

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

**Before  
J.A. FISCHER, B.T. PALMER, T.H. CAMPBELL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**O'GARRY L. CLARKE  
AVIATION BOATSWAIN'S MATE (E-5), U.S. NAVY**

**NMCCA 201400416  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 22 Jul 2014.

**Military Judge:** CAPT Robert B. Blazewick, JAGC, USN.

**Convening Authority:** Commander, Navy Region Southeast,  
Jacksonville, FL.

**Staff Judge Advocate's Recommendation:** CDR N.O. Evans,  
JAGC, USN.

**For Appellant:** David P. Sheldon, Esq.; Maj Jason R.  
Wareham, USMC; LT Doug Ottenwess, JAGC, USN.

**For Appellee:** Maj Tracey Holtshirley, USMC.

**30 November 2015**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PALMER, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of two specifications of sexual assault (vaginal and oral penetration) of a child who had attained the age of twelve but not sixteen years in violation of Article 120b, Uniform Code of Military

Justice, 10 U.S.C. § 920b.<sup>1</sup> The military judge merged the specifications for sentencing and imposed seven years of confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and except for the punitive discharge ordered it executed. Consistent with the military judge's recommendation, the CA suspended execution of adjudged forfeitures for a period of six months.

The appellant raises two assignments of error (AOE):

(1) that the military judge erred in excluding evidence under MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.); and

(2) that the evidence is legally and factually insufficient to support his convictions.

After carefully considering the record of trial and the submissions of the parties, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

## I. Background

In June 2013, the appellant, then 33 years old, lived in single-family base quarters on Naval Air Station Whiting Field. CMP was a 13-year-old friend of his daughter's who lived in an adjacent house with her father, Air Traffic Controlman First Class (AC1) DP. The appellant was aware of CMP's age.<sup>2</sup>

On the evening of 25 June 2013, at approximately 1930, CMP visited the appellant, who was home alone. Initially, they were in the kitchen but then moved to a bedroom, sat on a bed, and watched a movie for approximately an hour. CMP testified that when the appellant asked her what she wanted, seeing that he was aroused and believing he wanted sex, she removed her pants and underpants. They then engaged in oral sex and sexual intercourse, both with and without a condom.<sup>3</sup> According to CMP,

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<sup>1</sup> The appellant was acquitted of a third specification of sexual assault by engaging in oral sex with the same child victim and an Additional Charge of committing a lewd act with same victim in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b.

<sup>2</sup> Record at 124.

<sup>3</sup> *Id.* at 137-43.

during the course of this activity the appellant told CMP they needed to keep their actions secret, that she should "take it to [her] grave," and that "he was going to go to jail."<sup>4</sup> CMP testified that the sexual intercourse was interrupted when CMP's father, AC1 DP, rang the front doorbell.

AC1 DP testified that after some delay, the appellant answered the door and denied that CMP was in the house. AC1 DP began a series of trips between his house and the appellant's house searching for his daughter. Eventually, he discovered CMP, clad only in a short-sleeved half-shirt and her underpants, hiding in the bedroom closet. He then brought his daughter home, photographed her,<sup>5</sup> and called the police. AC1 DP testified the appellant came to his house three times that evening before the police arrived, variously wanting to speak with AC1 DP, to know what CMP told her father, and to return CMP's clothes - which AC1 DP refused to accept.<sup>6</sup>

Naval Criminal Investigation Service (NCIS) agents began gathering evidence that same night. They found CMP's flip-flops in the appellant's house and her sweater and cellphone were found in different locations in an adjacent yard.<sup>7</sup> Both the victim and the appellant underwent a sexual assault forensic examination. Test results revealed the presence of semen on CMP's cervix and perineum, but the sample was insufficient to establish a DNA profile.<sup>8</sup> CMP's DNA, however, was confirmed on the appellant's genitals and on the inside of his underwear. Additionally, a trace evidence expert testified that two compounds, starch and polydimethylsiloxane (PDM), which are most commonly used on lubricated condoms, were found on swab samples taken from both the appellant's penis and CMP's vagina. However, although the starch levels on the victim's swabs were not high enough to meet the threshold necessary to conclusively determine that a condom was the source of PDM found in the victim, the PDM and starch levels on the victim's swabs still exceeded the levels found on control swabs.<sup>9</sup>

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<sup>4</sup> *Id.* at 144.

<sup>5</sup> These photographs were admitted into evidence. *Id.* at 54, 81-82, 152, and Prosecution Exhibit 3.

<sup>6</sup> Record at 78-81.

<sup>7</sup> *Id.* at 169-70 and 173-74.

<sup>8</sup> *Id.* at 249, 261.

<sup>9</sup> *Id.* at 276-80.

The appellant testified to the following significantly different version of events than that described by CMP and her father: CMP came to his house at 2030 and, believing she was there with her father's permission, he allowed her in. They first stayed in the kitchen while he ate and washed the dishes. CMP started "talking about inappropriate stuff" that due to her "age knowledge" made him feel uncomfortable so he told her to discuss those issues with her parents.<sup>10</sup> They then moved to a bedroom, which had the house's only Wi-Fi capable television, to watch a movie. He told CMP to sit in a chair while he lay on the bed. She got bored and began pulling the blankets off him until he told her to stop. Thereafter she left to use the bathroom, returned, sat on the bed, and again began to repeatedly pull the blankets off him as he lay on his back. CMP eventually knelt next to the bed, and without warning, and before he could successfully react, she pulled his sweatpants down and immediately put his entire penis in her mouth.<sup>11</sup> He testified he pushed her off and ordered her out of his house, but instead of leaving, she went into the bathroom and that was when CMP's father rang the doorbell.<sup>12</sup>

The appellant saw AC1 DP through the window and told CMP that her father was there. The appellant then opened the front door and escorted AC1 DP to the bathroom, which was now empty. He and AC1 DP then jointly searched inside and outside the house looking for CMP without success. AC1 DP went home for a few minutes, then returned, reentered the house, went into the bedroom and shouted for his daughter - which caused CMP to walk out of the appellant's closet, clad only in her underwear and a shirt.<sup>13</sup> The appellant was shocked because the last time he saw her she was fully clothed. AC1 DP immediately dragged her home. After finding her clothes in the closet, the appellant followed them, but AC1 DP ordered him to leave. Upon returning home, he found CMP's iPod and cellphone and attempted to return those items as well. After learning AC1 DP did not want her phone and had already called the police, the appellant became frustrated and threw the phone "in the back of the house."<sup>14</sup>

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<sup>10</sup> *Id.* at 310-11.

<sup>11</sup> *Id.* at 327-29, 352-55.

<sup>12</sup> *Id.* at 329-31.

<sup>13</sup> *Id.* at 343.

<sup>14</sup> *Id.* at 346.

The appellant also testified that he was wearing a condom earlier that afternoon, thus accounting for forensic evidence, but provided no further explanation and admitted his wife was out of the country at the time.<sup>15</sup>

## II. Exclusion of Evidence under MIL. R. EVID. 412

The appellant's trial defense counsel (TDC) sought to produce evidence under MIL. R. EVID. 412 concerning CMP's age-inappropriate sexual knowledge and sexual history. Specifically, he wanted to introduce evidence that the victim masturbated, watched pornography, was physically or sexually abused in the past, and had engaged in sexual intercourse. This evidence, the appellant argued, provided her a motive to give false testimony, was a basis to attack her credibility, and provided a source, other than the appellant, for the semen found during the forensic examination. The Government opposed the motion, arguing: (1) evidence of CMP's alleged age-inappropriate sexual behavior was not relevant or material to prove motive to fabricate and (2) evidence of CMP's past sexual activity was not relevant to prove that someone other than the appellant was the source of the semen. The military judge conducted a closed hearing under MIL. R. EVID. 412 and heard, in relevant part, the following evidence:

(1) During an NCIS interview CMP stated she told the appellant she masturbates.

(2) In a different NCIS interview, in the presence of her mother, CMP said she had been masturbating since she was nine years old; and that when she was seven years old, she was inappropriately touched by a female adult but no charges were filed.

(3) During an NCIS interview the appellant's 13-year-old daughter (CR), who was CMP's friend, stated, that CMP told her she (CMP) had been physically and sexually abused by her father, AC1 DP, and that she had also engaged in sexual acts with two boys from school.

(4) In a later NCIS interview, CMP denied being sexually abused by her father, AC1 DP, but admitted she told CR that her father "does stuff to [her]" and abused her, including whippings. CMP stated she lied to CR about her father's abuse, but that CR had moved away before she could tell her the truth.

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<sup>15</sup> *Id.* at 346, 352.

CMP also admitted she exaggerated the severity of her father's beatings.

(5) During an NCIS interview CMP's younger sister, MP, stated CMP told her that AC1 DP had physically and sexually abused her. MP realized the allegations were false and confronted CMP, who admitted she had lied.

(6) During an NCIS interview with CMP's mother, she stated that she confronted CMP about her allegations of physical and sexual abuse against her father, and that CMP admitted she had lied to both CR and MP.

(7) Forensic reports indicated the presence of semen on CMP's cervical and perineum swabs.

As a result of the MIL. R. EVID. 412 hearing, the military judge granted TDC's motion, in part. He allowed certain evidence to include: direct evidence and cross-examination of CMP on her allegation that she was sexually abused by an adult when she was seven years old and her ensuing belief the offender suffered no consequences; direct evidence and cross examination of CMP on whether she made false allegations in the past, and if she denied doing so, her prior inconsistent statements admitting she made false allegations; and cross-examination of CMP as to the identity of her father as her falsely accused sexual and non-sexual abuse perpetrator.<sup>16</sup> The military judge excluded evidence of CMP's sexual knowledge and her sexual history, finding that it was not relevant, material or favorable to the defense. He additionally excluded evidence of the alleged past sexual abuse by CMP's father and of CMP's alleged sexual activity with two other boys as potential alternate sources of semen.

We review the military judge's ruling to exclude evidence pursuant to MIL. R. EVID. 412 for an abuse of discretion. *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010). We review the findings of fact under a clearly erroneous standard and the conclusions of law *de novo*. *Id.* The abuse of discretion standard "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citations and internal quotation marks omitted).

Under MIL. R. EVID. 412, evidence offered by the accused to show that the alleged victim engaged in other sexual behavior is

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<sup>16</sup> Appellate Exhibit VIII at 6-9.

inadmissible, with three limited exceptions: (1) evidence of specific instances of the victim's sexual behavior offered to prove that a person other than the accused was the source of semen or other physical evidence (MIL. R. EVID. 412(b)(1)(A)); (2) evidence of specific instances of the victim's sexual behavior to prove his/her consent (MIL. R. EVID. 412(b)(1)(B));<sup>17</sup> and (3) evidence "the exclusion of [which] would violate the constitutional rights of the accused [MIL. R. EVID. 412(b)(1)(C)]."

If there is a theory of admissibility under an exception, the military judge, before admitting the evidence, must conduct a balancing test as outlined in MIL. R. EVID. 412(c)(3) and clarified by *United States v. Gaddis*, 70 M.J. 248, 250 (C.A.A.F. 2011). The test is whether the evidence is "relevant, material, and [if] the probative value of the evidence outweighs the dangers of unfair prejudice." *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (citation omitted). Relevant evidence is any evidence that has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." MIL. R. EVID. 401. Evidence is material if it is "of consequence to the determination of appellant's guilt[.]" *United States v. Dorsey*, 16 M.J. 1, 6 (C.M.A. 1983) (citations and internal quotation marks omitted).

In determining whether evidence is of consequence to the determination of Appellant's guilt, we consider the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to the issue.

*United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010) (citation and internal quotation marks omitted).

If evidence is relevant and material, it must be admitted where its probative value outweighs the dangers of unfair prejudice. MIL. R. EVID. 412(c)(3). When balancing the probative value under MIL. R. EVID. 412, the military judge must consider the alleged victim's privacy interests. MIL. R. EVID. 412(c)(3); see also *United States v. Sanchez*, 44 M.J. 174, 178 (C.A.A.F. 1996). "Those dangers include concerns about 'harassment, prejudice, confusion of the issues, the witness' safety, or

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<sup>17</sup> Lack of consent is not an element under Article 120b and need not be proven in any prosecution thereunder. Accordingly, under the facts of this case, we need not examine the second exception under MIL. R. EVID. 412(b)(1)(B).

interrogation that is repetitive or only marginally relevant.'" *Ellerbrock*, 70 M.J. at 319 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). If the evidence survives the inquiry, a final consideration is whether the evidence in the record supports the inference on which the moving party is relying. See *id.* The party intending to admit evidence under MIL. R. EVID. 412 has the burden of proving the evidence is covered by an enumerated exception and must establish that the probative value is not outweighed by the danger of unfair prejudice to the victim's privacy. MIL. R. EVID. 412(c)(3); see also *United States v Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004).

Here we find the military judge did not abuse his discretion, and he appropriately excluded evidence of CMP's sexual knowledge and history, and evidence of possible alternative sources of semen.

#### A. Evidence of Victim's Sexual Knowledge and History

The appellant sought to establish that the victim masturbated, had watched pornography, had been sexually abused in the past, and had engaged in sexual intercourse. This evidence, the appellant asserts, was crucial to the defense theory that the victim had motive and the ability to fabricate a story of sexual intercourse with him - the victim's sexual knowledge would enable her to create a vivid, but false story of sexual intercourse with him.<sup>18</sup> He also relies on *United States v. Gray*, 40 M.J. 77 (C.M.A. 1994), to argue a child-victim's previous sexual activity should be admitted when relevant to show that the victim had knowledge beyond her tender years before her sexual encounter with the appellant. We disagree.

The military judge correctly concluded the evidence the appellant sought to admit falls squarely under the MIL. R. EVID. 412(a)(1) exclusion of a victim's "other sexual behavior." Accordingly, he analyzed the relevance, materiality, and probative value of the evidence balanced against the danger of unfair prejudice to determine whether the evidence fell under an MIL. R. EVID. 412 exception. *Ellerbrock*, 70 M.J. at 318; *Gaddis*, 70 M.J. at 255.

In examining for relevance, the military judge found, and we agree, the mere fact a 13-year-old victim had sexual knowledge or experience does not make it more or less probable she engaged in sexual activity with the 33-year-old appellant. The appellant argues CMP's prior sexual knowledge or experience was relevant to support a theory that she was upset by his

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<sup>18</sup> Appellant's Brief of 26 May 2015 at 3 and 8.

rejection of her advances and thus vindictively and falsely claimed the appellant engaged in mutually-desired intercourse and oral sex with her. The appellant, however, offers no credible explanation, other than speculative argument, to support that contention. Indeed, when the appellant had the chance at trial, he neither explored during the victim's cross-examination nor mentioned during closing argument his belief that the victim created a false narrative because the appellant spurned her. Nothing in the military judge's MIL. R. EVID. 412 ruling prevented the appellant's TDC from doing so.

Even if we found relevance, we are unable to find materiality in the victim's prior sexual knowledge or experience, which the appellant argues is necessary to assess her credibility. Even assuming the victim's sexual knowledge provided a means to attack her credibility, the degree of her sexual knowledge was readily apparent from her direct testimony graphically and colloquially describing her sexual encounter with the appellant. Thus, even if there was a linkage between sexual experience and motive to fabricate, other evidence such as her in-court testimony was sufficient for the appellant to make that argument. And as noted above, the military judge permitted the appellant to use evidence raised in the MIL. R. EVID. 412 motion to attack his accuser's credibility (e.g., CMP's allegation she was sexually abused by an adult and her belief that the offender suffered no consequences; CMP's false past allegations; and CMP's false accusation of AC1 DP as her sexual and non-sexual abuse perpetrator).

Finally, even if we were to assume both materiality and relevance, the probative value of the proffered evidence does not outweigh the danger of unfair prejudice to CMP's privacy when factoring in concerns over harassment, prejudice, issue confusion, or only marginally relevant interrogation. *Ellerbrock*, 70 M.J. at 318. Here, the probative value of the excluded evidence is low. The argument that CMP's sexual knowledge and experience provides a basis for CMP to spin a false tale of incrimination is weak and only marginally relevant at best. Conversely, an open-court examination of a 13-year-old's prior sexual experiences, in a case where victim consent is not relevant and where the victim was an apparent willing participant in the sexual activity, would result in unnecessary prejudice and harassment. "M.R.E. 412 is intended to shield victims of sexual assault from the often embarrassing and degrading cross-examination and evidence presentation common to [sexual assault prosecutions]." *Gaddis*, 70 M.J. 252 (citation and internal quotation marks omitted).

We do not share the appellant's belief that *Gray* required the military judge to admit evidence of CMP's sexual knowledge or experience. The accused, in *Gray*, was charged with committing indecent acts on a child. At trial, he testified the nine-year-old victim fondled his penis and kissed him while he slept, but that he pushed her away when he awoke. The trial court denied defense efforts to introduce evidence Gray's victim was seen engaged in oral sex with a 12-year-old female. The Court of Military Appeals reversed and held the trial judge abused his discretion by excluding evidence of the child's other sexual experiences which thereby deprived Gray of evidence that could have made his "otherwise incredible explanation" more believable. *Gray*, 40 M.J. at 80.

We factually distinguish *Gray*. *Gray*'s alleged victim was only nine years old and *Gray* claimed he was sleeping unawares on a sofa when she fondled him. Conversely, here, the appellant admits he was awake, wearing sweatpants without underwear, alone in his house with a 13-year-old neighbor, and lying on a bed while she repeatedly and playfully pulled the blankets off him - interactions that any reasonable middle-aged male would recognize as inappropriate. Unlike in *Gray*, where the victim had previously made a false sexual assault allegation against the accused, no such allegation exists here. Ultimately, *Gray*'s unlikely explanation that a child sexually assaulted him while he slept, a circumstance most reasonable people would not easily believe, was bolstered by evidence of an even *more* unlikely scenario - that the same 9-year-old girl was seen naked, engaged in oral sex with another female child. Although the appellant's claim that CMP orally sodomized him against his wishes is certainly incredible, evidence his teenage victim privately masturbated, had watched some unspecified pornography, or was sexually active, does nothing to make his story more believable. Thus, we find the unique facts in *Gray*, which resulted in a right to more expansively cross-examine his alleged victim, do not exist here. Accordingly, we find no precedent in *Gray* that compels a similar holding in the appellant's favor.

*B. Evidence of Victim's Prior Sexual Activity to Establish an Alternate Source of Semen or Evidence*

To establish an alternate source of the semen found on swabs taken from CMP, the appellant moved to admit, via MIL. R. EVID. 412(b)(1)(A), evidence of CMP's alleged sexual activity with her father, and separately, with two boys from her school.<sup>19</sup>

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<sup>19</sup> Record at 33, 43-44; AE III at 13-19.

The military judge ruled CMP's allusion that she had sex with two boys was too temporally remote from the alleged offense date to be relevant, and further held the probative value of the proffered evidence did not outweigh the unfair prejudice to CMP's privacy. The military judge similarly ruled CMP's allegation that her father abused her was too vague and too remote in time. Moreover, CMP recanted the allegation against her father, which negated viable grounds to introduce this information as substantive evidence. "Even if the witness admits the prior statement, it is only admissible for impeachment purposes." *United States v. Taylor*, 44 M.J. 475, 480, (C.A.A.F. 1996) (citation omitted). As a result, the military judge found this allegation "at best, marginally relevant" and substantially more prejudicial than probative.<sup>20</sup> He thus prohibited the appellant from presenting evidence or cross-examining the victim on these two issues.

The appellant does not now specifically challenge the military judge's rulings under MIL. R. EVID. 412(b)(1)(A), but instead tangentially couches the evidence constitutionally-required under MIL. R. EVID. 412(b)(1)(C). He asserts the victim's age-inappropriate sexual behavior is material, and if admitted, could have explained why the forensic results (unidentified semen and lubricant found in the victim) were inconsistent with the appellant's testimony.<sup>21</sup> Having already conducted our constitutionally-required analysis, *infra*, and recognizing the evidence's relevance ultimately turns on whether someone other than the appellant was the source of the semen or condom lubricant, we address this issue under MIL. R. EVID. 412(b)(1)(A). We assess for relevance, materiality, and probative value of the evidence balanced against the danger of unfair prejudice. *Ellerbrock*, 70 M.J. at 318; *Gaddis*, 70 M.J. at 250.

Evidence that CMP's father, AC1 DP, could be the source of the semen fails on both relevance and material grounds. There is simply no admissible evidence to support this claim. The victim denies stating she was sexually abused by her father, and admitted she lied when she claimed physical abuse. There are no eyewitnesses to any sexual activity between CMP and her father. Even if the court accepted as true that CMP told others that AC1 DP had sex with her, there is no information to indicate when or where this might have occurred - and certainly no information that it occurred in close proximity to the date of the charged

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<sup>20</sup> AE VIII at 8-9.

<sup>21</sup> Appellant's Brief at 10.

sexual assault. Under these circumstances, lacking relevance and materiality, we find no probative value exists to offset the danger of unfair prejudice to the victim.

Evidence that CMP potentially engaged in "sexual acts" with two classmates also fails for relevance. First, it is too vague. There is no evidence indicating whether the sexual activity, whatever it was, involved intercourse or any other conduct that would leave semen or other evidence on the victim. Second, CR, the witness who claims CMP told her about these sexual encounters, departed for Jamaica on 15 June 2013, ten days before the charged offenses occurred.<sup>22</sup> Even though that was the latest possible day CMP and CR could have talked in person, there is still no information indicating when the alleged sexual activity with schoolmates might have occurred. Under these circumstances, we agree with the military judge that the sexual acts, assuming they even involved sexual intercourse, were too remote in time to the charged offenses here. Given the vagueness of CR's allegation, the only way to attempt to establish its relevance would be to permit a wide ranging and invasive cross-examination of CR on her sexual history. As such, the dubious probative value of this evidence does not outweigh the prejudice to CMP's privacy that either cross-examination, or the production of extrinsic evidence concerning her prior sexual partners, would create.

We find the military judge did not abuse his discretion when denying the appellant's implied request under MIL. R. EVID. 412(b)(1)(A) to admit evidence of the victim potential prior sexual encounters.

### **III. Legal and Factual Sufficiency**

We review questions of factual and legal sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (internal quotation marks and citations omitted). In weighing questions of legal sufficiency, the court is "bound to draw every reasonable inference from the evidence in the record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The test for factual sufficiency is "whether after weighing the evidence in the

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<sup>22</sup> Record at 350; AE III at 23.

record of trial and making allowances for not having personally observed the witnesses," we are convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Proof beyond a reasonable doubt does not mean, however, that the evidence must be free from conflict. *United States v. Goode*, 54 M.J. 836, 841 (N.M.Ct.Crim.App. 2001).

For each guilty finding, the Government had to prove the appellant committed a sexual act upon a child who had attained the age of 12 years.<sup>23</sup> The appellant claims the evidence was both legally and factually insufficient because the physical evidence does not support the military judge's finding that oral and vaginal sexual intercourse occurred; the forensic evidence contradicted the victim's testimony but was consistent with the appellant's testimony; the victim's testimony contained illogical actions that indicate she was not credible; and the victim had a motive to fabricate. We disagree.

All the evidence the military judge considered was both relevant and admissible. Based on the appellant's testimony *alone*, the court heard evidence that he, a 33-year-old man, was home, at night, in an otherwise empty house, with a 13-year-old girl. The appellant admits that after the victim began discussing age inappropriate matters they still went to a bedroom to watch a movie together. The appellant agrees that he lay on the bed while wearing sweatpants without underwear. He states while on the bed, his child victim repeatedly and playfully pulled the blankets off him. He agrees, as confirmed by both the victim and the victim's father, that AC1 DP rang the doorbell looking for his daughter. The appellant also confirms that his victim, CMP, ultimately was found hiding in the closet of the same bedroom where the charged offenses occurred, dressed only in a shirt and her underpants.

The court heard the victim testify that she engaged in oral sex and sexual intercourse with the appellant and that he had donned a condom after first engaging in unprotected sex. She testified they were interrupted when her father rang the doorbell and that she first hid in the bathroom before ending up in the closet. She further testified she told her father she had sex with the appellant within moments of returning home. Her father, AC1 DP, corroborates her version of events when he testified he found his daughter, clad in only her underpants and a shirt, hiding in the appellant's closet.

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<sup>23</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 45b(b).

Under the circumstances of this case, we find the victim to be credible. First, no evidence was uncovered during the victim's cross-examination that revealed a motive to fabricate, and the victim never minimized her own role in their mutual sexual encounter. Second, when faced with her father's anger, she could have easily lied and claimed "nothing happened" or conversely claimed the appellant forced her to have sex. Instead, she freely acknowledged her willing sexual activity with the appellant and seemed most disturbed about breaking her promise not to tell anyone.

On the other hand, we find the appellant's version of events unconvincing. Although the appellant's assertion that CMP yanked his pants down and instantly began oral sex conveniently explains the presence of her DNA on his genitals, it is neither realistic nor plausible. Even ignoring the obvious differences in size and strength between the appellant and his 13-year-old female victim, the likelihood that anyone could perform such a feat on a sober, awake, alert appellant is remote at best. Moreover, evidence of semen found in the victim's vagina and some indication of lubricated condom use supports the victim's testimony and contradicts the appellant's claim he did not engage in intercourse. Ultimately, the strength of the Government's case against the appellant was overwhelming.

Thus, after reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are convinced that a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. Furthermore, after weighing all the evidence and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt.

Lastly, although not raised as an AOE, we note the promulgating order in this case incorrectly identifies the Charge and Additional Charge as violations of Article 120, vice Article 120b, UCMJ. We order corrective action in our decretal paragraph.

#### **IV. Conclusion**

The supplemental court-martial order shall correctly reflect the Charge and Additional Charge as violations of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b. The findings and the sentence as approved by the CA are affirmed.

Senior Judge FISCHER and Judge CAMPBELL concur.

For the Court

R.H. TROIDL  
Clerk of Court

