IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee,	)	Brief on Behalf of Appellant
v.	)	Crim.App. Dkt. No.: 20130822
Lieutenant Colonel (O-5) **Sean M. Ahern**, United States Army, Appellant.	)	USCA Dkt. No.: 17-0032/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

ISSUE PRESENTED

I. WHETHER THE LOWER COURT ERRED WHEN IT HELD THAT THE PROHIBITION AGAINST USING AN ADMISSION BY SILENCE PROVIDED BY MIL. R. EVID. 304(a)(2) IS TRIGGERED ONLY "WHEN THE ACCUSED IS AWARE OF" AN INVESTIGATION CONTRARY TO THE PLAIN LANGUAGE OF THE RULE.

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Case Law

Court of Appeals for the Armed Forces

Army Court of Criminal Appeals

Statutes

Uniform Code of Military Justice

Other Authorities

Military Rules of Evidence

Secondary Sources

Law Review Articles

Statement of Statutory Jurisdiction

The lower court reviewed this case under Article 66(b)(1) of the Uniform Code of Military Justice (UCMJ). This honorable Court has jurisdiction to review the case under Article 67(a)(3) of the UCMJ.

Statement of the Case

On September 20, 2013, a panel of officer members sitting as a general court-martial convicted Lieutenant Colonel (LTC) Sean M. Ahern, contrary to his pleas, of aggravated sexual assault of a child, aggravated sexual assault, assault consummated by a battery, indecent acts with a child (three specifications), and child endangerment in violation of Articles 120, 128, and 134, UCMJ, 10 U.S.C. § 920 (2006), 10 U.S.C. § 928 (2006), 10 U.S.C. § 934 (2000). The panel sentenced LTC Ahern to be confined for seventeen years and six months and to be dismissed from the Army. The Convening Authority approved the sentence as adjudged. On August 24, 2016, the Army Court of Criminal Appeals (ACCA) affirmed the findings and sentence as approved by the Convening Authority. Appellant petitioned this Court for review, and this honorable Court granted review of his case on November 17, 2016.

Summary of Argument

This Court should apply the well-settled principle of statutory construction that the plain language of a rule applies unless its application would lead to an

absurd result and hold that the plain language of Mil. R. Evid. 304(a)(2) does not require a defendant to actually know he is "under investigation" to trigger its protection. But even if this Court disagrees and reads a subjective knowledge requirement into the rule, the facts and circumstances presented here would trigger the protection of the rule if the test is actual awareness measured by the totality of the circumstances. Under either reading of the rule, Trial Counsel's use of the alleged "admissions by silence" was plain or obvious error that prejudiced Appellant's trial. Accordingly, the findings and the sentence here should be set aside.

Statement of Facts

Ms. SS (the alleged victim) moved in with Mrs. SA (her mother) and Appellant in June of 2008. (JA at 049.) Prior to that time, she had lived with them in a "trial run." (JA at 050.) While Ms. SS lived with them, there were "rules to follow." (JA at 053.) Ms. SS did not like these rules and felt that they were strict compared to the rules her friends had. (JA at 053.) Appellant was attentive and actively involved in Ms. SS's life. He discovered things that she tried to hide. (JA at 062.) For example, he found a pregnancy test in her backpack and love notes from her boyfriend that she had secreted away in a pencil bag. (JA at 062-063.) He forbade Ms. SS from seeing her boyfriend. (JA at 055-056.) But this did not work, and Ms. SS "snuck around" to see her boyfriend then lied about it. (JA at 040.) At

trial, Ms. SS testified that she hoped that if Appellant was "out of the house" that her mother would have allowed her to see her boyfriend. (JA at 064.)

Ms. SS's allegations of sexual abuse first came to light in September of 2010. (JA at 025, 042.) Mrs. SA claimed at trial that Appellant admitted to the abuse as early as September of 2010. (JA at 025, 042.) Appellant, however, asserted in the personal statement that he wrote in support of his clemency request that Ms. SS told Mrs. SA about the alleged abuse while he was away on a temporary duty assignment. (JA at 153.) Regardless of how the allegations came to light, nothing was done about them until six months later.

In late March of 2011, Ms. SS's biological father, received a call from Ms. SS. (JA at 043-044.) She was upset with her mother and crying. (JA at 044.) After a bit of prodding, Ms. SS told him that she had been molested. (JA at 044.) He did not take her to the police, but he did get her a therapist. (JA at 048.)

When Mrs. SA learned of this, she told Appellant. She explained that if Ms. SS was seeing a therapist, she might repeat the allegations to the therapist, who would be required to report it. (JA at 028.) Because of this, Mrs. SA and Appellant consulted with a criminal defense attorney. (JA at 027-028.) During that conversation, Mrs. SA told the lawyer that she supported Appellant and that she believed the allegations were false. (JA at 041.) She also said that Ms. SS had made the allegations up because she "wasn't getting what she wanted from" them.

(JA at 029.)

Almost a year later on March 31, 2012, Mrs. SA and Appellant separated. (JA at 026.) At that time, they were working on their divorce. *See* (JA at 031.) Then, in July of 2012, the couple was involved in an argument. (JA at 030.) Following this dispute, Mrs. SA decided to move out of the house that they had previously leased together so that she could live closer to where she worked. (JA at 030.)

On the morning of July 3, 2012, Appellant showed up at the house with a couple of police officers hoping that their presence would allow him to move his belongings free from incident. (JA at 031.) Mrs. SA was angry and left to seek an emergency protective court order. (JA at 032.) She did not get one though, and when she returned movers were packing up the house. (JA at 032.) She claimed at trial that he "emptied the master bedroom" and took her "personal things that were in the drawers in the dresser." (JA at 032.)

Two days after this contentious event and after speaking with her mother, Ms. SS reported her allegations of sexual abuse to the authorities for the first time. (JA at 037.) That day, July 5, 2012, an investigator attempted to facilitate a pretext telephone call between Ms. SS and Appellant by sending a text message from Ms. SS to Appellant's phone that said:

> I need to talk to you people are coming to talk to me about what happened to me and I don't want to get anyone in trouble and I just

> want to move past which [sic] you did so I will lie for you if that's what you want I need to know what you want ‘cause they are on their way.

(JA at 067.) Appellant did not respond to this text message. Likewise, Appellant did not respond to the pretext phone call. The investigator staged and recorded a pretext phone conversation in which Ms. SS identified herself and said:

> I really need to talk to you. Something happened and I was talking to [RB] and he told his parents and there are people coming to talk to me and Mom. And I don’t know what to tell them. I just--I don’t know what to do.

(JA at 069.) In response, Appellant simply hung up the phone. (JA at 002, 060, 069).

A little over ten days later, Mrs. SA conducted a pre-text phone call with Corporal Stern of the Maryland State Police. (JA. at 070.) During that call, they had the following exchange:

> Mrs. SA: . . . And you know, I’ve told [my therapist] that you had an affair. I didn’t, obviously, tell her it was with my daughter. But, you know, I’m—what I am trying to understand is how did this happen Sean?
>
> Appellant: What?
>
> Mrs. SA: The whole thing with you and [Ms. SS]. I mean, why? Why—why did you do that with her?
>
> Appellant: [SA], are you kidding me? I’m on a phone?
>
> Mrs. SA: Well, you never seem to be able to talk in person and this is something I am trying to deal with now. ‘Cause I go to see her again later in the week. And so I am just—I am trying to heal myself so I can be a better mom to these boys. I mean, is it something I did? I mean, do you understand why you—

Appellant: [SA], are you nuts? We are going through a divorce.

(JA at 087.) Later in the exchange, Mrs. SA told Appellant that Ms. SS alleged he had been touching her for a long period of time. (JA at 088.) He responded that he was "not buying into this stuff" and that the allegations were a "thing" she was making up as "part of their divorce." (JA at 088.)

During his closing, Trial Counsel argued that the Appellant's failure to deny the allegations of wrongdoing made in Ms. SS's pre-text text message and during Mrs. SA's pre-text phone call were indicative of his guilt. (JA at 098.) Trial Counsel noted that there were "no denials" by Appellant and that this was an "indicia of guilt." (JA at 098.) He went on to argue that Appellant "never denies any of it," and that he never denies any of it because he is guilty. (JA at 098.)

The lower court examined whether the Mil. R. Evid. 304(a)(2) applied in this instance and held that it did not because "Mil. R. Evid. 304(a)(2) is triggered by an investigation when the accused is aware of the investigation." (JA at 011.) It went on to hold that whether "an accused is aware of an investigation" is determined by an objective test that considers the facts and circumstances surrounding the alleged admission. (JA at 011-012.) Further facts necessary to the resolution of the issue presented are detailed below.

Argument

I. WHETHER THE LOWER COURT ERRED WHEN IT HELD THAT THE PROHIBITION AGAINST USING AN ADMISSION BY SILENCE PROVIDED BY MIL. R. EVID. 304(a)(2) IS TRIGGERED ONLY "WHEN THE ACCUSED IS AWARE OF" AN INVESTIGATION CONTRARY TO THE PLAIN LANGUAGE OF THE RULE.

This honorable Court should set aside Appellant's convictions and the sentence in this case because it was plain error when the military judge permitted Trial Counsel to argue that Appellant's failures to deny the allegations made against him when he was under investigation should be considered substantive evidence of his guilt. The language of Mil. R. Evid. 304(a)(2) is clear. It states that the "[f]ailure to deny an accusation of wrongdoing is not an admission of the truth of the accusation if at the time of the alleged failure the person was under investigation or was in confinement, arrest, or custody for the alleged wrongdoing." Mil. R. Evid. 304(a)(2). In this case, the prosecution used Appellant's silence in the face of allegations made in investigatory pre-text text messages and phone calls in his closing argument as substantive evidence of guilt. But since Appellant was under investigation when these exchanges happened, they could not be considered adoptive admissions under the plain language of the rule.

a. The plain language of the rule should apply because it will not lead to an absurd result.

"Statutory construction begins with a look at the plain language of a rule" and the "plain language will control, unless use of the plain language would lead to an absurd result." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007)(citations omitted). There is nothing absurd about drawing a bright-line for the admissibility of admissions by silence at the point where an investigation is initiated. It is practical in that the initiation of an investigation is almost always easy to determine and it is fair in that it does not limit the Government's investigatory powers in any significant way. The Government is still free to use pre-text text messages, phone calls, and meetings to secure affirmative admissions of guilt (i.e., confessions). And it is likewise free to use any adoptive admissions by silence that occurred before the investigation began that an investigator or Trial Counsel uncovers during the investigation.

It is wrong to read a knowledge requirement into the rule when it is not necessary. The rule itself does not address the defendant's knowledge of the investigation. It simply says that the failure to deny is not an admission where the person is "under investigation." As this Court has explained, military courts use "well-established principles of statutory construction to construe provisions in the *Manual for Courts-Martial*." *Id.*

As *Lewis* suggests, this Court has recognized that deviation from the plain language interpretation of a rule is required at times to avert a trip *ad absurdum*, but no such deviation is required here. In fact, courts have been skeptical about the probative value of silence in the face of accusations "in some of the earliest cases in which it is discussed" and it is practical to limit its use. *See* Bret Ruber, *Adoptive Admissions and the Duty to Speak: A Proposal for an Appropriate Test for the Admissibility of Silence in the Face of an Accusation*, 36 Cardozo Law Review 310 (2014). This is because: (1) people may remain silent in the face of an accusation for a variety of reasons unrelated to guilt; (2) admitting silence as an adoptive admission creates a duty to speak; and (3) admissibility of silence in the "face of an accusation in an informal setting is incongruent with the constitutional right to remain silent when accused in court." *Id*. at 311. Application of the plain language of the rule here would not be unjust or absurd. To the contrary, it would merely prevent the Government from converting failed pre-textual calls and text messages into substantive evidence of a defendant's guilt—as happened here.

b. There was no need to depart from *Lewis*.

The lower court erred when it concluded there was a need to look past the plain language of the rule. It justified its action with seven rationale: (1) that the "drafters in some instances intentionally wrote the rules broadly with the expectation that case law would fill in the ambiguities"; (2) that the President's

authority to make rules such as the one here is cabined by a Congressional mandate to, so long as practicable, apply the rules governing criminal trials in the United States district courts and it would therefore be inconsistent with that delegation of power to interpret the rule in a manner that would provide for "pre-arrest, pre-*Miranda* exclusions" that are not recognized in federal circuits; (3) that Article 31(b), UCMJ is not applied literally; (4) focusing on the temporal trigger of when an investigation begins loses sight of reliability, which is the "touchstone of the rules of evidence"; (5) the plain language reading of the rule renders the triggers of "arrest, confinement, or custody" as surplusage because "an investigation, however brief, will always precede" those things; (6) other cases decided by this Court seem to imply that "any investigation" does not trigger the rule; and (7) the plain language reading of the rule might result in increased litigation where it is not easy to determine when a statement was made in relation to the start of investigation. (JA at 010-011.)

None of these reasons justify a departure from *Lewis*. It does not matter that the drafters created the rules with the intention that ambiguities would be filled by case law since there is no ambiguity in this rule. Likewise, a congressional mandate that the President generally create rules that are similar to those followed in federal district courts is not the equivalent of a prohibition against creating a rule that adds additional protection to defendants in limited circumstances. And while it

is true that Article 31(b), UCMJ is not applied literally, that merely supports the argument that this Court's mandate in *Lewis* is controlling. Article 31(b) is not read literally precisely because a literal reading would lead to absurd results such as requiring some undercover agents to provide rights warnings when speaking with criminals.

As to reliability, the lower court's reasoning defeats itself. It claims that by focusing on the temporal trigger "we lose sight" of reliability. But then it goes on to note that an admission is "no more or less reliable" based on whether there is—unbeknownst to the target—an investigation that has begun. (JA at 11.) That is, it admits that a plain language reading of the rule has no effect on the reliability of the evidence at issue.

The remaining reasons proffered by the lower court are similarly unconvincing. Its argument that "an investigation, however brief, will always precede arrest or confinement" and that therefore the plain language interpretation of the rule turns the words "arrested, confined, or in custody" into surplusage misreads the rule. The rule does not say it applies "after an investigation has begun" but rather when the subject is "under investigation." And while there may be times when a subject is both under investigation and in confinement, there are also times when a subject will be in confinement but no longer under investigation—such as when the subject is simply in confinement awaiting trial.

c. Reading a knowledge requirement into the rule encourages absurd investigatory actions.

This Court would provide the Government with a temptingly powerful investigatory tool if it were to give its imprimatur to the actions taken here. Investigators could send a series of cooperating witnesses to make serial accusations against a defendant. If the defendant does not explicitly deny all of them, then it secures admissions by silence. At the extreme end of this, an investigator might intentionally send a cooperating witness to make serial allegations in the hopes that an exasperated defendant will simply stop answering text messages or hang up in the face of the repeated allegations. In such a case, the investigator would essentially manufacture a confession.

And while that might not be exactly what happened here, it is close. In this case, the investigator setup a pre-text text message and a pre-text phone call from Ms. SS to Appellant. Appellant did not respond to the text message and he hung up on Ms. SS after she made her allegations in the phone call. (JA at 60, 67, 148.) Later, authorities made another attempt to secure a confession when Mrs. SA conducted a pre-text phone call, Appellant responded to this allegation by saying that "this [was] all part of the divorce." (JA at 088.) Trial counsel twisted these incidents into admissions by silence and highlighted them during his closing argument. (JA at 097-098.) Under the plain language of the rule, this was not permitted.

d. The rule would apply here even if the standard is "actual awareness" as determined by assessing the facts and circumstances surrounding the alleged admission.

Despite the plain language of the rule, the lower court held that the prohibition against using an admission by silence is triggered only when an accused is aware of an investigation. But even if this Court agrees that the lower court correctly read an "actual awareness" element into the rule, the lower court still misapplied the rule it created to the facts of this case. Mil. R. Evid. 304(a)(2) should apply here if it is triggered when a defendant knows he is under investigation as determined by assessing all the facts and circumstances at the time of the "admission by silence" to see whether a reasonable man might have thought he was under investigation.

A reasonable man in Appellant's position might believe he was under investigation. Appellant knew of Ms. SS's allegations against him and had even consulted with a criminal law attorney about them. (JA at 027.) Ms. SS's pre-textual text message and phone call came out of the blue after months of silence. (JA at 066.) On July 5, 2012, after Ms. SS sent her pretext text message and made her pretext phone call, Appellant confronted Mrs. SA. Mrs. SA testified:

> [Appellant] was already just suspicious because on July 5th [SS] attempted to call him and he immediately met me when I got home outside and said 'What have you done? What is going on' Um, I told him I don't know what he's talk [sic] about—he said, 'Are you wearing a wire?' . . . So he was somewhat suspicious.

(JA at 039.) Mrs. SA's testimony objectively suggests that Appellant was aware of or suspicious that he was under investigation and that Mrs. SA was acting on the behalf of the authorities. Otherwise he would not have accused her of "wearing a wire." (JA at 039.)

In addition, Ms. SS's pretextual text and call both came out of the blue after Appellant had not heard from Ms. SS in the past 15-16 months and just two days after Mrs. SA and Appellant had gotten into a heated argument regarding their divorce. (JA at 066.) Under these circumstances, it was reasonable for Appellant to believe that Mrs. SA might have had Ms. SS exhume her allegations to secure an advantage in their bitter divorce. And in fact, he said as much when he said "[t]his is all part of the divorce. So I am very well aware of what is going on." (JA at 088.)

d. The error here was plain or obvious under the rule.

The error in allowing trial counsel to argue that these instances of Appellant's silence should be interpreted as indicia of guilt was plain or obvious given the clear language of the rule. As this Court has explained, improper argument is a question of law reviewed de novo. *United States v. Pope*, 69 M.J. 328, 334, (C.A.A.F. 2011). Since no objection was made at trial, this Court reviews Trial Counsel's argument for plain error. *Id*. Under plain error review, the appellant has "the burden of demonstrating that: (1) there was error, (2) the error

was plain or obvious, and (3) the error materially prejudiced a substantial right of the accused. *United States v. Treat*, 73 M.J. 331, 337 (C.A.A.F. 2014).

Here, Appellant was "under investigation" and the "silences" that were used in Trial Counsel's closing were in response to pre-text text messages or made during pre-text phone calls. The plain language of the rule thus applies. And given the unambiguous language of the rule, the error should have been obvious even absent objection.

This error was prejudicial. The case against Appellant relied solely on the testimony of Ms. SS and Mrs. SA. There was no physical evidence, no documented confession, and no impartial eyewitnesses. Both Ms. SS and Mrs. SA had demonstrable motives to misrepresent their testimony. Ms. SS had a score to settle with Appellant that stemmed from his strict discipline and the fact that he had prohibited her from seeing her boyfriend. (JA at 055-056.) She admitted that she thought that if he was "out of the picture" her mother would have allowed her to see her boyfriend. (JA at 064) This would explain why she initially made her allegations.

Allegations which Mrs. SA did not believe at first. Mrs. SA told the lawyer that they consulted with that she supported Appellant and that the allegations were false. (JA at 041.) At that time, she also said that Ms. SS had made the allegations up because she "wasn't getting what she wanted from" them. (JA at 029.) But Mrs.

SA probably recognized that the false allegations could be turned to her advantage in their divorce proceedings after she and Appellant had their emotional fight. She began to backpedal. Her statements of disbelief to the lawyer became a "cover story." (JA at 029.) And she testified that Appellant confessed to sexual activity with Ms. SS. (JA at 025.) The lower court characterized this as an "actual confession," (JA at 13) but that was not the case. It was not a confession that was recorded or reduced to writing and signed. It was Mrs. SA saying that Appellant confessed. Since this assertion first came about after Mrs. SA's motive to misrepresent was born, it should be viewed through the lens of her potential bias and dismissed as not credible.

Appellant's failure to deny the allegations played a key role in Trial Counsel's closing and converted the case from a "she said, he said" case to a "she said, he said nothing and is therefore guilty case." This is especially likely given the instructions here. The military judge gave a standard Fifth Amendment instruction in which he told the panel that they were not to "draw any inference adverse to the accused from the fact that he did not testify as a witness" and that the "fact that the accused [had] not testified must be completely and totally disregarded . . . ." (JA at 143) (emphasis added). But he gave no instruction regarding Appellant's pre-trial silence. He did not explain how Appellant's failure to deny allegations could, or could not be used in their deliberations. "This

omission may have led the members to conclude that, while no adverse inference could be drawn from appellant's failure to testify at trial, the members were permitted to draw an adverse inference from appellant's" pre-trial silence. *United States v. Alameda*, 57 M.J. 190, 199 (C.A.A.F. 2002).

Conclusion

A plain language reading of the straightforward, unambiguous language of Mil. R. Evid 304(a)(2) is easy to apply and not unduly burdensome on the Government. It would be reasonable, not absurd. Accordingly, the plain language interpretation should apply. This Court would have to ignore its own common sense principles to hold otherwise and read a subjective knowledge element into the rule; in so doing, this Court would undermine the rule of construction that the plain language of a statute applies absent absurdity. It should not do so. Instead, this Court should hold that the Government's use of Appellant's supposed "admissions by silence" was a plain or obvious violation of the Rule. And since this error was prejudicial to Appellant's case, Appellant respectfully requests this honorable Court set aside the convictions and sentence.

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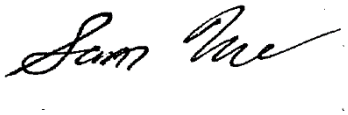

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Ahern*, Army Dkt. No. 20130822, USCA Dkt. No. 17-0032/AR, was filed with the Court and the Government Appellate Division on December 16, 2016.

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