UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JONATHAN H. ROGERS
United States Air Force

ACM 35028

19 April 2005

Sentence adjudged 29 August 2001 by GCM convened at McConnell Air Force Base, Kansas. Military Judge: Israel B. Willner (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jefferson B. Brown, Major Jennifer K. Martwick, and Joseph W. Kastl.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, Major Shannon J. Kennedy, and Major John C. Johnson.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

Before a military judge sitting as a general court-martial, the appellant pled guilty to an indecent act, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Contrary to the appellant's pleas, the military judge also convicted him of indecent assault, in violation of Article 134, UCMJ. The judge sentenced him to a dishonorable discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. In accordance with a pretrial agreement (PTA), the convening authority approved a bad-

conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

The appellant assigns three[1] errors for our consideration: (1) Whether the evidence of the indecent assault is legally and factually insufficient; (2) Whether the military judge erred when he refused to grant the defense request for an expert consultant; and (3) Whether the prosecution failed to provide discovery of highly significant impeachment evidence, and assuming there was a discovery violation, whether the proper remedy is to set aside the PTA and order a new trial on both charges.

Background

On 17 December 2000, BH, a 20-year-old college student, reported to investigators with the Air Force Office of Special Investigations that the appellant sexually assaulted her at about 1000 hours that morning in his dormitory room. She had been invited to a party in the appellant's room and fell asleep on his bed at about 0500 hours. She told investigators that the medication she took made her drowsy. Her friend, KH, who had accompanied her that evening, had been sleeping on a couch in the appellant's room and observed the interactions between the appellant and BH while she was in his bed.

Although most of the statements BH made about the events in the appellant's room were consistent, they also included major discrepancies. BH agreed to an examination at a civilian hospital on 17 December 2000. She told a nurse practitioner, who was a sexual assault nurse examiner, that she awoke with a pain in her genital area and found the appellant trying to put her clothes back on her. About 10 days later, investigators asked BH to provide additional information about the medications she took on 17 December 2000. After initially adhering to her earlier version of events, BH finally admitted that she was awake during the appellant's sexual contact with her.

At trial, the appellant pled guilty to an indecent act with BH. He admitted he engaged in an act of sexual intercourse with BH in the presence of KH. The government then called BH as a witness to testify regarding the indecent assault specification. BH testified that she met the appellant at the bar where she worked. Although he had asked her out a number of times, she was in his company socially only on one other occasion when they were both part of a group of several people who went out to eat together.

BH testified that when she and KH arrived at the appellant's dormitory room in the early morning hours of 17 December 2000, KH was drunk. KH became sick and went into the appellant's bathroom, so BH and the appellant followed to assist her. The

[1] For ease of discussion, we have combined the two issues dealing with the failure of the government to disclose potential impeachment information about the complaining witness.

appellant tried to kiss BH while they were in the bathroom, but BH prevented him from doing so by leaning away from him. BH and the appellant then put KH on a couch in the appellant's room so she could rest and KH fell asleep. The appellant agreed to help BH get KH out of the dormitory room after the movie they were watching finished. BH lay down on the appellant's bed and fell asleep. She was especially tired because she had been studying for finals and worked before coming to the appellant's dormitory room.

BH further testified that she awoke when she felt a sharp pain in her rectum. At the time, there was sunlight streaming through the windows in the appellant's room. She testified her pants and panties were down around her knees, and someone had his arm around her. Because she was facing a wall, she was unable to immediately tell who it was. Each time she felt something being inserted into her rectum, she shifted her weight closer to the wall and away from the person. She said it seemed like the person penetrated her rectum for a long time, but she had no means of judging how long this actually occurred. BH said she feigned sleep because she was scared and she didn't know who else was in the room.

BH next testified that the person then turned her on her back and removed her pants and panties. She continued to feign sleep and tried to keep her legs closed. She said the person moved to the other side of her and used his legs and arms to force her legs apart. As he was straddling her, she felt his body shift as he leaned over, and she became scared because she didn't know what the person was reaching for. She said she opened her eyes briefly and saw it was the appellant who was straddling her. She also saw that KH appeared to be awake, so she mouthed the word "help," but KH did not respond. She saw the appellant reach for a condom and put it on, but she didn't fight back because she was afraid the appellant would hurt her or KH. BH said her body was "numb" and that she couldn't yell or move. She decided if she pretended to be asleep, "it would just get over faster."

BH said the appellant next penetrated her vagina. This, too, was very painful. BH testified she did not speak to the appellant or touch him, but tears came down her face. After the appellant finished, he went into the bathroom. When he returned, he attempted to put her clothes back on her, but only got them on part way. When he stopped moving, she opened her eyes and saw that KH was looking at her. BH said, "Help me get out of here." The women both went into the bathroom and agreed to leave immediately. As they left, BH told the appellant, "You're one sick mother f***** to do that to someone when you think they're sleeping . . . [w]e're going to the police station now." The appellant did not reply.

The government also called KH as a witness. She testified that when she awoke, it was light in the appellant's room and she could see the appellant lying on his bed and BH lying on the other side of him. KH saw that the appellant was apparently engaging in sexual activity with BH. She saw him fondle BH's breasts and kiss her, but BH didn't

react to him. KH testified that he then pulled up the covers and his hips moved near BH's backside, "like he was penetrating her anally." Afterward, she said she saw the appellant roll BH onto her back and put on a condom. There were covers over the appellant and BH, but they appeared to be engaged in vaginal intercourse. KH testified that she didn't know what to think when she watched this. She felt that if this activity was consensual and she spoke up, they would all be embarrassed. If it was not consensual, she believed it might endanger BH or herself if she tried to do something.

KH further testified that the appellant eventually left the bed and went into the bathroom. When he returned he was wearing different pants. He got back into the bed and put BH's pants back on her. Then he moved to the other side of BH and lay with his face away from KH. At this point, KH could see that BH was looking at her. BH said something like, "Get me out of here," or, "I need help." The women went into the bathroom together. BH was crying, so KH helped her get her belongings. As the women left, BH called the appellant a name and told him they were going to the police station.

Ms. Linda Hollis, an obstetrics and gynecology (OB/GYN) nurse practitioner and sexual assault nurse examiner, with 22 years of nursing experience, also testified on behalf of the government. Ms. Hollis examined BH on the day she reported the assault. Ms. Hollis performed a complete head-to-toe examination, including a detailed genital examination. She testified she found an abrasion and laceration in BH's vaginal area and bruising and an abrasion near her anus. Ms. Hollis stated that these injuries were consistent with blunt force trauma and were the type she frequently saw caused by sexual assault. She said these injuries would have been painful, and that in her 22 years as an OB/GYN nurse practitioner, she had not seen injuries like this in the area near the anus during consensual sex, even if a partner mistakenly hit the area while attempting vaginal intercourse. She also said she did not observe any injuries inside BH's vagina or bruising anywhere else on her body.

The appellant testified in his own defense. He said that he and a male friend had been drinking before he invited BH to his room, but he was able to accurately judge her conduct. He said he and BH went into the bathroom with KH to help her while she was throwing up. He testified that while KH was leaning over the toilet, he kissed BH passionately, but stopped when they heard KH fall onto the bathroom floor. He picked KH up and carried her to his couch. To him, she appeared "pretty much out for the night." The appellant testified that BH asked if she could lie down on the bed, which she did while the appellant watched a movie and finished drinking his beer. After the movie was over, he lay beside BH with his arm around her and they went to sleep. He awakened when he nearly fell off the bed. He still had his arm around BH, so he tried to move her without waking her up. He said she then rolled onto her back and a flashing pin on her shirt shined in his eyes. He tried to turn it off but he could not, so he moved the bed covers to try to hide the pin.

The appellant testified that after he covered BH's flashing pin, they started kissing. The appellant believed that BH consented to this because she never pushed away from him or gave him any indication that she did not want him to go further. The appellant testified that he fondled her breast on the outside of her clothes and that BH lifted her buttocks slightly so he could remove her pants. The appellant said he did not use force to pull BH's legs apart and he did not hold her down. He said he used a condom because BH whispered in his ear that she did not want to get pregnant. In answer to questions from his counsel, the appellant agreed he never intentionally tried to put his penis in BH's anus, but it was possible that he did so accidentally because the beer he drank might have made him uncoordinated. The appellant said that BH had her arms on him, but his sexual contact with her stopped when her arms dropped to her sides and she got an expression on her face that suggested she was bored.

Upon cross-examination, the appellant stated that he and BH "French" kissed in his bathroom while they assisted KH as she was throwing up. Their kissing was interrupted by the sound of KH falling to the floor. He also admitted he did not think it was odd that BH would want to have sex in front of KH. The appellant testified that BH did not touch him with her hands during their sexual activity, but he did not find that odd either. He also contradicted his earlier testimony and said she did not speak to him during their sexual contact. The appellant admitted that he lied when he later told his friend, who had been in the room when the women arrived, that nothing sexual had happened between him and BH. He also testified that he had drunk a few beers, but he was not drunk. He answered in the affirmative when asked if it was possible that he lied on two occasions—first, when he told AFOSI that he couldn't remember what happened between him and BH because he was drunk, and second, when he told a nurse that he drank so much he passed out.

Procedural History

The appellant was initially charged, apparently in the alternative, with raping, sodomizing, and committing an indecent assault on BH. Additionally, he was charged with committing an indecent act with BH by having sexual intercourse with her in front of KH. He was also charged with committing sodomy and an indecent act with another woman by videotaping her without her consent while they engaged in sexual intercourse. After some negotiation, the appellant agreed to plead guilty in a bench trial to the specification alleging an indecent act with BH by having sexual intercourse with her in the presence of KH. The PTA contained a provision indicating that the appellant would plead not guilty to the specification alleging an indecent assault of BH. In accordance with the agreement, the convening authority withdrew the remaining charges and specifications. The PTA said that the approved sentence would not include a dishonorable discharge or confinement greater than 6 months if the military judge found the appellant guilty only of the indecent act. If the military judge found the appellant guilty of both specifications, the PTA said the convening authority would not approve a

dishonorable discharge or confinement greater than 10 months. In either event, the agreement did not limit the remaining punishment options.

The military judge found the appellant's plea to the indecent act provident but he delayed entering a finding of guilty on the charge until after the conclusion of the government's case. As provided in the PTA, the government went forward with proof of the indecent assault. The military judge found the appellant guilty of that specification as well. However, the military judge dismissed the indecent act specification because he believed it was a lesser included offense of the indecent assault.

Following the trial, the convening authority took action. But before the record was forwarded to this Court, trial defense counsel learned from a government counsel that in 1997, five years before the appellant's court-martial, BH reported to police that she had been raped. BH was 15 years old at the time. She said a 17-year-old boy raped her while they were riding in the enclosed bed of a pickup truck.

After learning about the prior rape allegation, trial defense counsel asked the convening authority to set aside his earlier action and order a post-trial Article 39(a), UCMJ, 10 U.S.C. § 839(a), session. The convening authority did so. He ordered the military judge to:

> conduct an inquiry into defense allegations that the trial counsel and government representatives engaged in misconduct by failing to provide the defense with discoverable evidence which was in their possession concerning the victim's alleged previous false claims of rape, and that this misconduct substantially affects the legal sufficiency of the findings of guilty and sentence.

During the post-trial hearing, the military judge permitted the defense considerable leeway to examine both BH and her mother about the 1997 rape allegation. The record reflects that BH told her parents about the attack two days after it happened. Her parents concluded that prosecution would be difficult because BH had taken a shower before she disclosed the attack to them, but they arranged for her to get counseling from a psychologist for several months. BH reported the matter to the police after speaking to the psychologist.

After hearing testimony from several witnesses, the military judge made findings of fact and conclusions of law, most pertinently:

> [T]he 1997 incident would not have been exculpatory in the findings portion of the trial. . . . Extrinsic evidence to indicate that [BH] is being untruthful about the 1997 incident, if any such evidence were to be uncovered, would not be admissible. [Mil. R. Evid.] 608(b). . . . [T]he

> court concludes that the defense counsel would have been essentially stuck with [BH's] answer that the 1997 incident occurred, unless cross-examination caused her to state otherwise. . . . Assuming the evidence is admissible, and was presented in a manner consistent with the way in which it was presented at the Art 39(a) hearing, to include the extrinsic evidence, the court is convinced that it would have had no impact on *findings* in this bench trial.

(Emphasis added.)

On the other hand, the military judge concluded that this evidence would have been admissible during the *sentencing* portion of the trial, but it would have made no difference in the sentence he adjudged. The military judge did not make a finding on whether BH's prior report of rape was truthful.

The military judge also found that trial counsel had not engaged in misconduct. Instead, he found that a change in government counsel during the course of the prosecution led to the failure to provide discovery about the prior alleged attack. He found that the trial counsel who initially learned of the 1997 rape allegation believed the trial defense counsel already knew about it and saw no need to provide this information. When the case was passed to the successor trial counsel, they also thought the defense already knew of the prior rape allegation.

Discussion

I. Legal and Factual Sufficiency

The defense contends that the evidence is legally and factually insufficient to establish indecent assault because BH consented to the appellant's sexual advances and even if she did not, the appellant had a reasonable belief that she consented.[2]

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the

[2] The specification alleging an indecent assault states:

> In that AIRMAN FIRST CLASS JONATHAN H. ROGERS, United States Air Force, 22d Aircraft Generation Squadron, did, at McConnell Air Force Base, Kansas, on or about 17 December 2000, commit an indecent assault upon [BH] a person not his wife by touching the breast of, engaging in sodomy with, and/or engaging in sexual intercourse with the said [BH], with intent to gratify his sexual desires.

appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

After carefully examining the record, we hold the evidence is both legally and factually sufficient to support a finding that the appellant indecently assaulted BH by touching her breasts and engaging in sodomy and sexual intercourse. BH immediately filed a formal complaint, and an eyewitness and documented injuries corroborated her version of the events. Moreover, there was no credible motive for her to have fabricated her accusations. We are mindful of the false statements she made and have considered all of the surrounding circumstances in deciding whether BH consented.[3] We find her testimony that she did not consent to be credible and compelling. The touching of her breasts and the anal sodomy, at least initially, occurred while she was asleep and unable to manifest consent. She manifested her lack of consent to sexual intercourse by trying to keep her legs closed. And, in any event, it is clear that under the circumstances she was overcome by fear and thus unable to further resist. We also find that the appellant could not have reasonably believed BH consented to his actions. Therefore, we find insufficient evidence to support a mistake of fact defense.

II. Denial of Expert Consultant

a. Background

The appellant next complains that the military judge erred in denying his request for an expert consultant for the purpose of evaluating the injuries BH sustained in her vaginal and rectal areas.[4] Before trial, the convening authority appointed a physician specifically requested by the defense to act as an expert consultant to assist in evaluating the injuries BH sustained. Through no fault of either the government or the defense, the appointed physician was uncooperative and never consulted with the defense. After this came to light, the government offered the assistance of an Air Force OB/GYN nurse. After consulting with the OB/GYN nurse, the defense asserted she was not qualified to assist them because she had no experience in examining sexual assault victims. The government then offered the assistance of a sexual assault nurse examiner employed by a civilian hospital. The defense was not satisfied with the sexual assault nurse examiner, and moved to compel the government to appoint a "physician" with expertise in OB/GYN to act as an expert consultant. The defense contended that the nurse appointed to assist them was not as qualified as a physician because her practice only involved

[3] "Proof beyond a reasonable doubt . . . does not mean that the evidence must be free of conflict." *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

[4] The appellant has styled this issue as a request for an expert "witness." It is clear, however, from the record of trial and the appellate briefs that the parties are arguing about whether the appellant was entitled to an expert "consultant" with qualifications different than those of the two nurses who were already appointed.

injuries associated with sexual assaults and she was unable to provide assistance as to the age of the injuries. Trial defense counsel argued:

> DC: All the injuries she's seen . . . are people reporting sexual assault. And an OB/GYN physician *or somebody who specializes in this field* would, *possibly*, be able to give us a broader range, saying, "Yes, I see these types of injuries associated with other activities, or other problems, not just sexual assault."
>
> . . . .
>
> MJ: And you believe that a physician may be better qualified to give expert opinion as to causation and aging of the lacerations and abrasions?
>
> DC: Yes sir; based on the more extensive training and experience, we do believe that a physician would be more qualified to testify regarding these issues than the nurse examiner appointed.

(Emphasis added.)

> Defense counsel later said:
>
> It seems like the government wants us to have one or the other, somebody who has only experience with sexual assault or somebody who has none. We would like somebody who can testify about sexual assault victims and normal physiology and injuries resulting from other types of occurrences. And, so far, that's not what we've been provided.

b. Law

We review a military judge's denial of a request for expert assistance for an abuse of discretion. *United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999). *See also United States v. Washington*, 46 M.J. 477, 480 (C.A.A.F. 1997); *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). As a matter of "military due process," servicemembers are entitled to confidential expert assistance. *Garries*, 22 M.J. at 290. To establish an entitlement to expert assistance, the burden is on the appellant to demonstrate, on the record, the "necessity" for such services. *Id*. at 291. But even upon a showing of necessity, an appellant is not entitled to a specific expert of his or her own choosing. *Ake v. Oklahoma*, 470 U.S. 68, 84 (1985); *United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 1990). All that is required is that "competent" assistance be made available. *Ake*, 470 U.S. at 83; *Burnette*, 29 M.J. at 475.

We apply a three-part analysis to determine whether an appellant has established the need for expert assistance: "First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994).

c. Discussion

We turn now to an application of the *Gonzalez* analysis to the case sub judice. As to the first step, we note that on appeal, the appellant appears to have abandoned his argument concerning the need for expert assistance to determine the age of the injuries BH sustained. Instead, he focuses on the need to have expert assistance to determine whether the injuries were consistent with consensual intercourse. Concerning what a physician would accomplish, the appellant relies on the arguments made on his behalf at trial, but also highlights a letter provided to the convening authority as part of his post-trial clemency submissions. The letter is written by Lieutenant Colonel (Lt Col) Mark Lobaugh, a doctor specializing in OB/GYN. Lt Col Lobaugh apparently reviewed the photographs documenting BH's injuries. He stated:

> [I]t is impossible to rule out the possibility that these injuries are consistent with consensual intercourse. In my years of practice, I have seen patients who had much worse injuries . . . incurred during consensual sexual intercourse. I believe that to state categorically that these types of injuries are inconsistent with consensual intercourse is a mistake.
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> . . . .
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> After reviewing the photos, I note that there are no obvious visible injuries to the rectum other than a slight bruise beneath the rectum. I would expect to see greater injury to [BH's] rectum if there were actual forcible penetration, as she claims, especially if the victim had never engaged in anal sex in the past. There does not appear to be an injury that would indicate such a forcible penetration.[5]

As to the final prong—why trial defense counsel were unable to gather and present the evidence that the expert assistance would have provided—the appellant makes two arguments. First, he argues, as he did at trial, that even with their best efforts, his trial defense counsel were simply incapable of discerning this information. Second, the appellant acknowledges that his counsel could have found the information provided by Lt Col Lobaugh prior to trial, but argues they had little time to do so because they only

[5] Lt Col Lobaugh apparently was unaware that Ms. Hollis had testified there was also an abrasion in the rectal area.

received the photos from the government five days prior to the start of trial and it took them several days to realize the appointed nurse consultant could not help them.

The military judge concluded that the appointment of two nurses—one with expertise in OB/GYN and one with expertise in sexual assault—was sufficient as a matter of due process. He also concluded the defense had not demonstrated that further expert assistance would accomplish anything more productive for the appellant or that an expert would gather and present more evidence than could be obtained by the defense counsel themselves.

Indeed, the question is not so much whether the appellant was entitled to expert assistance, as indeed he was. Rather the issue is whether he was entitled to more qualified and broadly experienced consultants, or, put another way, whether the nurses that were provided were not competent to assist the defense. The record fails to reflect any basis whatsoever to conclude that the nurses were not competent to assist in a determination of whether the injuries to BH were consistent with consensual sex. To the extent the appointed sexual assault nurse examiner was less familiar with injuries associated with consensual sex, the appointed OB/GYN nurse could have made up the shortfall. The success of the appellant in locating Lt Col Lobaugh after trial in no way impeaches the competency of the appointed nurse consultants. Nor are we convinced that the lack of availability of the photographs until five days prior to trial speaks to the competency of the appointed nurses. While the time constraints may have limited counsel's ability to shop around for an expert with conclusions different than that of the appointed nurses, it was a reasonable period of time to work with their consultants. We hold the military judge was correct in concluding the appellant had not met his burden of establishing the need for a physician consultant.

III. Failure to Provide Discovery of Prior Rape Complaint

a. Background

The appellant asserts the military judge erred in concluding he was not materially prejudiced when the government improperly withheld information about the rape complaint BH made in 1997. He argues the military judge was incorrect in ruling that the erroneously withheld evidence was not materially prejudicial in findings or sentencing beyond a reasonable doubt. He further claims he is entitled to a new trial because of the impact the undisclosed evidence had on pretrial negotiations. The defense made it clear during the post-trial hearing that the new evidence did not undermine the appellant's guilty plea. Instead, appellate defense counsel contend that evidence of the prior rape complaint would have been admissible and trial defense counsel lost an opportunity to fully assess the evidence in this case. The appellant testified at the post-trial hearing, and asserted in his brief to this Court, that he would not have signed the PTA had he known of the prior rape allegation. The military judge found this statement self-serving.

b. Law

A military judge's findings of fact will not be overturned unless they are "clearly erroneous" or "unsupported by the record." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). *See also United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985); *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981). We review conclusions of law, including determinations of materiality, de novo. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004).

When we review discovery/disclosure issues, we use a two-step analysis. *Roberts*, 59 M.J. at 325. First, we must determine whether the information or evidence was subject to disclosure or discovery. The government conceded at the post-trial hearing and again on appeal that the prosecution violated Rule for Courts-Martial (R.C.M.) 701 when it failed to disclose the prior rape complaint. Thus, we now turn to the second step—whether nondisclosure materially prejudiced the appellant. As our superior court has stated:

> In this context, an appellate court reviews the materiality of the erroneously withheld information in terms of the impact that information would have had on the results of the trial proceedings. Both phases of this analysis involve a determination of "materiality" but they are two distinct inquiries. The first inquiry at the trial level is whether the information would be "material to the defense" in the preparation of their case and the second inquiry, at the appellate level, determines the materiality of the withheld information to the results of the trial.

Roberts, 59 M.J. at 326.

There are two tests for assessing materiality with respect to erroneous nondisclosure of discoverable evidence on appeal. The first test applies to cases in which the defense did not make a discovery request or made only a general request for discovery. *Id.* Once an appellant has demonstrated error with respect to nondisclosure, the appellant will be entitled to relief only if there is a "reasonable probability" that there would have been a "different result at trial if the evidence had been disclosed." *Id*. at 327 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). *See also United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990); *Strickler v. Greene*, 527 U.S. 263, 290 (1999). However, the defense need not demonstrate by a preponderance of the evidence that the suppressed evidence would have resulted in acquittal. *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999). The second test arises when an appellant has demonstrated that the government failed to disclose discoverable evidence with respect to a specific request or as a result of prosecutorial misconduct. Under those circumstances, the appellant will be entitled to relief unless the government can show that nondisclosure was harmless beyond a reasonable doubt. *Roberts*, 59 M.J. at 327 (citing *Hart*, 29 M.J. at

410). When applying either test, we consider materiality "in light of the evidence in the entire record." *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004) (citing *United States v. Stone*, 40 M.J. 420, 423 (C.M.A. 1994)). *See also United States v. Agurs*, 427 U.S. 97 (1976).

c. Discussion

Turning to the case before us, we find that the discovery request contained "boilerplate" provisions. It did not make a specific request for information concerning a prior rape report, or statements by BH. Instead, it made a general request for:

> Any known evidence tending to diminish the credibility of . . . all potential witnesses . . . and evidence of other character, conduct, or bias bearing on witness credibility.
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> . . . .
>
> Any other evidence in the possession of the Government or otherwise known to the Prosecution which reasonably may tend to:
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> (1) negate the guilt of the accused;
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> (2) reduce the guilt of the accused to the offenses charged, or
>
> (3) reduce the potential punishment.

We concur with the military judge's finding that the government did not engage in misconduct. Because the defense used a general request for information and the government's nondisclosure was not the result of misconduct, we will apply the "reasonable probability of a different result at trial" test to determine materiality.

The case before us is remarkably unusual in that the military judge had the opportunity to assess the admissibility and effect of evidence that came to light after the case was tried, but before the case was forwarded for appellate review. In this bench trial, the military judge concluded that extrinsic evidence about the prior rape would not have been admissible during findings if BH denied making a prior false rape complaint. He concluded that Mil. R. Evid. 403, 412, and 608(b) would prohibit its admission. On the other hand, the military judge said the evidence would have been admissible on sentencing, but that it would have made no difference in the sentence he adjudged. He concluded that the government's failure to provide this discovery was harmless error beyond a reasonable doubt.

Mil. R. Evid. 412, the military's "rape shield" rule, ultimately controls whether evidence of a prior rape complaint is admissible. This rule prohibits the admission of evidence offered to prove a victim of alleged sexual misconduct engaged in "other sexual behavior" or to establish the victim's "sexual predisposition." The rule contains three exceptions, only one of which is applicable here. Mil. R. Evid. 412(b)(1)(C) allows admission of otherwise proscribed evidence when it is necessary to protect the constitutional rights of an accused. Under this exception, an accused has the "right to present evidence that is 'relevant, material, and favorable to his defense.'" *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004) (quoting *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983)). *See also United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982).

If the judge determines the evidence is relevant and material, he or she must then conduct a balancing test to determine whether the evidence is favorable or "vital" to the defense. *Banker*, 60 M.J. at 222. The balancing test in Mil. R. Evid. 412 is distinct from that conducted under Mil. R. Evid. 403 in two ways. First, while Mil. R. Evid. 403 favors inclusion, Mil. R. Evid. 412 favors exclusion. Second, under Mil. R. Evid. 412, the military judge must balance the factors listed under Mil. R. Evid. 403 (such as unfair prejudice, confusion of the issues, misleading the members, undue delay, waste of time, and needless presentation of cumulative evidence) against the legitimate privacy interests of the victim. *Banker*, 60 M.J. at 223.

In the case sub judice, we are not persuaded the evidence is relevant. The defense has not demonstrated how a prior report of rape against another person undermines BH's credibility concerning the events involving the appellant. In *United States v. Velez*, 48 M.J. 220, 227 (C.A.A.F. 1998), our superior court held that a prior report of rape was not logically or legally relevant to attack the credibility of a complaint in an unrelated case. The *Velez* court observed that "[t]he mere filing of a complaint is not even probative of the truthfulness or untruthfulness of the complaint filed." *Id. See also United States v. Morrison*, 98 F.3d 619, 628 (D.C. Cir. 1996). Our superior court reiterated that view in *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000), and upheld a trial judge's ruling that a prior report of rape was inadmissible to impeach the victim in an unrelated rape trial. Even if we assume the evidence is relevant and material to the defense, we must conduct the balancing test required by *Banker*. After considering the Mil. R. Evid. 403 factors, as well as the privacy interests of the victim, we conclude that they weigh in favor of exclusion on the findings. The record amply supports the military judge's findings of fact and conclusions of law. *Gore*, 60 M.J. at 185; *Burris*, 21 M.J. at 144.

The military judge concluded that the evidence would have been admissible in the sentencing portion of the trial, but it would have made no difference in the sentence he adjudged. He said that the sentence he adjudged would have been the same had BH not even testified during presentencing. We also find it instructive that when considering the impact of the undisclosed evidence, the military judge applied a more stringent standard than required by the facts of this case. The standard he applied was whether the failure to

disclose was harmless beyond a reasonable doubt. Given all these factors, we are not persuaded the defense has shown a reasonable probability of a different result during the case in chief or sentencing.

d. Pretrial Negotiations

Finally, the appellant raises a novel issue in military law—whether the government must disclose impeachment information to the defense before entering into a PTA.[6] He offers no legal analysis related to PTAs to support this request for relief. Our review of Supreme Court cases reveals that in *United States v. Ruiz*, 536 U.S. 622, 633 (2002), the Court held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." However, a military accused's right to obtain favorable evidence is also grounded in statute. Article 46, UCMJ, 10 U.S.C. § 846, states, "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." This statutorily based right is implemented by R.C.M. 701, which adopts a liberal discovery practice in the military in order to avoid "gamesmanship" and promote efficiency. Drafter's Analysis, *Manual for Courts-Martial, United States (MCM)*, A21-35 (2000 ed.).

R.C.M. 705 governs PTAs. This rule permits either the government or defense to propose terms or conditions "not prohibited by law or public policy." R.C.M. 705(d)(1). R.C.M. 705(c)(1)(B) lists impermissible terms and conditions of PTAs. It states:

> *Deprivation of certain rights*. A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

But the rule expressly allows an appellant to waive "procedural requirements such as the Article 32[7] investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings." R.C.M. 705(c)(2)(E).

We decline to grant the appellant relief. Nothing in Article 46, UCMJ, R.C.M. 701 and 705, or military case law expressly requires the government to provide impeachment information to an accused before entering into a PTA. In neither *Ruiz*, nor

[6] The government did not address this issue in its Answer to the Assignment of Errors.
[7] Article 32, UCMJ, 10 U.S.C. § 832.

in this case, has the defense contended the government withheld information establishing the factual innocence of the appellant concerning the offense to which the appellant pled guilty. In *Ruiz*, the government sought to protect the identity of certain witnesses. In the instant case, the defense does not assert that it had less than an equal opportunity to interview BH. On the contrary, we find that the defense had sufficient access to BH before trial to inquire about whether she had made prior reports of sexual assault. And as we mentioned earlier, the government's failure to disclose this information did not result from misconduct. It resulted from a misunderstanding. We also see no evidence of overreaching or gamesmanship. The terms of the PTA in this case did not deprive the appellant of any right protected by R.C.M. 705. Finally, we cannot join the appellant in speculating about the effect the undisclosed evidence had on pretrial negotiations. It is the function of this Court to interpret and apply the law. Rulemaking and policy making in this sphere are the province of Congress and authorities other than this Court. Under the circumstances of this case, we conclude there is an insubstantial basis for us to use our Article 66(c), UCMJ, 10 U.S.C. § 866(c), power to grant the appellant relief.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court