

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

BEFORE

W.L. RITTER

J.F. FELTHAM

E.S. WHITE

UNITED STATES

v.

**Robert A. JOHANSSON
Corporal (E-4), U.S. Marine Corps**

NMCCA 200401940

Decided 31 May 2007

Sentence adjudged 4 December 2003. Military Judge: J.P. Colwell. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, SC.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LT JUSTIN DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Judge, delivered an opinion, Parts I, III, and V of which are for the Court, and filed an opinion dissenting as to Part II and concurring in the result as to Part IV. RITTER, Senior Judge, and WHITE, Judge, joined Parts I, III, and V of that opinion. WHITE, Judge, delivered an opinion, Parts II and IV of which are for the Court. RITTER, Senior Judge, joined Parts II and IV of that opinion.

FELTHAM, Judge, delivered an opinion, Parts I, III, and V of which are for the Court, and filed an opinion dissenting as to Part II and concurring in the result as to Part IV:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of forcible sodomy with a child under the age of 12 and committing an indecent act upon the body of a child under the age of 16, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The convening authority approved the adjudged sentence of confinement for seven years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

The appellant raises four assignments of error, claiming: (1) his sodomy conviction was legally and factually insufficient, in that there was no evidence of penetration; (2) the military judge erred in granting the Government's motion *in limine* preventing the appellant from presenting evidence of prior allegations of sexual abuse by his accuser; (3) the military judge erred in denying the appellant's motion to suppress his statement to the Naval Criminal Investigative Service; and (4) a sentence of confinement for seven years is inappropriately severe, given the appellant's character and the character of his military service.

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. It is the decision of the court, with one member dissenting, that the findings of guilty of Charge I and the specification thereunder, forcible sodomy with a child under the age of 12, are set aside. The court concludes that the remaining findings of guilty and the sentence are correct in law and fact and, following reassessment of the sentence, that no error materially prejudicial to the substantial rights of the appellant remains. See Arts. 59(a) and 66(c), UCMJ.

PART I
Motion to Suppress Appellant's Confession

The Naval Criminal Investigative Service (NCIS) began investigating the appellant after the victim, HP, accused him of inappropriately touching and kissing her while he babysat her at her parents' quarters between July and October 2002.

On 13 March 2003, in response to an NCIS request to interview the appellant, a member of the appellant's command, First Sergeant Lorenzo Cox, USMC, accompanied the appellant to the NCIS office aboard MCRD, Parris Island, South Carolina. When they arrived at the NCIS office, First Sergeant Cox informed the appellant that he was there because the NCIS agents had some questions for him. When the appellant asked to know the subject of the questions, First Sergeant Cox replied that he did not know and said the agents would give the appellant this information.

First Sergeant Cox testified that he told the appellant to "answer the questions to the best of your ability, if you choose to do so." Record at 30. He further testified: "And I also told him that they are the ones who are in charge and are supposed to read you your rights and all because I don't do that because I am not the one who is charging you or has questions for you because I don't know what is going on basically." *Id.* First Sergeant Cox then left the appellant at the NCIS office, telling him to call if he needed a ride after the interview.

Special Agent Tony Richardson, NCIS, arrived at the office shortly thereafter, and escorted the appellant to an interrogation room. There, he introduced him to Special Agent Matthew Plauche, NCIS, and told the appellant that Special Agent

Plauche would be present during questioning. Special Agent Richardson then informed the appellant of the offenses of which he was suspected. At 1110, 13 March 2003, Special Agent Richardson began explaining the appellant's Article 31(b), UCMJ, rights to him. He did this by placing a Military Suspect's Acknowledgement and Waiver of Rights form (Prosecution Exhibit 2 at 1) in front of the appellant, and reading the contents of the form to him.

Special Agent Richardson testified that, after reading the form, the appellant verbally acknowledged that he understood his rights. Record at 121. He then asked the appellant to read the form again, ask any questions he might have, and initial each of the five enumerated rights listed on the form. The purpose of initialing was to acknowledge that the appellant had read and understood each of his individual rights. *Id.*

Special Agent Richardson then asked the appellant if he was willing to talk to him, and testified that the appellant indicated he did. Special Agent Richardson then asked the appellant to read and initial the "waiver of rights" paragraph on the form. The appellant did so, placing his initials at the beginning and the end of the following paragraph: "I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made to me." PE 2 at 1. The appellant signed the waiver of his rights at 1115, 13 March 2003, and Special Agents Plauche and Richardson signed the form as witnesses. *Id.* At the end of the interview which followed, the appellant signed a written statement in which he admitted kissing HP's vaginal area on a Friday night in July 2002. *Id.* at 2-4. He signed the statement at 1628, 13 March 2003, and Special Agents Plauche and Richardson signed as witnesses. *Id.*

At trial, the appellant moved to suppress his confession, arguing that "his free will was overborne," and that the confession was not the result of a free and unconstrained choice. "The totality of the circumstances in this case—the length of the interview, physical condition of the accused, his observed and documented learning and behavioral difficulties, 'repeated and prolonged nature of the questioning, [internal citation omitted], and Cpl Johansson's extensive conditioning by the Marine Corps to comply with authority figures, indicate that his will was overborne. Cpl Johansson was in a hostile environment, for many hours without sustenance and 'believed himself alone against the [G]overnment.' [Internal citation omitted.]" Appellate Exhibit XLI at 11.

After receiving evidence, and making essential findings of fact, the military judge denied the appellant's motion to suppress his confession. The appellant claims this was error. He argues on appeal that his decision to waive his rights and

provide the confession was not a free and unconstrained choice because, as a result of a "reading disorder," he did not finish reading the Military Suspect's Acknowledgement and Waiver of Rights form before signing it "as he could not keep up with SA Richardson and did not ask him to slow down because he did not want to feel stupid." Appellant's Brief of 7 Apr 2006 at 4. He claims that "[h]e initialed the waiver because he was told to and did not want to be reported to First Sergeant Cox." *Id.*

The appellant also argues that: "Before signing [the confession, he] neither read the entire statement nor did he catch the misspelling of his own name on the statement." *Id.* at 6. He further claims not to have understood that the confession could be used against him in a criminal prosecution, believing instead that the information he gave the NCIS agents would be used to corroborate HP's accusations against him so that she could receive therapy. "Appellant did not think anything would happen to him by signing the document and thought it would help [HP] in her therapy." *Id.*

In *United States v. Ellis*, 54 M.J. 958 (N.M.Ct.Crim.App. 2001), *aff'd*, 57 M.J. 375 (C.A.A.F. 2002), this court summarized the law applicable to this assignment of error:

The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law. . . ." Accordingly, a confession must be voluntary before it can be admitted into evidence. *Dickerson v. United States*, 530 U.S. 428, 433, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Congress expressly incorporated these rights into the UCMJ, which states that "no person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend incriminate him," Art. 31(a), UCMJ, and that "no statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." Art. 31(d), UCMJ. The President, in turn, implemented these constitutional and statutory mandates in MIL. R. EVID. 304(a), which states, in pertinent part, that "an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule," and MIL. R. EVID. 304(c)(3), which defines an involuntary statement as one "obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."

In *United States v. Bubonics*, 40 M.J. 734, 739 (N.M.C.M.R. 1994), *aff'd*, 45 M.J. 93 (1996), this court stated that "the principles for determining whether a pretrial statement was the product of coercion, unlawful influence, or unlawful inducement are essentially the same whether the challenge is based on the Constitution, Article 31(d), or MIL. R. EVID. 304." A confession is voluntary if it is "the product of an essentially free and unconstrained choice of its maker." *United States v. Ford*, 51 M.J. 445, 451 (1999)(quoting *Bubonics*, 45 M.J. at 95). "If his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Ford*, 51 M.J. at 451 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961)).

When an accused objects at trial to the admission of his confession, the Government must prove by a preponderance of the evidence that the confession was voluntary. *Bubonics*, 45 M.J. at 95; MIL. R. EVID. 304(e). This determination is made by examining "the totality of all the surrounding circumstances" of the confession, including "both the characteristics of the accused and the details of the interrogation." *Ford*, 51 M.J. at 451 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973)); *United States v. Martinez*, 38 M.J. 82, 86 (C.M.A. 1993); *United States v. Jones*, 34 M.J. 899, 906 (N.M.C.M.R. 1992). Factors to be considered include the following: the provision of rights warnings; the length of the interrogation; the characteristics of the individual, including age and education; and the nature of the police conduct, including the use of threats, physical abuse, and incommunicado detention. *United States v. Sojfer*, 47 M.J. 425, 429-30 (1998). However, the "'totality of the circumstances' does not connote a cold and sterile list of isolated facts; rather, it anticipates a holistic assessment of human interaction." *Martinez*, 38 M.J. 87.

On appeal, the voluntariness of a confession is a question of law that we review *de novo*. *Arizona v. Fulminante*, 499 U.S. 279, 287, 113 L. Ed. 2d 302, 111 S. Ct. 1246, (1991); *Ford*, 51 M.J. at 451. Although the military judge made essential findings of fact in ruling on the appellant's suppression motion, we are not bound by his findings under our Article 66(c), UCMJ, review authority. *United States v. Cole*, 31 M.J. 270, 272, (C.M.A. 1990). However, we are generally inclined to give such findings deference, so long as they are adequately supported by the evidence of record. *Jones*, 34 M.J. at 905; *United States v. Ruhling*, 28 M.J. 586, 592 (N.M.C.M.R. 1988).

Id. at 963-64 (footnotes omitted).

Applying the foregoing principles, we hold that the appellant's written confession was voluntary and admissible. At trial, the appellant's motion to suppress his confession was thoroughly litigated, and the military judge made detailed findings of fact. Having reviewed them, we find those findings of fact to be adequately supported by the evidence of record.

During the NCIS interview, the appellant appeared to be alert, aware of his surroundings, not under the influence of alcohol or other substances, and not visibly nervous. He was properly advised of the general nature of the offenses of which he was suspected, and properly advised of his rights under Article 31(b), UCMJ. The appellant gave no indication that he did not understand the NCIS agents' questions, nor did he appear reluctant to talk to them. While the appellant's statement was being typewritten for his review, he was told he could go to the bathroom, and get a drink or a snack from a vending machine in the building, but declined the opportunity.

The appellant was allowed to review each page of his completed statement, and told to check it for accuracy, typographical errors, and any necessary corrections. While reviewing the completed statement, the appellant asked Special Agent Richardson to insert a clarification. Specifically, he directed that the statement should indicate that after he pulled down HP's underwear, he kissed "the very top" part of her vaginal area. As reflected in the military judge's essential findings, and in the statement itself, Special Agent Richardson inserted the requested language. After reviewing the entire statement, the appellant initialed the beginning and end of each paragraph. Special Agent Richardson then swore the appellant to the statement, and the appellant signed it at 1628, 13 March 2003.

Based on the totality of the circumstances, we hold that the appellant's written confession was provided voluntarily. We find that the appellant's waiver of his Article 31(b), UCMJ, rights was voluntary and that the appellant was fully aware of the rights being waived. We find that there was no action on the part of the NCIS agents or First Sergeant Cox that could have been reasonably construed as overriding the appellant's ability to exercise his Article 31(b), UCMJ, rights.

Concerning the confession itself, we find that the statements the appellant provided to the NCIS agents on 13 March 2003, both oral and written, were provided voluntarily. The appellant was properly advised of his Article 31(b), UCMJ, rights, and voluntarily waived them. Although he was present in the NCIS office for approximately five hours, his interrogation occupied a significantly shorter period than this. Special Agent Richardson began typing the appellant's statement about two hours after the interview began, but lost it in his computer. He then had to

retype the statement before he could give it to the appellant for review.

There is no evidence in the record to suggest that the appellant was ever subjected to bodily harm during the time he was in the company of the NCIS agents. He was not deprived of food or sleep. He was not confined or subjected to loss of any privileges. He was not promised immunity or leniency, offered any reward or benefit, or threatened with adverse consequences. Although the NCIS agents did not interrupt the interview to allow the appellant to go to the chow hall, they told him he could use the bathroom, use a vending machine in the building, and get drinks of water. The appellant declined these offers.

Although the evidence of record indicates the appellant has some learning disabilities that affect his reading ability and written communication skills, we note that he is a high school graduate, of average intelligence, that he successfully completed several military schools, and that he coached Marine recruits on the rifle range at Parris Island. We also note that the appellant never informed the NCIS agents that he was unable to comprehend his interrogation or any part of the written statement that resulted from it. In fact, as we have previously noted, the appellant asked the agents to add clarifying language to the statement.

Based upon the evidence of record, and viewing the totality of the circumstances surrounding the appellant's written confession, we conclude that the confession was voluntary. We find that the military judge properly denied the appellant's motion to suppress the confession, and decline to grant relief.

PART II

Sufficiency of the Evidence

With regard to the appellant's first assignment of error, I disagree with my colleagues, as I am convinced beyond a reasonable doubt that the appellant is guilty of sodomy.

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 also 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).

There are three elements to the offense of forcible sodomy with a child under the age of 12: (1) that the accused engaged in unnatural carnal copulation with a certain other person; (2) that the act was done with a child under the age of 12 years at the time of the offense; and (3) that the act was done by force and without the consent of the other person. "Unnatural carnal copulation" with another is defined as taking into one's mouth or anus the sexual organ of another person, or placing one's sexual organ in the mouth or anus of another person, or having carnal copulation in any opening of the body, except the sexual parts, with another person. Penetration, however slight, is sufficient to complete the offense. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2002 ed.), Part IV, ¶ 51(a), (b) and (c).

The appellant contends that the evidence is both legally and factually insufficient to support his conviction for sodomy because it fails to establish actual penetration. He concedes that he provided a statement to NCIS, in which he admitted kissing the "very top part" of the vaginal area of HP, an eight-year-old girl. However, he argues that his "statement does not admit to kissing the vagina itself, but the vaginal area. Nothing else in the statement explained the use of the word 'area.'" Appellant's Brief at 8.

At trial, HP testified that the appellant kissed "my private part," and "my vagina." When the trial counsel asked HP how many times the appellant kissed her "down there," she replied, "Maybe about once or two times - - I mean two or three times."

The appellant argues:

No other evidence was presented at trial clarifying the discussion above except Appellant's testimony denying the incident.

All the evidence at trial amounted to just [HP's] testimony of two or three kisses on the vagina and the Appellant's admission of kissing the vaginal area. Nothing further was presented to suggest any sort of penetration.

Appellant's Brief at 8-9.

The appellant argues that HP's testimony at trial and his admission to the Naval Criminal Investigative Service "amount to nothing more than the passing of Appellant's lips over [HP's] sexual organ," which, according to his argument, is insufficient to establish penetration. "However, the 'female genitalia' include a large number of organs, the majority of which are located either partially or entirely inside the body's perimeter." *United States v. Cox*, 18 M.J. 72, 73 (C.M.A. 1984)

(citing R. Warwick and P. Williams, *Gray's Anatomy* 1363-64 (35th British ed., 1973)). "Thus, 'licking' [the female genitalia] in no way negates penetration" *Id.*

In *State v. Ludlum*, 281 S.E. 2d 159, 162 (N.C. 1981), the Supreme Court of North Carolina noted:

. . . the external genital organs of the female consist, in pertinent part, of the *mons pubis*, *labia majora*, *labia minora*, and the clitoris. The outermost of these are the *labia majora*. Next come the *labia minora*. The innermost of these anatomical structures is the clitoris

If the term 'vulva' means all of the external female genitals, as the cited authorities say, and the clitoris lies beneath both the outer and inner labia, then in order for the vulva in its entirety or the clitoris to be stimulated, there must be some penetration of at least the outer labia.

Our superior court has held that cunnilingus is among the acts that "clearly constitute discrete offenses of sodomy." *United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997). It has also held that a specification that alleged licking a girl's genitalia sufficiently alleged the offense of sodomy. See *Cox*, 18 M.J. at 74.

The appellant's argument is similar to that of the appellant in *Cox*. In the instant case, the appellant confessed to kissing the "very top part" of HP's vaginal area. HP testified that the appellant kissed her "vagina" and her "private part" two or three times.

My analysis of whether this evidence established the element of penetration depends, in part, upon whether the word "vagina" was used literally, or figuratively, in the context of the trial. "In its denotative, anatomical meaning, the word 'vagina' refers to no more than the canal which leads from the female uterus to the external orifice of the genital canal [internal citation omitted], and does not include those other physiological parts of the female sex organ which otherwise lie 'entirely inside the body's perimeter.'" *United States v. Tu*, 30 M.J. 587, 589 (A.C.M.R. 1990)(citing *Cox*, 18 M.J. at 73). "It extends from the uterus on the inside to the opening on the outside between the folds of the labia minora, just below the outlet of the bladder." J. E. Schmidt, *Attorneys' Dictionary of Medicine and Word Finder*, Vol. 2, 858 (Matthew Bender 1968).

Therefore, in its literal sense, the word "vagina" refers to a portion of the internal female genitalia. Accordingly, "[i]f an accused places his tongue against a vagina in the literal sense of that word, the offense of sodomy is complete because penetration of the female sex organ is inherent in any touching

of a vagina even though there is no penetration of the vagina per se." *Tu*, 30 M.J. at 589 (citing *United States v. Williams*, 25 M.J. 854, 855 (A.F.C.M.R. 1988))(licking the clitoris is sufficient to establish the offense of sodomy). Thus, if HP used the word "vagina" in its literal sense when she testified as to where the appellant kissed her, I conclude that a reasonable factfinder, presented with this evidence and properly instructed by the military judge, could have found the element of penetration beyond a reasonable doubt. Having evaluated this same evidence, and interpreting HP's use of the word "vagina" in its literal sense, I am convinced beyond a reasonable doubt that the finding of guilty of forcible sodomy with a child under the age of 12 is correct in law and fact.

"However, the word 'vagina' is also used in a connotative or pejorative sense as a reference to the entire female sex organ. Thus, an ambiguity in proof arises when evidence indicates no more than that an accused has 'licked a vagina'; without more, such evidence may establish nothing more than a 'passing of the tongue' over the female sex organ, proof which does not establish the requisite element of penetration." *Tu*, 30 M.J. at 590 (citing *United States v. Deland*, 16 M.J. 889, 893 (A.C.M.R. 1983), *aff'd in part reversed in part*, 22 M.J. 70 (C.M.A. 1986) (testimonial evidence that an accused merely 'licked' a vagina is not sufficient to establish penetration)). "There is, quite simply, an issue of fact whether there has been some penetration." *United States v. Green*, 52 M.J. 803, 805 (N.M.Ct.Crim.App. 2000).

Under the facts in the record before us, even if the word "vagina" was used "as a reference to the entire female sex organ," where HP testified that the appellant kissed her "vagina" and "private part," and where the appellant admitted kissing the "very top part" of HP's "vaginal area," I conclude that reasonable court members, having been properly instructed on the elements of forcible sodomy with a child under the age of 12, could nonetheless have found that the element of penetration was proved beyond a reasonable doubt.

Although HP's testimony and the appellant's statement to NCIS did not specifically state that penetration occurred, the members were not thereby precluded from finding that it did. In a trial before members, when a statement of an accused is admitted into evidence, the members shall "give such weight to the statement as it deserves under the circumstances," and the military judge shall so instruct them. MILITARY RULE OF EVIDENCE 304(e)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The final determination as to the weight or significance of the evidence, and the credibility of the witnesses, rests solely upon the members. They are free to consider the probability or improbability of the evidence, including any statements made by the accused.

In applying MIL. R. EVID. 304(e)(2) to the appellant's written statement to NCIS, the members were not limited to the four corners of the document. An accused's confession or admission, even one which falls short of a complete acknowledgement of guilt of all the offenses charged, does not impose a ceiling on the members' findings. The fact that the appellant only admitted to kissing the top part of HP's vaginal area, did not preclude the members from finding that he penetrated her labia majora.

Having heard HP testify that the appellant kissed her "vagina" and her "private part" two or three times, it was entirely proper for the members to consider HP's ability to accurately remember the incident, as well as her demeanor in court. It was also proper for them to consider the extent to which HP's testimony supported or contradicted the appellant's statement, and how the appellant and HP may have been affected by the verdict.

In weighing any discrepancy or discrepancies between HP's testimony and the appellant's statement, it was proper for the members to consider whether the discrepancy was the result of an innocent mistake or a deliberate lie. Considering all of these matters, it was proper for the members to consider the probability of HP's testimony, the probability of the appellant's statement, and the inclination of HP and the appellant to tell the truth.

Furthermore, even though HP did not specifically testify that the appellant penetrated her labia majora, the absence of such testimony did not preclude the members from considering the appellant's statement as evidence against him on the charge of committing forcible sodomy with a child under the age of 12. MIL. R. EVID. 304(g) provides that "[a]n admission or confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth."

However, "[t]he corroborating evidence need not confirm each element of the charged offense. Nor does this rule even compel the corroboration of the *corpus delicti* of the offense." *United States v. Nellon*, No. 200401014, 2006 CAAF LEXIS 13 at 6, unpublished op. (N.M.Ct.Crim.App. 25 Jan 2006)(citing *United States v. Seay*, 60 M.J. 73, 79 (C.A.A.F. 2004)). "It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth" *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988)(quoting *Opper v. United States*, 348 U.S. 84, 93 (1954)). "This inference may be drawn from a quantum of corroborating evidence that [our superior court] has described as 'very slight.'" *United States v. Arnold*, 61 M.J. 254, 257 (C.A.A.F. 2005)(citing *Melvin*, 26 M.J. at 146).

Although HP did not specifically state that penetration occurred when she testified that the appellant kissed her "vagina" and her "private part," her testimony nonetheless supported the "essential facts" of the appellant's statement to NCIS "sufficiently to justify" an "inference of their truth." I conclude that, having taken this testimony into account, along with the appellant's admission that he kissed the "very top part" of HP's vaginal area, and letting the credibility of HP and the appellant be their guide in evaluating the evidence, the members could have found that the element of penetration, however slight, was proved beyond a reasonable doubt.

Having weighed this same evidence, and, as this court did in *Green*, "applying [my] own common sense and knowledge of human nature and the ways of the world," based upon HP's testimony about the appellant kissing her "vagina" and "private part" two or three times, and the appellant's admission that he kissed her "vaginal area," I conclude that the appellant orally penetrated HP's labia majora. See *Green*, 52 M.J. at 805. Taking all the evidence into account, and noting that HP testified that the appellant kissed a specific part of her body, as opposed to merely an area of her body, I conclude that the appellant actually kissed her genitals. Having so concluded, and again taking all the evidence into account, I deem it highly unlikely that, having first decided to kiss the genitals of a child, the appellant then conducted himself in such a careful and fastidious manner as to deliberately avoid penetrating, however slightly, that child's genitals as he applied his lips to them.

After carefully reviewing the record of trial, I am convinced beyond a reasonable doubt that the appellant committed each of the elements of the offense of forcible sodomy with a child under the age of 12. I would also find the evidence legally sufficient and would affirm the finding of guilty of this offense, and would decline to grant relief on this assignment of error.

PART III

Evidence of Prior Allegations of Sexual Abuse

At trial, the military judge granted a Government motion *in limine*, excluding any defense inquiry into prior incidents or allegations of sexual abuse made by HP and her mother against her natural father. The defense asserted that HP's father would have testified that HP accused him of sexual abuse during a 1999 child custody proceeding involving HP and her mother, and that HP's mother coached HP to make this allegation. The appellant argued this evidence was admissible to show: (1) that HP had made false allegations of sexual abuse against her natural father in order to gain attention, or as a result of coaching by her mother for the purpose of giving her mother an advantage in custody litigation, thereby demonstrating bias or a motive to fabricate; and (2) that, as a result of prior sexual abuse by her natural father, HP suffered from dreams in which she believed she was

being attacked, and that she had transferred the trauma resulting from this abuse to the appellant.

The military judge found the defense argument that evidence of HP's prior allegations demonstrated bias, or a motive to fabricate the charges against the appellant for the benefit of HP and her mother, "speculative at best." Record at 360. He noted:

There is or has been no connection or link between this accused and [HP's] natural father, [JP]. While Military Rule of Evidence 608(c) does allow extrinsic evidence to show a bias, prejudice or motive to misrepresent, this bias or motive to misrepresent needs to be related to the issues before the court. The relevant issues before this court are whether this accused, Corporal Johannson, committed sodomy and indecent acts with [HP]. Any motivations that [HP] or her mother might have had to make allegations against her natural father four years ago do not suggest a motive to fabricate the allegations against this accused.

Id. at 360-61.

With regard to the defense claim that this same evidence showed a motive or plan by HP and her mother to fabricate allegations of sexual abuse to their advantage, and that the prior allegations were made under circumstances similar to those present at the appellant's trial, the military judge again found the defense argument "speculative and not supported by the evidence." *Id.* at 361.

Although the defense claimed the prior allegations of abuse were made in the midst of a contested custody proceeding, the military judge observed that this custody proceeding was not initiated until after the allegations against the appellant had surfaced. *Id.* at 361. He noted that at the time of the allegations, HP's mother and father had already agreed to joint legal and physical custody of HP, with HP's mother having primary custody. HP's mother then sought to modify this arrangement by petitioning for sole custody of HP, but did not begin this process until after the allegations arose. *Id.* The military judge noted that the appellant was not in a position to be impacted, financially or otherwise, by any divorce or custody proceedings concerning HP. Therefore, he regarded as "speculative" the defense argument that the earlier accusations against HP's father showed a motive or plan on the part of HP and her mother to fabricate sexual allegations to their advantage. *Id.*

The military judge also noted that in order for evidence of HP's prior allegations of sexual abuse to be relevant for impeachment purposes, the allegations would have to have been false. (If true, they would have provided no basis for

impeachment.) Although the defense argued that HP's father's denial of the allegations would be sufficient to establish their falsity, the military judge noted that the record contained "an equal amount of evidence, if not more," to suggest that the allegations were true. *Id.* at 362. Concluding that the truthfulness of the allegations "would become a hotly contested issue that the members would have to decide," and that this "would then unnecessarily create a trial within a trial," the military judge, citing MIL. R. EVID. 403, ruled that the probative value of this evidence was substantially outweighed by the "danger of confusion of the issues, undue delay and waste of time." *Id.*

On appeal, the appellant contends the evidence of HP's prior allegations "was relevant under Military Rules of Evidence 404 and 608," and that it was error for the military judge to exclude it. Appellant's Brief at 11. We disagree.

A military judge's decision to admit or exclude evidence under MIL. R. EVID. 403 is reviewed for an abuse of discretion. *United States v. Lake*, 36 M.J. 317, 322 (C.M.A. 1993). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000)(quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

We hold that the military judge did not abuse his discretion in this case. The evidence the appellant sought to present concerned unrelated accusations of sexual abuse made by the victim against a party other than the appellant. As the military judge concluded, this evidence was irrelevant to the appellant's trial, and did not establish a sufficient basis for an attack on HP's credibility. The evidence of prior allegations of sexual abuse had no bearing on the charges against the appellant, nor did it provide evidence of a motive on the part of HP to fabricate accusations against him. *See McElhaney*, 54 M.J. at 130.

"In the context of limiting cross-examination of a witness, [our superior court has] held that 'the mere filing of a complaint is not even probative of the truthfulness or untruthfulness of the complaint filed Thus, its relevance on the question of credibility of a different complaint in an unrelated case [. . .] escapes us.'" *McElhaney*, 54 M.J. at 130 (quoting *United States v. Velez*, 48 M.J. 220, 227 (C.A.A.F. 1998)). Applying *McElhaney* and *Velez*, we decline to grant relief.

PART IV Sentence Severity

In his fourth assignment of error, the appellant claims the sentence of confinement for seven years is inappropriately severe,

given the nature of the offenses, his character, and the character of his service. Because the Court set aside the findings as to Charge I and its specification, my colleagues reassessed the sentence before considering the assigned error and found that even in the absence of Charge I the court-martial would not have adjudged a sentence less than that approved by the convening authority. Since I would affirm the findings as announced by the court-martial, sentence reassessment would not be required; however, I concur with my colleagues in their conclusion after sentence reassessment and as to the resolution of the assigned issue.

PART V Conclusion

The findings of guilt of Charge I and the specification thereunder are set aside, and the charge is dismissed. The findings of guilt of Charge II and the specification thereunder are affirmed. The sentence, as approved by the convening authority, is affirmed. We direct that the supplemental court-martial order contain the pleas and findings with respect to Specification 3 of Charge II.

WHITE, Judge, delivered an opinion, Parts II and IV of which are for the Court:

In his first assignment of error, the appellant contends his conviction of sodomy, in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925, is legally and factually insufficient because there was no evidence of penetration. The Government counters that the testimony of HP, the victim of the alleged sodomy, and the appellant's admissions to the Naval Criminal Investigative Service (NCIS) raised an inference of penetration sufficient to establish that element beyond a reasonable doubt. After weighing all the evidence in the record, and recognizing we did not see or hear the witnesses, we must decide whether we are convinced of the appellant's guilt beyond a reasonable doubt.

PART II
Sufficiency of the Evidence

Facts

HP was nine years old at the time of her testimony. She had been eight years old at the time of the alleged sodomy. Record at 499.

At trial, HP testified the appellant kissed her "lips and stuff," and her "private part." *Id.* at 505. The trial counsel attempted to clarify what HP meant by "private part." He asked her, "When you say private part, what do you mean by private part?" HP replied, "My private part." The trial counsel then pointed to various part of his body, such as his head, ears and lips, asking HP what she called each part. He then asked her, "What about the area that's below my belt?" As he asked this question, the trial counsel put his hands on his pockets below his belt, next to his hips. HP answered, "That's your private part." *Id.* at 506. She then acknowledged boys and girls have different private parts. When asked "What type of private parts does a girl have?" she replied, "They have a vagina." When asked, "What do you call your private part?" she replied, "A vagina."

HP also testified the appellant "was kissing my vagina." Asked what that felt like, she responded, "Probably weird." She testified the appellant kissed her there "Maybe about once or two times - I mean two or three times." While the appellant was kissing her vagina, HP testified, she was lying on her back, with the appellant over her legs. *Id.* at 507. She further testified the appellant then "flipped [her] on [her] stomach and he stuck his finger up [her] bottom." Finally, she said the appellant had "stuck his tongue in [her] mouth," and it tasted "nasty" and like "mouthwash." *Id.* at 510.

The Government also introduced the appellant's 13 March 2003 statement to NCIS. In that statement, the appellant said:

HP did not get up, so I told her I would pull her underwear down. HP did not respond, so I pulled her underwear partially down, to see if she would move. I kissed HP on her lower belly, warned her again, then I pulled her underwear down further so I could see the top portion of her vagina. I warned HP again, but still no response, so I kissed her vaginal area (very top part).

Prosecution Exhibit 2 at 2.

Law

Article 66(c), UCMJ, commands the Courts of Criminal Appeal to affirm only such findings of guilt as they find correct in law

and fact and determine, on the basis of the entire record, should be approved. By this command, Congress conferred on the Courts of Criminal Appeals an awesome, plenary, *de novo* power of review that requires this court to weigh the evidence in the record and, making allowances for not having personally observed the witnesses, determine whether the court itself is convinced, beyond a reasonable doubt, of the appellant's guilt. *United States v. Beatty*, ___ M.J. ___, No. 06-0793, 2007 CAAF Lexis 534 (C.A.A.F. Apr. 23, 2007); *United States v. Walters*, 58 M.J. 391, 396 (C.A.A.F. 2003); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Article 66 requires the court to evaluate not only the sufficiency of the evidence, but also its weight. *Turner*, 25 M.J. at 325.

For the appellant to be guilty of sodomy in this case, the Government must have proved the appellant engaged in unnatural carnal copulation with HP. It is "unnatural carnal copulation" for a person to take into his mouth the sexual organ of another person. Penetration, however slight, is sufficient to complete the offense. See Art. 125, UCMJ; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 51. Some penetration, however, is a necessary element of sodomy. *United States v. Cox*, 18 M.J. 72, 73 (C.M.A. 1984); *United States v. Ruppel*, 45 M.J. 578 (A.F.Ct.Crim.App. 1997), *aff'd*, 49 M.J. 247 (C.A.A.F. 1998); *United States v. Milliren*, 31 M.J. 664, 665 (A.F.C.M.R. 1990).

Penetration is not established by evidence an accused simply "touched" or "licked" the victim's vagina or genital area. "Such language neither proves nor negates penetration. Instead, it simply creates an ambiguity of proof." *Milliren*, 31 M.J. at 665; (citing *United States v. Tu*, 30 M.J. 587 (A.C.M.R. 1990)). Evidence the accused "licked a vagina," by itself, may establish nothing more than a passing of the tongue over the female sex organ, which does not establish the requisite element of penetration. *Tu*, 30 M.J. at 590; see also *United States v. Deland*, 16 M.J. 889 (A.C.M.R. 1983), *aff'd*, 22 M.J. 70 (C.M.A. 1986). When confronted with such ambiguity, the court can sustain a conviction for sodomy "only where there is some evidence, albeit circumstantial or interpretive, from which the court can conclude penetration occurred." *Milliren*, 31 M.J. at 665; *United States v. Ruppel*, 45 M.J. 578, 587 (A.F.Ct.Crim.App. 1997)(citing *Milliren*).¹

¹ The only reported case sustaining a conviction for sodomy on evidence the accused merely "kissed" the victim's vagina is *United States v. Breuer*, 14 M.J. 723, 726 (A.F.C.M.R. 1982). In that case, however, the Air Force Court found the accused's admission he had kissed the victim's vagina adequate to establish penetration only because the military judge had informed him penetration was required, and he had admitted he was guilty understanding that requirement. Without that contextual support, the Air Force Court would have found the accused's admission he had kissed the victim's vagina insufficient to prove penetration.

If the evidence fails to establish penetration, the accused may still be guilty of the lesser included offense of indecent acts with a child under 16, in violation of Article 134, UCMJ, if the evidence establishes all the elements of that offense. *United States v. Yates*, 24 M.J. 114, 120 (C.M.A. 1987); *Milliren*, 31 M.J. at 666; *Deland*, 16 M.J. at 893.

Factual Sufficiency of the Evidence

In this case, we are not convinced beyond a reasonable doubt that the evidence establishes the appellant penetrated the victim's sexual organ. Given HP's tender years, and in light of her entire testimony, it is highly doubtful she used the term "vagina" in the technical sense, meaning "the canal which leads from the female uterus to the external orifice of the genital canal," which would necessarily establish penetration. *See Tu*, 30 M.J. at 589 (quoting *Webster's New Third World Dictionary* 2528 (1981)). More likely, she used the term in its more colloquial sense to refer to the entire female sex organ. While such a use does not negate the possibility of penetration, it does create an ambiguity of proof. Further, neither the appellant's statement he "kissed [HP's] vaginal area (very top part)", nor HP's testimony she was on her back and the appellant was "on [her] legs" as he kissed her vagina, provides "circumstantial or interpretive" evidence that resolves the ambiguity of HP's testimony.

Finally, in describing the appellant's indecent acts, HP clearly testified the appellant "stuck his finger in my butt," and "stuck his tongue in my mouth." Although HP's young age raises substantial doubt she used the word "vagina" with technical precision, she was clearly old enough and confident enough to describe the appellant's penetration of her anus and mouth with his finger and tongue, respectively. Had he also penetrated her vagina, it is entirely reasonable to expect she could have so testified.

Accordingly, we conclude the evidence is factually insufficient to prove sodomy. Having concluded the evidence is factually insufficient, it is unnecessary to discuss the appellant's contention that the evidence is also legally insufficient.

While the evidence is factually insufficient to prove sodomy, it does establish beyond a reasonable doubt that the appellant committed an indecent act with a child under the age of 16, in violation of Article 134, UCMJ, by kissing HP on the vagina. While such conduct is a lesser included offense of sodomy, it was also included in the specification under Charge II, of which the appellant was found guilty. As a result, it would be multiplicitous to affirm a separate finding of guilt of indecent acts under Charge I. The proper resolution, therefore, is simply to set aside the finding of guilt to Charge I and the

specification thereunder, and affirm only the finding of guilt to Charge II and its sole specification.

PART IV
Sentence Reassessment and Appropriateness

Having determined that we must set aside the finding of guilt of Charge I and its specification, we must reassess the sentence. Applying the analysis set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1988), and after carefully considering the entire record, we are satisfied beyond a reasonable doubt that, even if the appellant had not been convicted of Charge I, the court-martial would not have adjudged a sentence less than that approved by the convening authority in this case.

Further, after reviewing the entire record, we find the sentence, as adjudged by the court-martial and approved by the convening authority, appropriate for this offender and his offense. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). The appellant, a friend of the victim's family, sexually molested a young girl and violated her trust. His crime deserves the punishment meted out in this case.

For the Court

R.H. TROIDL
Clerk of Court