

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SIMS, COOK and GALLAGHER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class ANDREW J. AGUIRRE
United States Army, Appellant

ARMY 20090487

United States Army Special Operations Command
Gary J. Brockington, Military Judge
Colonel Mark W. Seitsinger, Staff Judge Advocate

For Appellant: Captain Stephen J. Rueter, JA (argued); Colonel Mark Tellitocci, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Jacob D. Bashore, JA; Captain Shay Stanford, JA; Captain Tiffany K. Dewell, JA (on brief).

For Appellee: Captain Daniel D. Maurer, JA (argued); Major Amber Williams, JA; Major LaJohnne A. White, JA; Captain Benjamin Owens-Filice, JA (on brief); Major Katherine S. Gowel, JA (supplemental pleadings).

1 June 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

SIMS, Senior Judge:

A military panel composed of officers and enlisted members, sitting as a general court-martial, convicted appellant, contrary to his pleas, of assault consummated by a battery on a child under the age of 16 years in violation of Article 128 of the Uniform Code of Military Justice, 10 U.S.C. § 928 (2006) [hereinafter UCMJ]. The panel sentenced appellant to be dishonorably discharged, to be confined for 181 days, to forfeit all pay and allowances, and to be reduced to the grade of E-1. The convening authority approved the sentence as adjudged and

waived the automatic forfeiture of all pay and allowances, effective 25 June 2009, for a period of six months from the effective date of those forfeitures.¹

This case is before us for review pursuant to Article 66, UCMJ. Before this court, appellant alleges five assignments of error, only the second of which merits both discussion and relief.

In his second assignment of error, appellant argues that a fatal variance exists between the pleadings and the proof where the panel changed the date of the offense by nine months, thereby violating appellant's due process rights. Although the government concedes there was a "material variance," the government argues the variance is not fatal because appellant was not prejudiced in that he "is protected by double jeopardy, was not misled, and was not denied the opportunity to defend against the charge." The government also concedes that the military judge's instructions that led to the variance were "confusing and erroneous" but argues that they actually resulted in a "substantial benefit to appellant."

FACTS

On or about 25 December 2007, appellant was accused by CS, a seven-year old neighbor, of sexually assaulting her on three separate occasions in the preceding months. According to both the government's theory at trial and in appellate pleadings, the first incident allegedly occurred on or about June 2007 in appellant's minivan in a Walmart parking lot as CS was accompanying appellant's family en route to a local swimming pool (hereinafter the Walmart/Minivan Incident); the second incident allegedly occurred on or about fall or winter of 2007 in appellant's living room while CS was watching "The Chronicles of Narnia" with appellant's family during a sleepover (hereinafter the Narnia/Sleepover Incident); and the third incident allegedly occurred on or about November 2007 in appellant's master bedroom bathroom after CS had eaten dinner at appellant's house (hereinafter the Bedroom/Bathroom Incident).

Appellant was charged with several different offenses relating to CS spanning the time frame of 1 January 2007 to 25 December 2007.² Due to the 1 October 2007

¹ We note that this is yet another case in which a convening authority approved a waiver of automatic forfeitures with the intent that the waived forfeitures be paid to family members, but failed to disapprove the adjudged forfeitures thereby effectively nullifying the approved waiver.

² Appellant was also charged with committing an indecent act upon another child under circumstances similar to the Narnia/Sleepover Incident. Appellant, however,

(continued . . .)

effective date of a major change to Article 120, UCMJ, the government utilized Article 134, UCMJ (indecent act) to cover appellant's alleged misconduct occurring from 1 January 2007 to 30 September 2007 and Article 120, UCMJ (aggravated sexual abuse of a child) to cover appellant's alleged misconduct occurring from 1 October 2007 to 25 December 2007. The government also made use of generic language and lengthy overlapping periods of time to charge some of the discrete incidents, thereby resulting in some confusion at trial as to which alleged incidents the individual charges and specifications actually pertained.

In response to a defense motion for a finding of not guilty as to several of the charged specifications pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 917, the trial counsel clarified that:

(1) The Walmart/Minivan Incident was covered by Specifications 2 and 3 of Charge III (indecent acts)(between on or about 1 January 2007 and 30 September 2007);

(2) The Narnia/Sleepover Incident was covered by the Specification of Charge II (aggravated sexual abuse of a child)(between 1 October 2007 and on or about 25 December 2007); and

(3) The Bedroom/Bathroom Incident was covered by the Specification of Charge I (attempted sodomy)(between 1 January 2007 and on or about 25 December 2007).³

(. . . continued)

was found not guilty of that specification after the child was unable to identify appellant in court. Although the government made use of the fact that there were two similar crimes involving two different victims to argue appellant's guilt, we will not reference that specification further because that specification has no bearing on the issue discussed in this opinion.

³ The trial counsel also initially told the military judge the Specification of The Additional Charge (rape of a child)(between 1 October 2007 and on or about 25 December) corresponded to the Narnia/Sleepover Incident. However, a short time later the trial counsel indicated the Specification of The Additional Charge actually corresponded to the Bedroom/Bathroom Incident which resulted in the amending of the Specification of Charge I (attempted sodomy) in order that the Specification of Charge I would have a start date of 1 October 2007 and therefore match the dates alleged in the Specification of The Additional Charge (rape of a child).

Thereafter, the military judge entered findings of not guilty to Specification 2 of Charge III (indecent act)⁴ and to the Specification of The Additional Charge (rape of a child) based on a failure of proof.

During the presentation of the defense case, appellant specifically denied ever touching CS inappropriately. Additionally, CS was recalled and testified that the Narnia/Sleepover Incident occurred prior to the Walmart/Minivan Incident, based upon her recollection of her brother's age and her mother's stage of pregnancy at the time of the Narnia/Sleepover Incident. Other defense witnesses provided testimony that supported the probability that the Narnia/Sleepover Incident occurred in early 2007 (which would place the incident well outside the three-month time period charged for the offenses related to the Narnia/Sleepover Incident and prior to the effective date of the revised Article 120, UCMJ).

After the presentation of the defense case, the trial counsel presented the government's theory of the case to the panel wherein the trial counsel specifically correlated each of the remaining specifications with specific incidents. This recitation was consistent with what the trial counsel had represented to the military judge during the discussion of appellant's R.C.M. 917 motion. Of particular importance as to the issue of variance was the trial counsel's assertion that the Specification of Charge II (aggravated sexual abuse) corresponded to the Narnia/Sleepover incident.

In her closing, the trial defense counsel argued both that appellant had never inappropriately touched CS and that the government failed to prove that the Narnia/Sleepover Incident, which formed the basis of the Specification of Charge II, occurred within the charged timeframe of that specification. Furthermore, the trial defense counsel argued that because the government did not use on or about language to designate the start date of the Specification of Charge II, the panel was precluded from finding appellant guilty of that specification (even if the panel were to believe that the offense occurred prior to 1 October 2007).

Over appellant's objection, the military judge instructed the panel on several lesser included offenses to include assault consummated by a battery on a child in violation of Article 128, UCMJ, as a lesser included offense of both the Article 134,

⁴ The military judge found that Specifications 2 and 3 of Charge III were "multiplicious" in that they referred to the exact same course of conduct and required the trial counsel to choose which specification with which the government wished to proceed. After the trial counsel elected to proceed with Specification 3 of Charge III, the military judge entered a finding of not guilty to Specification 2 of Charge III.

UCMJ, indecent act specification (that was charged as having occurred between on or about 1 January 2007 and 30 September 2007) and the Article 120, UCMJ, aggravated sexual abuse specification (that was charged as having occurred between 1 October 2007 and on or about 25 December 2007).

Again over appellant's objection, the military judge specifically informed the panel that if they were to find appellant guilty of an assault consummated by a battery on a child in violation of Article 128, UCMJ, the panel could do so by exceptions and substitutions to modify the Article 120, UCMJ, specification to cover acts that occurred prior to the start date of the charged Article 120, UCMJ offense "[b]ecause the current version of Article 128, UCMJ, was in effect both before and after 1 October 2007."

Thereafter, the panel found appellant not guilty of indecent acts, attempted sodomy, and aggravated sexual abuse of a child. The panel, however, found appellant guilty under the Specification of Charge II of a lesser included offense of assault consummated by a battery on a child from between 1 January 2007 to on or about 25 December 2007 by exceptions and substitutions, thereby resulting in a nine-month variance in the start date of the charged offense.

LAW AND DISCUSSION

Due Process and Material Variance

"Fundamental due process demands that an accused be afforded the opportunity to defend against a charge before a conviction based upon that charge can be sustained." *United States v. Teffeau*, 58 M.J. 62, 67 (C.A.A.F. 2003). Such fundamental due process is violated where an appellant's "conviction is predicated upon a different incident than the one originally alleged in the specification."

As conceded by the government, the panel in appellant's case was improperly instructed as to their ability to vary the dates of the Specification of Charge II which resulted in a "material variance" in the panel's verdict. "A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999). Although the Rules for Courts-Martial authorize findings by "exceptions and substitutions," they do not allow for such exceptions and substitutions to be "used to substantially change the nature of the offense." R.C.M. 918(a)(1). As noted in the discussion of R.C.M. 918(a)(1), "[c]hanging the date or place of the offense may, but does not necessarily, change the nature or identity of the offense." R.C.M. 918(a)(1) discussion. "Minor variances" as to the location or date of an offense "do not necessarily change the nature of the offense and in turn are not necessarily fatal, especially where the government has made use of the "on or about" language in the

charged specification. *Teffeau*, 58 M.J. at 66 (C.A.A.F. 2003)(citing to *United States v. Hunt*, 37 M.J. 344, 347-48 (C.M.A. 1993)). The words "on or about" are "words of art in pleading which generally connote any time within a few weeks of the 'on or about' date. *United States v. Brown*, 34 M.J. 104, 110 (C.M.A. 1992).

In order to succeed on a fatal variance claim, an "appellant must show that the variance was material and that it substantially prejudiced him." *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F. 2006)(quoting from *United States v. Hunt*, 37, 347 (C.M.A. 1993)). As conceded by the government, there is no question that the variance in this case was material as it expanded appellant's exposure by a full nine months and did so in the absence of any "on or about" language. There is, however, an issue as to the prejudice suffered by appellant from this material variance.

The Court of Appeals for the Armed Forces has recognized three separate ways in which substantial prejudice can result from a material variance. A material variance "can prejudice an appellant by (1) putting 'him at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to defend against the charge.'" *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009)(quoting *United States v. Teffeau*, 58 M.J. at 67).

Appellant in this case was not charged with one specification of assaulting CS on divers occasions over a twelve-month period of time. Instead, he was put on notice by the government's charging decisions and the trial counsel's representations to the military judge and the panel that he was required to defend himself against allegations arising from three separate incidents involving CS. Taken chronologically, as presented by the trial counsel, these incidents consisted of the Walmart/Minivan Incident in the summer of 2007, the Narnia/Sleepover Incident in the fall or winter of 2007, and the Bedroom/Bathroom Incident in November of 2007. As represented to the military judge and argued to the panel by the trial counsel, each of these incidents was linked to a specifically designated specification.

Appellant's defense strategy consisted of categorically denying ever having sexually touched CS, presenting a motive for CS to fabricate allegations against appellant, and in showing the implausibility and numerous inconsistencies in those allegations. This strategy was relatively successful as reflected in the numerous not guilty findings that were eventually returned by the panel. For example, the members found appellant not guilty of the specification relating to the Walmart/Minivan Incident (Specification 3 of Charge III which encompassed "between on or about 1 January 2007 and 30 September 2007"). They also found appellant not guilty of the specification relating to the Bedroom/Bathroom Incident (the Specification of Charge I which was alleged to have occurred "between 1 October 2007 and on or about 25 December 2007").

As part of that strategy, appellant's trial defense counsel was able to show not only was it unlikely that appellant would be able to "touch the vagina" of CS and cause "her to touch his penis" in a room in which other persons were present, but that the Narnia/Sleepover Incident did not even take place at the time alleged and therefore could not serve as the basis of the Specification of Charge II. However, when the military judge erroneously instructed the members that they could expand the reach of the specification relating to the Narnia/Sleepover Incident (the Specification of Charge II which initially was alleged to have occurred within a three-month time span) in order to encompass a window of almost twelve months and to straddle the effective date of the new Article 120, UCMJ, the military judge eviscerated a key component of appellant's trial strategy. This led to appellant being found guilty of a single assault which took place at some undetermined time within the calendar year 2007.

As such, we cannot agree with the government's position that appellant received a windfall from the military judge's error.⁵ Instead, we find that appellant was substantially prejudiced in that he was both misled and denied the opportunity to defend against the charge of which he was ultimately convicted. Accordingly, under the unique and confusing circumstances of this case, we find the existence of a fatal variance and will set aside the findings as to the single remaining specification and charge.

CONCLUSION

The findings of guilty and the sentence are set aside. A rehearing may be ordered by the same or a different convening authority. All rights, privileges, and property of which appellant has been deprived by virtue of his sentence being set aside by this decision are ordered restored. See UCMJ, arts. 58b(c) and 75(a).

Judge COOK concurs.

GALLAGHER, Judge, concurring in part and dissenting in part and in the result:

Although I concur with my fellow judges that the charges and specifications in this case were aligned with discrete incidents, I cannot concur with their conclusions that the military judge erred in his instructions to the panel, that there was a material variance between the pleadings and the proof in this case, or that,

⁵ In its brief, the government argues that the military judge's instructions "resulted in a substantial benefit to appellant" in that he was convicted of "only one specification of battery on a child" as opposed to two such specifications.

even if there was a material variance, appellant was prejudiced. Therefore, I respectfully dissent.

Likewise, I part ways with the government concession that the military judge's instructions were confusing and that there was a material variance between pleadings and proof.* The government conflates the allegedly erroneous instruction on the lesser included offense with the dangers of ex post facto judicial decisions and concludes that the panel's findings by exceptions and substitutions constituted a material variance. This case does not involve ex post facto concerns as to the lesser included offense of assault consummated by a battery in violation Article 128, UCMJ. Additionally, the military judge's instructions were clear and eliminated ex post facto concerns. *See United States v. Marcus*, 130 S.Ct. 2159, 2165 (2010).

After the close of evidence, during an Article 39(a), UCMJ, session regarding lesser included offense instructions on the Specification of Charge II, the military judge made the only judicial finding on assault consummated by a battery as a lesser included offense (LIO) and variance: 1. There was evidence to support the offense occurring in early 2007, prior to the Article 120, UCMJ, statutory inception date, and some evidence that it occurred after; 2. Article 128, UCMJ, assault consummated by a battery on a child under sixteen, was a listed lesser included offense of Article 120, UCMJ; 3. That Article 128, UCMJ, was in effect both prior to and after 1 October 2007; and 4. "As such, as I see the law, the members could convict the accused of a violation of assault consummated by a battery on a child under 16, notwithstanding that they find that the offense did not occur after that date." The defense objected to the variance instruction because "the dates of this case are vital and they go to notice and they also are -- we disagree with the legal possibility that a lesser included could have different dates than the primary charge."

INSTRUCTIONS ON LESSER-INCLUDED OFFENSES

"An accused may be found guilty of an offense necessarily included in the offense charged..." *United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011)(quoting Article 79, UCMJ, 10 U.S.C. § 879 (2006)).

Whether an offense is an LIO is a question of law that is reviewed *de novo*." *United States v. Miller*, 67 M.J. 385, 387 (C.A.A.F. 2009). In determining whether an offense

* The government labels the military judge's instructions on assault consummated by a battery on a child under the age of sixteen in violation of Article 128, UCMJ, as a lesser-included offense of aggravated sexual abuse of a child under Article 120, UCMJ, "intrinsically erroneous."

is an LIO, this Court applies the elements test. *United States v. Jones*, 68 M.J. 465, 469-70 (C.A.A.F. 2010) (citing *Schmuck v. United States*, 489 U.S. 705, 716, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989)); see *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (noting that the elements test encompasses ordinary principles of statutory construction, “ ‘permit[ing] lesser offense instructions only in those cases where the indictment contains the elements of both offenses,’ and as a result ‘gives notice to the defendant that he may be convicted on either charge.’ ”) (quoting *Schmuck*, 489 U.S. at 718, 109 S.Ct. 1443).

U.S. v. Girouard, 70 M.J. 5, 9 (2011).

The military judge is required to instruct the panel members on those lesser included offenses reasonably raised by the evidence. *Jones*, 68 M.J. at 468 (citing *United States v. Miergrimado*, 66 M.J. 34, 36 (C.A.A.F. 2008)); see *Schmuck*, 489 U.S. at 716 (adopting the “elements test” and holding that one offense is not necessarily included in another unless the elements of the lesser are a subset of the charged offense). The elements test does not require identical statutory language in determining whether the elements of an alleged lesser included offense are a subset of the elements of the charged offense. *Alston*, 69 M.J. at 216.

When a military judge instructs panel members on findings, he also “bears the primary responsibility for ensuring that mandatory instructions . . . are given and given accurately.” *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003); R.C.M. 920(a) (“The military judge shall give the members appropriate instructions on findings.”) Mandatory instructions on findings include “[a] description of the elements of each offense charged” and “[a] description of the elements of each lesser[-]included offense in issue, unless trial of a lesser[-]included offense is barred by the statute of limitations (Article 43)” R.C.M. 920(e)(1), (2). As explained in the discussion accompanying R.C.M. 920(e), a “matter is ‘in issue’ when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose.” R.C.M. 920(e) discussion; *United States v. Dearing*, 63 M.J. 478, 484 n.20 (C.A.A.F. 2006).

Appellant asserts that the offense of assault consummated by a battery upon a child under sixteen is not a necessarily included lesser offense of aggravated sexual abuse of a child under sixteen. I disagree. After examining the instructions given by the military judge in light of the evidence presented in this case, I find that the judge did not err in determining that the Article 128, UCMJ, offense was a lesser-included offense and that it was raised by the evidence. See *Jones*, 68 M.J. at 465; *Bonner*, 70 M.J. at 2; *Alston*, 69 M.J. at 216.

Assault consummated by a battery upon a child under sixteen is a “subset” of aggravated sexual abuse of a child in violation of Article 120(f), UCMJ, the charged offense. Proof of the elements of aggravated sexual abuse of a child under sixteen (engaging in a “lewd act,” defined as the intentional touching, not through the clothing, of the genitalia of another person or intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person, with a child under sixteen) also proves the elements of assault consummated by a battery upon a child under sixteen - bodily harm done with unlawful force or violence upon a child under sixteen. Based on the charged specification, appellant knew he had to defend against wrongful contact, that of touching the vagina of a child under sixteen, with the intent of abusing, humiliating, or degrading the victim. “Such contact would, at a minimum, be offensive given the ordinary understanding of what it means for contact to be offensive.” *Bonner*, 70 M.J. at 3 (citing *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000)); cf. *Alston*, 69 M.J. at 216.

In addition to being a lesser included offense of Article 120, UCMJ, effective 1 October 2007, the specification itself is sufficient to allege an assault consummated by a battery upon a child under sixteen, in violation of Article 128, UCMJ. Although not dispositive, the *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], specifically identifies both assault consummated by a battery and assault consummated by a battery upon a child under sixteen as lesser included offenses of aggravated sexual abuse of a child. Appellant was on notice of the lesser offense.

VARIANCE AND DUE PROCESS

In *United States v. Tefteau*, 58 M.J. 62 (C.A.A.F. 2003), our superior court held as follows on the issue of variance and the appropriate legal test for it:

“A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge.” *Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999) (citing *United States v. Lee*, 1 M.J. 15, 16 (C.M.A. 1975)). The [*MCM*] (2002 ed.) . . . anticipates the potential for a variance by authorizing findings by exceptions and substitutions. See [R.C.M.] 918(a)(1). Findings by “[e]xceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.” *Id.*; *United States v. Wray*, 17 M.J. 375, 376 (C.M.A. 1984) (the same prohibition existed in [*MCM*] (1969 Rev. ed.) para. 74(b)(2)).

Minor variances, such as the location of the offense or the date upon which an offense is allegedly committed, do not necessarily change the nature of the offense and in turn are not necessarily fatal. *See, e.g., United States v. Hunt*, 37 M.J. 344, 347–48 (C.M.A. 1993)(date of rape charged as “on or about”); *United States v. Parker*, 54 M.J. 700, 711 (Army Ct. Crim. App. 2001)(change in the date of an alleged rape not material) [*rev’d*, 59 M.J. 195 (C.A.A.F. 2003)] ; *United States v. Willis*, 50 M.J. 841 (Army Ct. Crim. App. 1999) (change in language alleged to be false under Article 107 violation not material). Where, however, an appellant can demonstrate that a variance is material and that he or she was prejudiced, the variance is fatal and the findings thereon can not stand.

Id. at 66 (subsequent negative history added.) In *Teffeau*, the C.A.A.F. approved the lower court’s use of the two-part *Allen* test: (1) material variance, and (2) prejudice to appellant.

Applying a due process analysis, in *United States v. Williams*, 40 M.J. 379 (C.M.A. 1994), our superior court concluded that:

In determining whether an indictment is sufficiently specific, the traditional test is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction Courts have specifically held that unless the date is an essential element of the offense, an exact date need not be alleged.

Id. at 382 (C.M.A. 1994)(holding that where the time frame of the alleged offenses was a two-month period, neither appellant’s Fifth Amendment right to due process nor his Sixth Amendment right to present a defense were impaired)(internal citations omitted); *see Fawcett v. Bablitch*, 962 F.2d 617, 618-19 (7th Cir. 1992) (holding that a six-month period was sufficient notice in a child sexual abuse case). A variance in the date upon which an offense was allegedly committed is not necessarily fatal. *See Teffeau*, 58 M.J. at 66; *Allen*, 50 M.J. at 86; *Hunt*, 37 M.J. at 347-48.

R.C.M. 918(a)(1), authorizing findings by exceptions and substitutions, provides the mechanism for changing a date to conform to the evidence presented.

While “on or about” language in a specification alleviates the need for the government to prove an exact date, it is not required. *United States v. Madro*, 7 C.M.R. 690, 694 (A.F.B.R. 1952) (finding that the exact date of an offense is **especially immaterial** when the words “on or about” are included in the specification) (emphasis added). The evidence may show an offense happened at a time reasonably near the charged date without a requirement that the finding be returned by exceptions and substitutions. *Hunt*, 37 M.J. at 347 (no material variance as a matter of law when the evidence supported a date reasonably near the charged time).

Based on the military judge’s finding that some evidence was presented that the incident occurred prior to the charged date, a variance instruction was warranted if not otherwise precluded. I find no legal authority, and neither the majority opinion nor the defense point to any, that supports the propositions that it is error to instruct on variance in dates because “on or about” language is not used in the specification or because a variance would allow a pre-existing lesser included offense to predate the statutory inception date of the greater offense.

The date of the Narnia/Sleepover Incident was not material. In the context of this case, the finding of guilty by exceptions and substitutions did not substantially change the nature of the offense nor did it increase the seriousness of the offense or the maximum punishment. The date of occurrence of this specific incident is not an element of either the charged Article 120, UCMJ, offense or the lesser-included Article 128, UCMJ, offense. At all times, the nature of the offense remained a wrongful, unlawful contact, that of touching the vagina of a child under sixteen. Appellant was defending against sexually touching CS’s vagina while the seven-year old CS was at a sleepover at appellant’s house watching the movie “Narnia.” Not surprisingly, CS was unable to testify as to the date of the incident. The evidence throughout the record is clear that there is only one “Narnia” incident although the evidence as to the date of occurrence varied within the one-year time period alleged on the charge sheet for all offenses against CS. Accordingly, the military judge did not err in instructing the members that variance as to the date alleged in the specification was permissible as to the lesser included offense of assault consummated by a battery on a child under sixteen, and the nine-month expansion of the date range returned by the members was not a material change.

Even assuming that the variance was material, appellant was not prejudiced. The majority correctly identifies the three-part test from *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009) (quoting *United States v. Teffeau*, 58 M.J. at 67). A material variance “can prejudice an appellant by (1) putting 'him at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to defend against the charge.'”

The variance does not put appellant at risk for being prosecuted again for the same conduct. On the contrary, the findings returned by the members expanding the date for the Narnia/Sleepover Incident from “between 1 October 2007 and on or about 25 December 2007” to “between 1 January 2007 and on or about 25 December 2007” precludes another prosecution for the “Narnia” incident for the entire time period covered by the findings.

Appellant was not misled as to the nature or time period of the allegations involving CS such that he was unable to adequately prepare for trial, nor was he denied an opportunity to defend against the charge of which he was ultimately convicted. Factually, there is no dispute that the defense was on notice there would be a discrepancy between the pleadings and proof as to the date of the Narnia/Sleepover Incident. The record shows appellant was not surprised by the change in dates. To the contrary, the defense elicited the evidence that brought the charged date into question, including appellant’s testimony that the sleepover and Narnia movie incident occurred in January 2007 and not in the fall of 2007. Appellant effectively used evidence of the date to secure an acquittal of the greater offense. This is a tactical choice counsel are frequently required to make, not a denial of an opportunity to defend against a lesser-included offense. Likewise, counsel’s partisan position on the law and facts of the case are not binding upon the military judge. The defense assertion that no lesser included offenses were raised and should not be instructed upon did not preclude the military judge from exercising his duty under R.C.M. 920(e)(1)–(2) to provide an instruction on the lesser-included offense, especially when it is raised by the evidence and the government requests the instruction. *United States v. Emmons*, 31 M.J. 108, 111 (C.M.A. 1990); *United States v. Clark*, 22 U.S.C.M.A. 576, 577, 48 C.M.R. 83, 84 (1973); *United States v. Smith*, 13 U.S.C.M.A. 471, 33 C.M.R. 3 (1963). Similarly, defense’s advocacy of their position as to the state of the law, in which they disagreed “with the legal possibility that a lesser included could have different dates than the primary charge,” does not make it the law and does not provide evidence that they were misled as to what they were defending against or denied an opportunity to present a defense.

The only significance of the Narnia/Sleepover Incident date of occurrence arises, not from concerns of alibi or inability to defend, but from concerns about appellant being convicted of violating a statute that was not in effect at the time of the conduct. As previously discussed, the military judge carefully instructed the members they could not convict appellant of a violation of the new statute, except on conduct occurring on or after 1 October 2007. However, the effective date of the new statute did not mean appellant’s conduct was not criminal prior to the effective date. The military judge properly instructed on the long-standing offense of assault consummated by a battery. The finding returned by the members expanding the date for the Narnia/Sleepover Incident from “between 1 October 2007 and on or about 25

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December 2007” to “between 1 January 2007 and on or about 25 December 2007” was not a fatal variance.

For the above reasons, I respectfully dissent. I would affirm the finding of guilty as to Charge II and its Specification and affirm the sentence.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Joanne P. Tetreault Eldridge".

JOANNE P. TETREAUULT ELDRIDGE
Deputy Clerk of Court