honest in her disclosure of the earlier relationship when she provided a statement to Special Agent Henson.

Legal and Factual Sufficiency

The appellant contends that the evidence supporting the finding of guilty of rape is legally and factually insufficient. He alleges, in his brief, that Petty Officer G lied on the witness stand, and provided new evidence at trial concerning a second penetration. Specifically, she testified that, during the alleged rape, the appellant's penis slipped out of her vagina during intercourse, and that he then reinserted it. During cross-examination, it was brought out that she had not mentioned this second penetration in her sworn statement to NCIS, during her testimony at the Article 32, UCMJ, investigation into the charges, or during the closed hearing pursuant to MIL. R. EVID. 412. As a result of the "second penetration" evidence, the appellant contends that the military judge should have given Petty Officer G's testimony less weight than he did, or that he should have disregarded it altogether. He argues that the finding of guilty of rape "reflects a decision by the military judge contrary to the evidence on the record." Appellant's Brief of 29 Sep 2006 at 23. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; see Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. See *Reed*, 51 M.J. at 562; *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

The offense of rape consists of only two elements: (1) an act of sexual intercourse committed by the accused; and (2) execution of the act of sexual intercourse by force and without the consent of the victim. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 45b(1). The victim in this case, Petty Officer G, testified that the appellant forcefully pulled her by the wrist into a storage room on board USS SAIPAN on 11 June 2004, pushed her to the floor (causing her to hit her head on a metal shelf), pinned her down with the weight of his body, and eventually penetrated her vagina with his penis over her protests and against her will. This testimony, by itself, provided legally sufficient evidence to establish the elements of rape. We conclude that a reasonable fact-finder, having heard this evidence and being aware of the elements of rape, could have found beyond a reasonable doubt that the appellant raped Petty Officer G. Moreover, after reviewing the record of trial, we are convinced beyond a reasonable doubt that the appellant is guilty of rape. We decline to grant relief.

Post-Trial Delay

The appellant contends he was denied due process where 420 days elapsed from the date of trial until his case was docketed at this court.

We consider four factors in determining if post-trial delay violates an appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey*, 60 M.J. at 102).

Here, the appellant points out that although he was sentenced on 17 May 2005, the convening authority did not take action on the case until 26 May 2006, over a year later. He also notes that an additional 46 days was required for the record to be mailed to this court. In response, the Government claims "the 374-day delay was not egregious and was largely due to the time

required for the record of this 644-page contested general court-martial to be scoped, transcribed, and authenticated by the military judge. Additionally, Appellant was responsible for a 27-day delay in the post-trial processing of his case." Government's Brief of 17 Nov 2006 at 21.

The 27-day period referred to in the Government's brief began on 23 February 2006, when the appellant was served with a copy of the staff judge advocate's recommendation, and ended on 22 March 2006, when the appellant submitted clemency matters. On 23 February 2006, the appellant requested a 20-day extension to file clemency matters. The request was granted on 27 February 2006, and the appellant submitted clemency matters on 22 March 2006.

The Government argues that the 374-day delay between sentencing and docketing at this court was "largely due" to time spent transcribing the record, and having it authenticated by the military judge. We note that the military judge authenticated the record on 23 December 2005. Although the Government's brief contains a detailed breakdown of the 27-day delay it urges us to hold against the appellant, it is devoid of any explanation of why the convening authority took over five months after authentication to act on the case.

The appellant's case was tried prior to the date our superior court decided *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Therefore, the presumptions of unreasonable delay prior to docketing with this court as set forth in that case do not apply here. Nonetheless, we find that the delay in this case was facially unreasonable, triggering a due process review.

Regarding the second factor (reasons for the delay), as indicated above, the Government argues that the delay between sentencing and docketing was "largely due" to the appellant, but offers no explanation for the five-month-plus delay from the time the record was authenticated until the convening authority acted on the case.

Looking to the third and fourth factors, the appellant concedes that he did not assert his right to a timely review and appeal prior to filing his brief before this court, and we find no claim or evidence of specific prejudice. We find the appellant's generalized claims of prejudice to be purely speculative. We also find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. Thus, we conclude that there has been no due process violation resulting from the post-trial delay. *Jones*, 61 M.J. at 83.

We are also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *Toohey*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002);

United States v. Brown, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

Conclusion

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

Chief Judge RITTER and Senior Judge ROLPH concur.

For the Court

R.H. TROIDL
Clerk of Court