IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	FINAL BRIEF ON BEHALF OF
	)	APPELLANT
Appellee	)	
v.	)	
	)	
Specialist (E-4)	)	Crim. App. Dkt. No. 20100196
JUSTIN P. SWIFT,	)	
United States Army,	)	USCA Dkt. No. 16-0407/AR
Appellant	)	

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

Issues Presented

I.

WHETHER THE ARMY COURT DENIED APPELLANT HIS SUBSTANTIAL RIGHT TO AN ARTICLE 66(c) REVIEW BY AFFIRMING THE FINDINGS AND SENTENCE ON UNCHARGED MISCONDUCT PRESENTED AT TRIAL RATHER THAN THE CHARGED OFFENSES.

II.

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING APPELLANT'S PRETRIAL STATEMENT WHERE THERE WAS NO INDEPENDENT EVIDENCE TO CORROBORATE THE ESSENTIAL FACTS ADMITTED.

III.

WHETHER THE EVIDENCE OF THE TWO CONVICTIONS OF INDECENT ACTS WITH A CHILD IS LEGALLY SUFFICIENT.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On March 10, 2010, an enlisted panel sitting as a general court-martial convicted Specialist Justin P. Swift [hereinafter appellant], contrary to his pleas, of two specifications of indecent acts with a child in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2000). On November 29, 2012, the Army Court set aside the findings and sentence and dismissed the specifications without prejudice because the government failed to allege the terminal element for both Article 134 offenses. A new trial was authorized. On October 22, 2014, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of indecent acts with a child in violation of Article 134, UCMJ. Appellant was sentenced to a dishonorable discharge, eleven years confinement, and reduction to the grade of E-1. The convening authority approved the findings and sentence.

On January 21, 2016, the Army Court affirmed the findings of guilty and the sentence. (JA 6). In accordance with Rule 19 of this Court's Rules of Practice and

Procedure, SPC Swift was notified of the Army Court's decision and subsequently petitioned this Court for review on March 21, 2016. On May 9, 2016, this Honorable Court granted appellant's petition for review. On June 1, 2016 this Court granted appellant's motion to extend time to file a brief until June 23, 2016.

Statement of Facts

The Charges:

The government charged appellant with two separate indecent acts with a child in violation of Article 134, UCMJ. (JA 7). Specification 1 alleged appellant touched KS's vulva with his hand while in Hawaii between November and December 2003. (JA 7). Specification 2 alleged appellant laid his head upon KS's chest and touched KS's vulva with his hand while in Texas between May and September 2007. (JA 7).

Both specifications were based on appellant's pretrial sworn statement detailing two separate acts: 1) a bedside incident "around Nov or Dec of 2003 when [he] was stationed at Schofield Barracks, Hawaii" where appellant got into bed with his wife and accidentally fondled his then-four-year-old daughter's vagina believing her to be his wife [hereinafter Hawaii Bedside Incident]; and 2) a time at "Fort Bliss, Texas, in [their] current house, and that was around 6 Jun 07" where appellant had a dream he placed his head on the chest of an old-flame girlfriend and reached down to touch her vagina only to awaken and find that he was

performing the action in real life with his daughter [hereinafter Texas Old-Flame Incident]. (JA 224-25).

Mil. R. Evid. 404(b) and Mil. R. Evid. 414 Motion and a Bill of Particulars:

Prior to trial, the government filed a motion seeking to admit Mil. R. Evid. 404(b) and Mil. R. Evid. 414 evidence of: a) appellant "peeing" after KS straddled appellant while he was sleeping on a couch with his penis exposed [hereinafter Couch Incident]; b) appellant touching KS's vulva in the back seat of a van when she was four [hereinafter Hawaii Van Incident]; and c) appellant fondling KS while she was in time-out after KS pushed her sister into a pool [hereinafter Texas Pool Incident]. (JA 261-65). The "Facts" section of the government's motion stated appellant was charged with molesting KS and appellant admitted to United States Army Criminal Investigation Command [hereinafter CID] he had touched KS inappropriately on two separate occasions. (JA 258). In an Article 39(a) session, both parties agreed to address the motion during trial along with an additional act of misconduct that KS had recently revealed. (JA 12-13).

Due to confusion regarding the charged misconduct and the new instance of uncharged misconduct, leading to discussion in an RCM 802 session about a verbal bill of particulars, (JA 13) the military judge allowed that "if necessary, the defense may request a bill of particulars from the government as to which misconduct that

they are actually charging in the case. And, we will take that up as it comes, but we should be able to resolve that as well." (R. at 15).

Government's Opening Statement:

The government claimed appellant started molesting KS beginning in 2003, and also asserted that KS would describe three different occasions of molestation. (JA 14). The government said the military judge would hear from therapists, others that heard of appellant's actions, and also from appellant through his sworn statement. (JA 15). The government requested that at the close of the evidence the appellant be found guilty of the charge and its specifications. (JA 15).

The Government's Case in Chief:

KS testified appellant inappropriately touched her on "two or three" occasions. (JA 34). First, she testified the Hawaii Van Incident occurred in appellant's van when she was four years old and appellant placed his hand on top of her clothes on her legs and vaginal area for a couple of minutes and moved his hand in a massaging motion. (JA 34-36, 62). Second, she testified the Texas Pool Incident occurred when she was seven and appellant put his hand on top of her bikini on her vaginal area and moved his hand in a massaging motion. (JA 36-38, 62). She also testified that when she was seven years old in Texas she was sleeping in bed with her mother because she had a nightmare. (JA 39). When appellant arrived home he got in bed and touched the skin of her vaginal area with his fingers, moving his

hand in a massaging motion without entering her [hereinafter Texas Bedside Incident]. (JA 39-40, 63).

Finally, KS testified that she denied the allegations against her father at the first court-martial because she was afraid of testifying and wanted to leave the witness stand as quickly as possible. (JA 46).

Ms. VA, KS's third grade teacher, testified that during a reading comprehension test in October 2007, KS disclosed she had been sexually assaulted by her dad. (JA 71, 75, 79-80). The military judge questioned the government:

> MJ: Government, is it your proffer and belief that the incident that she may or may not have revealed to her teachers is one of the charged offenses?
>
> TC: Sir, what she revealed to her teacher, the government believes the answer to be, is a general statement. So it wouldn't - - it could relate to the charged offenses, but it also could relate to other offenses. But, it is a general statement of fact.
>
> MJ: Do you believe it relates to one of the incidents that she testified about this morning?
>
> A: Yes, Your Honor, we do.

(JA 74).

The defense objected to the testimony as impermissible hearsay. (JA 75). The military judge allowed the statement itself into evidence under the doctrine of victim's outcry evidence. (JA 79).

Ms. RL, KS's clinical social worker in 2006, testified KS disclosed to her that appellant had touched KS's private parts. (JA 85, 88). When KS disclosed this information "she was sitting on the floor and she put her hand on her genital area." (JA 88). Ms. RL laid the foundation for admission of Pros. Ex. 14, which consist of clinical notes taken after therapy sessions with KS in 2006. (JA 93-94, 115).

These notes contain the following six general allegations: "[KS] also stated 'he was doing inappropriate things like touching her," (JA 249); "She stated [her] father was doing inappropriate things. She stated 'he was touching me like this.' At that moment she put her right hand on her private parts. She then stated he did it only once, she said 'He learned. He probably forgot he can't touch me there,'" (JA 250); "I told the truth about my dad touching me," (JA 251); "'Parents did bad things, like touching me in places they were not supposed to.' She clarified that only father touched her," (JA 253); "In session [KS] was given written questions that addressed sexual abuse. She started answering 'Yes' to one of them, but rapidly changed her mind," (JA 254); and "She was asked if she knew why she and her sister were placed in foster care. She stated 'because my dad touched my private parts." (JA 255).

Ms. CLT, KS's therapist, testified about KS's disclosure in January 2008 of the uncharged Couch Incident. (JA 116-23).

Ms. LF, a child forensic interviewer with the Department of Public Safety for Texas, testified KS disclosed the Hawaii Van Incident in an interview with her on June 29, 2006. Ms. LF laid the foundation for admission of Pros. Ex. 4, a video-recording of the forensic interview in which KS described the Hawaii Van Incident. (JA 130-31, 133); *see also* (JA 265). Initially, the defense objected to admission of the entire video with the exception of two sentences as the rest of the video was not a prior consistent statement. (JA 132). The military judge asked, "And those two statements would be about outcry regarding the offense?" and the defense replied "Yes, your Honor." (JA 132). Later, the defense agreed to the admission of the entire video. (JA 205).

Special Agent JS testified he took the sworn statement of appellant and laid the foundation for Pros. Ex. 1, appellant's sworn statement, which discusses the Hawaii Bedside Incident and the Texas Old-Flame Incident. (JA 160). He explained the circumstances of and detailed appellant's admissions regarding the Hawaii Bedside Incident and the Texas Old-Flame Incident. (JA 146-71).

Government Closing Argument:

The government highlighted the disclosures to Ms. VA, Ms. CLT, Ms. LF, and Ms. RL and the video-taped interview of KS. (JA 207-8). The government then argued appellant's own admissions. (JA 208). Specifically, "[Appellant] admitted

to everything that is on that charge sheet. And, that is something that defense can't get around." (JA 208). The government then focused on the other assaults:

> And while the accused only admits to assaulting [KS] twice, you heard her testify that in addition to those two times, there are three others that she remembers. The first, when she was four years old in the family van in Hawaii. Just her and her dad, cleaning out the van, and he rubs her four-year-old vagina.
>
> The second when she was here in Texas; a little girl in timeout from pushing her sister into the pool. And, as he's asking her if she's thought about what she's done, he assaults her again. And, finally, another time, where a young child seeks comfort in the bed of her mother after she has a nightmare. And, the accused comes in and again assaults his young daughter.

(JA 209).

Government Rebuttal Argument:

The government discredited defense's argument, using the video disclosure of the Hawaii Van Incident as an example and highlighted:

> Yes, a four, almost five-year-old is old enough to say whether or not they are wet. They don't need to be cupped on their vagina to determine that. But, the bigger question, sir, is was the accused checking to see if [KS] was wet when he fondled her in the bed at four years old? Was he checking to see if she was wet when he talked about having a dream of his old flame and fondling her vagina, and, oh, waking up and realizing no, it is my daughter at seven? Is he really not going to report a sleep disturbance that causes him to sexually assault his own children? That's what he is going to keep to himself? He's not going to tell a physician's assistant about that? That's what this court is to believe? The accused sexually assaulted his daughter starting at the age of four. He admitted to it. He is guilty of it. And, this court should find him so.

(JA 220-22).

The Military Judge's Findings:

The military judge found appellant guilty of both specifications by exceptions and substitutions. (JA 222-23). The military judge found the government failed to prove the language "to the prejudice of good order and discipline in the armed forces" for both specifications and failed to prove the language "lying his head upon her chest and" for Specification 2 of the Charge. (JA 223).

The Army Court Opinion:

The Army Court found, "Appellant was convicted of sexually assaulting his natural daughter, KS. On one occasion, appellant rubbed his four-year-old daughter's vagina over her clothing while they were cleaning the inside of the family van. On another occasion, appellant massaged his daughter's vagina while she was lying in bed with her mother." (JA 2). The Army Court then held admission of KS's statement to her teacher Ms. Aguirre as victim "outcry" evidence was error, but held the statement was admissible for the non-hearsay purpose of effect-on-the-listener. (JA 4-5).

Argument

I.

WHETHER THE ARMY COURT DENIED APPELLANT HIS SUBSTANTIAL RIGHT TO AN ARTICLE 66(c) REVIEW BY AFFIRMING THE FINDINGS AND SENTENCE ON UNCHARGED MISCONDUCT PRESENTED AT TRIAL RATHER THAN THE CHARGED OFFENSES.

Standard of Review

When this court doubts that the court below properly conducted its Article 66(c) review, the remedy is to remand the case for a proper review of the findings of guilty. *United States v. McAllister*, 55 M.J. 270, 277 (C.A.A.F. 2001) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

Law and Argument

Article 66(c) review is a substantial right, and in the absence of complete and independent review, appellant has suffered material prejudice to a substantial right. *United States v. Jenkins*, 60 M.J. 27, 31 (C.A.A.F. 2004). An accused has a right to be tried and "heard on the specific charges of which he is accused." *United States v. Dunn,* 442 U.S. 100, 106 (1979). Though the Army Court has significant fact-finding powers under Article 66, UCMJ, the Army Court is "not free to revise the basis on which a defendant is convicted simply because the same result would

likely obtain on retrial." *United States v. Miller,* 67 M.J. 385, 388 (C.A.A.F. 2009) (quoting *Dunn,* 442 U.S. at 107).

At trial, the government presented evidence of at least five separate incidents between appellant and KS. The charged misconduct consisted of the two incidents appellant detailed in his sworn statement to CID: 1) the Hawaii Bedside Incident; and 2) the Texas Old-Flame Incident. The uncharged misconduct consisted of KS's testimony regarding: 3) the Hawaii Van Incident; 4) the Texas Pool Incident; 5) and the Texas Bedside Incident.

The government specifically charged appellant with the incidents contained in his confession: the Hawaii Bedside Incident and the Texas Old-Flame Incident. *See generally* (JA 208, 258). Specification 1 of The Charge alleges that appellant committed an indecent act in Hawaii based on the exact time period appellant stated to Special Agent JS when he described the Hawaii Bedside Incident. *Compare* (JA 7) (between on or about 1 November 2003 and on or about 31 December 2003) *with* (JA 224) (I think she was 4 years old, and this happened around Nov or Dec 2003). Specification 2 of the Charge alleges that appellant committed an indecent act in Texas by "lying his head upon her chest and touching her vulva with his hand." (JA 7). The specific act of lying his head upon her chest is the same act described by appellant to Special Agent JS when he discussed his dream of the Texas Old-Flame Incident. (JA 225).

The government highlighted this charging decision in closing argument and rebuttal, "[Appellant] admitted to everything that is on the charge sheet. And, that is something that defense can't get around." (JA 208). Appellant was charged with the acts contained in his admission to Special Agent JS. The government further stated that while appellant admitted to assaulting KS twice, "in addition to those two times there are three others that [KS] remembers." (JA 208-9). The three acts KS testified about are separate uncharged misconduct in addition to appellant's charged admissions. Despite presenting evidence of at least five separate acts the government highlighted in rebuttal that "the bigger question" involved the Hawaii Bedside Incident and the Texas Old-Flame Incident. (JA 221). They are the bigger question because they are the charged offenses. As the government concluded, "[Appellant] admitted to it. He is guilty of it. And, this court should find him so." (JA 222).

The Army Court, however, erroneously conducted its Article 66(c) review and affirmed the findings of guilty based on the uncharged misconduct of the Hawaii Van Incident and the Texas Bedside Incident. The Army Court stated in the Background section of its opinion:

> Appellant was convicted of sexually assaulting his natural daughter, KS. On one occasion, appellant rubbed his four-year-old daughter's vagina over her clothing while they were cleaning the inside of the

> family van. On another occasion, appellant massaged his daughter's vagina while she was lying in bed with her mother.

(JA 2). The Army Court later referenced this bedside incident deciding, "Appellant's statement that he mistakenly believed he was touching his wife's vagina and not his seven year old daughter was implausible, considering his wife was considerably larger than KS at the time." (JA 5).

The government disclosed the Hawaii Van Incident as Mil. R. Evid. 404(b) and 414 evidence in its pretrial motion and therefore it cannot be the basis for appellant's conviction of Specification 1 of the Charge, which is alleged to have occurred in Hawaii. (JA 262).

Furthermore, the Army Court confused the facts of the Texas Bedside Incident when KS was seven, with the Hawaii Bedside Incident when KS was four. Appellant never admitted to mistaking his wife for his daughter when KS was seven, but rather that this occurred when KS was four in Hawaii. *Compare* (JA 5) *with* (JA 224). It was KS that described a separate but similar act that occurred in Texas when she was seven. (JA 48-49).

The, Hawaii Bedside Incident cannot be the basis for appellant's conviction of Specification 2 of The Charge as the incident occurred at a completely different time and location. Additionally, although KS testified regarding the separate bedside incident that occurred when KS was seven, the Texas Bedside Incident cannot be the basis for appellant's conviction of Specification 2 of The Charge as

the language of "lying his head on her chest" specifically put appellant on notice that the government charged him with the Texas Old-Flame Incident.

The Army Court's confusion is further explained by the additional act of uncharged misconduct disclosed just prior to trial. (JA 13). While the parties and the military judge did not detail the facts of this new uncharged misconduct, the military judge made clear that if there is confusion, the defense may request a bill of particulars. (JA 13). The only misconduct KS testified about on the stand that was not previously listed in the Mil. R. Evid. 404(b) and Mil. R. Evid. 414 motion is the Texas Bedside Incident. *Compare* (JA 258-265) *with* (JA 34-40). This new uncharged misconduct explains the potential for confusion, which might result, and indeed did on appeal, because the facts are similar to the facts of the charged Hawaii Bedside Incident, despite constituting two separate occurrences. *Compare* (JA 39-40) *with* (JA 224-25).

Thus, despite the Charge and its specifications respectively putting appellant on notice of the Hawaii Bedside Incident and the Texas Old-Flame Incident, the Army Court erroneously conducted its Article 66(c) review and affirmed the findings based on the uncharged Hawaii Van Incident and the uncharged Texas Bedside Incident. The Army Court erroneously conducted its Article 66(c) review on the uncharged Mil. R. Evid. 404(b) and Mil. R. Evid. 414 incidents presented at trial

and this Court should remand for the Army Court to conduct its required review based on evidence of the crimes the government actually charged.

II.

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING APPELLANT'S PRETRIAL STATEMENT WHERE THERE WAS NO INDEPENDENT EVIDENCE TO CORROBORATE THE ESSENTIAL FACTS ADMITTED.

Standard of Review

"Plain error is established when: (1) an error was committed; (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to an appellant's substantial rights." *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007). Appellant bears the burden of persuading this Court plain error exists. *Id.*

Law and Argument

"Mil. R. Evid. 304(c) requires an amount of independent evidence sufficient to justify an inference of truth of the essential facts admitted from the confession." *United States v. Adams*, 74 M.J. 137, 140 (C.A.A.F. 2015). "What constitutes an essential fact of an admission or confession necessarily varies by case." *Id.* "While a sufficient amount of evidence can be slight, the evidence must nevertheless be sufficient in quantity and quality to meet the plain language of the rule." *Id.* Independent evidence of "each and every element of the confessed crime is not required as a matter of military law," but independent evidence is required for "the

essential facts stated in the confession." *United States v. Rounds*, 30 M.J. 76, 80 (C.A.A.F. 1990) (citing *United States v. Melvin,* 26 M.J. 145, 147 (C.M.A. 1988)); Mil. R. Evid. 304(c). "There is no "tipping point" of corroboration which would allow admission of the entire confession if a certain percentage of essential facts are found to be corroborated," admission of the essential facts requires a fact by fact analysis whereby uncorroborated essential facts are excised. *Adams*, 74 M.J. at 140.

A. The military judge's failure to *sua sponte* identify and address the issue of corroboration under Mil. R. Evid. 304(c) was plain error.

The only evidence of the charged Hawaii Bedside Incident and Texas Old-Flame Incident offered at trial was Pros. Ex. 1, appellant's sworn statement to Special Agent JS and the testimony of Special Agent JS regarding these admissions. (JA 146-171). The other evidence presented by the government consisted of uncharged misconduct and general statements made by KS to both Ms. VA and Ms. RL. The government expressly sought to introduce the propensity evidence to negate rather than corroborate appellant's admissions of accident.

The general statements to Ms. VA and Ms. RL were made by KS and therefore necessarily corroborate KS's testimony of uncharged misconduct rather than appellant's statements to Special Agent JS. KS disclosed a general statement to Ms. VA that she had been sexually assaulted by her dad that was only admissible

as non-hearsay and not for the truth of the matter asserted. (JA 79-80; 4-5). KS also disclosed six general statements to Ms. RL essentially stating her father inappropriately touched her private parts. (JA 249-56). None of these general statements contained any description of where and when the touching occurred. (JA 79-80; 249-56). As trial counsel admitted to the military judge regarding KS's statement to Ms. VA:

> TC: Sir, what she revealed to her teacher, the government believes the answer to be, is a general statement. So it wouldn't - - it could relate to the charged offenses, but it also could relate to other offenses. But, it is a general statement of fact.
>
> MJ: Do you believe it relates to one of the incidents that she testified about this morning?
>
> A: Yes, Your Honor, we do.

(JA 74).

While trial counsel initially stated that the disclosure could relate to either the charged or uncharged misconduct, the government's conclusion that it relates to the uncharged incidents KS testified about that morning confirms this logical conclusion. The same holds true for KS's statements to Ms. RL. The general statements were made by KS and therefore necessarily refer to her version of what happened. However, KS was clear that appellant had assaulted her "two or three" times and she described each of these times as the uncharged Hawaii Van Incident, the Texas Pool Incident, and the Texas Bedside Incident, and not the charged

allegations of the Hawaii Bedside Incident and the Texas Old-Flame Incident. (JA 33-40). These general statements therefore corroborate KS's testimony of uncharged misconduct rather than appellant's sworn statement.

The military judge should have noticed the lack of corroboration of appellant's admissions under Mil. R. Evid. 304(c), because KS's testimony and the general statements necessarily referring to her version of events detailed three separate instances of uncharged misconduct occurring at different times and places than the charged misconduct. (*Compare* 224-25 *with* R. at 34-40, 62-63). The military judge's failure to consider Mil. R. Evid. 304(c) when allowing appellant's statements to Special Agent JS into evidence was plain error.

This Court addressed the corroboration of an airman's confession to ingesting cocaine in *Rounds*. 30 M.J. at 78. In his statement, Rounds admitted the following essential facts: "I did the cocaine in Houston. A couple times. On [T]hanksgiving and on New Years." *Id.* An eyewitness testified at trial he and Rounds attended parties on both occasions with friends, all of whom the witness knew had "been involved in the use of drugs." *Id.* at 79. He did not observe Rounds use cocaine at either party. *Id.* at 76. While the witness did not see drugs at the Thanksgiving party, he did see drugs at the New Year's Eve fest "in visible abundance." *Id.* In fact, the witness twice requested a dollar bill from Rounds, consumed cocaine in

front of him and returned the dollar bill to Rounds. Standing next to the witness, Rounds had, "An unobstructed view of the cocaine" each time. *Id.* at 79.

Although the evidence did not directly show consumption, this Court found the evidence was sufficient to corroborate use during the New Year's Eve party and was not sufficient to corroborate use during the Thanksgiving party. *Id.* at 80. This Court reasoned the eyewitness testimony revealed that on New Year's Eve, Rounds "had both access and the opportunity to ingest the very drugs he admitted using in his confession," and it "establish[ed] appellant's presence at the scene of active drug use" and "dovetail[ed] with the time, place, and persons involved in the criminal acts admitted." *Id.* In contrast, an inference was "distinctly lacking" for the admitted cocaine use at the Thanksgiving party. *Id.* The witness corroborated the time and place of the admitted cocaine use and he placed Rounds in the company of known drug users, but failed to corroborate the essential fact of access to drugs on that particular occasion. *Id.* "The sole witness to this incident, said he saw "no drugs" whatsoever at that time." *Id.*

Similarly this Court held in *Adams*, "[i]n a case where the only direct evidence of the crime was the confession, it is important to determine what was not corroborated." *Adams,* 74 MJ at 141. At trial, Adams was found guilty of larceny of cocaine from a local drug dealer. *Id.* at 138. Adams provided a pretrial sworn statement in which he confessed to stealing cocaine with two co-conspirators from

a drug dealer. *Id.* In the statement Adams provided his motive for the larceny, the general location of the offense, admitted that he brandished a handgun and that his co-conspirator grabbed the cocaine from the drug dealer. At trial the government did not call the drug dealer or the two accomplices. *Id.* The government instead relied on the testimony of two special agents to corroborate the known existence of the drug dealer and the known existence of the general situs of the crime. *Id.* This court held "there is no evidence which corroborates Adam's opportunity or motive to commit the crime, his access, his intent, the accomplices involved, the subject of the larceny(i.e., cocaine), the time of the crime, or the act of the larceny itself (waving the handgun while [DT] grabbed the cocaine)." *Id.* at 141. The Court held that even assuming the location of the larceny and the identity of the victim those facts alone were legally insufficient without any additional evidence of the crime. *Id.*

The lack of corroboration in the instant case is similar to the lack of corroboration in both *Rounds* and *Adams*. As previously discussed, the only evidence aside from appellant's admissions to Special Agent JS entered in evidence at trial were acts of uncharged misconduct and KS's general statements, which logically refer to the uncharged misconduct. Aside from appellant's general propensity, these uncharged acts were used at trial to establish appellant's opportunity, intent, and absence of mistake or accident. (JA 258-62).

In the instant case, there were substantially less corroborating facts than those regarding the Thanksgiving party in *Rounds*, which contained direct evidence by an independent witness that described the actual Thanksgiving party contained in the admissions. *Rounds*, 30 M.J. at 79. Here there is no direct independent evidence of the particular offenses admitted by appellant. In *Rounds*, even though there was direct evidence of the Thanksgiving party, the evidence of the accused being in the company of known drug users on that specific occasion was insufficient to corroborate the essential fact of access to drugs on that particular occasion. *Rounds*, 30 M.J. at 80. General access and opportunity were not enough. *Id.* Here, there is nothing in KS's description of the other acts that corroborates the actual date and situs of the particular crimes detailed in appellant's admissions to Special Agent JS. The government stated in closing argument KS described separate acts occurring at different times and places. While the evidence may have established that appellant had general access and opportunity resulting from being KS's father, just as in *Rounds* this general access and opportunity is not enough. In both cases, the government failed to corroborate the specific access and opportunity contained in the admissions.

This Court's holding in *Adams* is instructive because appellant's admissions to Special Agent JS are the only direct evidence of the crime and it therefore becomes important to determine what was not corroborated. *Adams,* 74 MJ at 141. Here

there was nothing to corroborate the specific time and place of the Hawaii Bedside Incident and the Texas Old Flame Incident, let alone the specific facts and circumstances of each occurrence. Even the motive and intent expressed by inference in KS's testimony regarding other uncharged acts does not match the accidental intent described in appellant's admissions. The government expressly sought to introduce the propensity evidence to negate rather than corroborate appellant's admissions of accident. As in *Adams*, virtually none of the facts this Court has previously determined as essential were corroborated.

B. The military judge's error materially prejudiced appellant because his statement was the only evidence of the charged offenses.

"Because appellant's statements to Special Agent JS were 'the government's key piece of evidence' the admission of the uncorroborated essential facts was prejudicial . . . ." *Adams*, 74 M.J. at 141. The only evidence of the charged misconduct in this case were appellant's statements to Special Agent JS. The military judge's erroneous admission of this evidence therefore materially prejudiced appellant because his uncorroborated statements were the lynchpin of the government's case against him.

Absent appellant's statements to Special Agent JS regarding the charged offenses, the government's case erodes completely. Admission of the statements prejudiced appellant. Without this evidence, the government would be left with evidence of separate occasions of uncharged misconduct and general statements

necessarily corroborating that very same uncharged misconduct. While evidence of several crimes, it is not evidence of the crimes the government charged.

The military judge committed prejudicial plain error by admitting appellant's statements to Special Agent JS against Mil. R. Evid. 304(c) and the decisions of this Court. The removal of that evidence from the record must result in this Court setting aside and dismissing The Charge and its specifications.

III.

WHETHER THE EVIDENCE OF THE TWO CONVICTIONS OF INDECENT ACTS WITH A CHILD IS LEGALLY SUFFICIENT.

Standard of Review

Questions of legal sufficiency are reviewed *de novo*. *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, (1979)).

Law and Argument

The government's theory of the case at trial was that appellant assaulted KS at least five separate times. (JA 209). Appellant's statements to Special Agent JS were the only evidence presented by the government at trial that The Charge and

its specifications ever occurred. However, as discussed above, these statements should not have been admitted into evidence as they were uncorroborated and thus cannot provide the basis to find the specifications legally sufficient. Further, both specifications are legally insufficient because the government failed to prove that the acts of appellant were indecent and that under the circumstances, the conduct of the appellant was of a nature to bring discredit upon the armed forces.

A. The only evidence of the charged misconduct presented at trial was appellant's statements to Special Agent JS.

The government's first witness, appellant's wife, testified about background facts regarding when the family lived in Hawaii and Texas, KS's different ages when the family lived in Hawaii and Texas, and physical characteristics of both herself and KS when they lived in Hawaii and Texas. (JA 15-27). She did not testify about any acts or misconduct of appellant. (JA 15-27).

KS testified next regarding three times that her father touched her inappropriately: 1) the Hawaii Van Incident (JA 34-36, 62); 2) the Texas Pool Incident (JA 36-38, 62); 3) and the Texas Bedside Incident (JA 37-38, 63). The government theory of the case was appellant admitted to the charged misconduct and "that in addition to those two times, there are three others that KS remembers." (JA 209). The government specifically listed both the Hawaii Van Incident and the Texas Pool Incident as Mil. R. Evid. 404(b) and 414 evidence in its pretrial motion. Additionally, the military judge highlighted in a pretrial session that the

parties had made him aware of an additional act of uncharged misconduct to which KS would testify. (JA 13). The only other incident KS testified about was the Texas Bedside Incident. (JA 37-38, 63). KS did not testify about any of the charged misconduct: the Hawaii Bedside Incident or the Texas Old-Flame Incident.

The third witness, Ms. VA, testified regarding a general statement KS made in October 2007 that KS had been sexually assaulted by her dad. (JA 71, 75, 79-80). This evidence necessarily relates to KS's testimony, as it was her disclosure, rather than the admissions of appellant. Thus, Ms. VA's testimony logically related to the uncharged misconduct rather than the charged offenses. Furthermore, the military judge erroneously admitted this evidence over the objection of the defense. (JA 5-6). The Army Court held the admission of this evidence based on victim outcry to be harmless error because the statement was admissible for the non-hearsay purpose of effect-on-the-listener. (JA 5-6). Under the Army Court's ruling, this evidence was not admitted for the truth of the matter asserted and the testimony was limited such that Ms. VA provided no substantive testimony regarding any misconduct of appellant.

Ms. RL, KS's clinical social worker in 2006 testified KS made general disclosures to her that appellant had touched KS's private parts. (JA 85, 88). These general disclosures did not include any description of when or where the indecent

acts occurred and necessarily relate to KS's testimony, as it was her disclosure, rather than the admissions of appellant. Thus, Ms. RL's testimony logically related to the uncharged misconduct rather than the charged offenses. Furthermore, Ms. RL's last session with KS occurred in October 2006 (JA 256). It is therefore, factually impossible for Ms. RL's testimony to have related to Specification 2 of The Charge, averred as occurring nearly at least a half year later between May to September 2007. (JA 7).

Ms. CLT, KS's therapist, testified about KS's disclosure in January 2008 of the uncharged Couch Incident. (JA 116-23). She did not testify about any of the charged misconduct.

Ms. LF, a child forensic interviewer with the Department of Public Safety for Texas, testified KS disclosed the Hawaii Van Incident in an interview with her on June 29, 2006. Ms. LF laid the foundation for admission of Pros. Ex. 4 a video-recording of the forensic interview in which KS described the Hawaii Van Incident. (JA 130-131, 133). The Hawaii Van Incident was uncharged misconduct. (JA 262, 265). Ms. LF did not testify about any of the charged misconduct.

Special Agent JS provided the only testimony related to the charged misconduct. He testified about appellant's admissions to the Hawaii Bedside Incident and the Texas Old-Flame Incident. (JA 146-171).

Captain MO is a physician's assistant and was qualified as an expert in reading medical records and preliminary diagnosis. (JA 171-72). He reviewed appellant's medical records from December 2006 to February 2009 and testified he saw no evidence in those particular records of a sleep disorder but could not state that appellant never had a sleep disorder. (JA 173-76). He did not testify about any acts or misconduct of the accused.

The government's last witness, Dr. AF, was qualified as an expert in clinical psychology, specifically the fields of forensic interviewing, reporting and recantation of child sexual abuse, and delayed disclosure of child sexual abuse. (JA 181). She testified about her expert review of the evidence, her opinion the forensic interviews were conducted following modern protocol and were non-suggestive, her opinion KS displayed different aspects of the five stages of disclosure to include recantation, and her opinion about KS's delayed reporting. (JA 182-87). Dr. AF's testimony consisted of commentary and opinion on KS's disclosures and behavior based on her review of the evidence, she did not testify about any of the charged misconduct.

The defense called Sergeant CC and Staff Sergeant WA to testify that they knew appellant since he returned to the unit and appellant was an outstanding soldier with outstanding military bearing. (JA 192-97). They did not testify about the charged misconduct.

The defense then called Ms. MS, KS's fraternal grandmother and appellant's mother, to testify that she witnessed the Hawaii Van Incident and during this occasion appellant placed his hand on KS's crotch to check KS's underwear because they both suspected KS had urinated in her pants. (JA 199). She further testified that at the previous trial KS disclosed to her in the restroom that KS's maternal grandmother Nana had coached KS's testimony and stated the truth was "dad never touched me, he never did anything." (JA 200-1). Ms. MS did not testify about any of the charged misconduct.

The only exhibit admitted into evidence that related to the charged misconduct was Pros. Ex. 1, appellant's sworn statement to Special Agent JS. Prosecution Exhibits 2 and 3 were rights warning waivers signed by appellant. (JA 227-29). Prosecution Exhibit 4 was a forensic interview conducted by Ms. LF in which KS disclosed the uncharged Hawaii Van Incident. (JA 230, 265). Prosecution Exhibit 7 is Dr. AF's curriculum vitae. (JA 231-45). Prosecution Exhibits 11, 12, and 13 were family photos depicting KS at various ages with different family members. (JA 246-48). Prosecution Exhibit 14 was Ms. RL's notes of therapy sessions she conducted with KS in 2006 in which KS made general disclosures that necessarily relate to KS's testimony, as it was KS's disclosure, rather than the admissions of appellant. (JA 249-56). Lastly, Pros. Ex. 17 is appellant's Enlisted Record Brief. (JA 257).

Thus, the only evidence presented at trial regarding the charged misconduct was the testimony of Special Agent JS and Pros. Ex. 1, appellant's sworn statement to Special Agent JS.

B. The government failed to prove Specification 1 of The Charge beyond a reasonable doubt because appellant's act was a mistake which under the circumstances was not indecent and was not of a nature to bring discredit upon the armed forces.

Appellant admitted to Special Agent JS that he came home late from a long day at work, climbed into bed, and had a strong desire to make love to his wife. (JA 224). Appellant "reached to touch her" and stated "I felt flesh and reached under her undergarments but something didn't feel right. I thought it was my imagination and continued. Then I heard my wife say that [KS] was in bed with her. I pulled my hand away instantly and went for the light." (JA 224).

Special Agent JS and appellant had the following exchange regarding this particular incident:

> Q. How old do you think [KS] was the first time you fondled her vagina?
>
> A. I think she was 4 years old, and this happened around Nov or Dec of 2003, when we were stationed at Schofield Barracks, Hawaii.
>
> Q. When you were in bed that evening and you reached over and were fondling your daughter[']s vagina, what was it that you noticed was different?

A. Smooth skin, and no hair. Position, when my wife lays down she has a certain body size and my daughter has a certain body size.

Q. How long were you fondling your daughter[']s vagina?

A. 10 to 15 seconds. Then my wife said KS was in the bed. That is when I stopped.

Q. Did you insert your finger in her vagina?

A. No.

Q. What did you do?

A. I was just rubbing it.

(JA 224-25).

At trial the government used Ms. LE, appellant's now ex-wife, to compare the relative sizes of both herself and KS when the family lived in Hawaii. (JA 22-23). However, Ms. LE also stated she shaved her pubic hair while in Hawaii. (JA 23). The government also introduced family photographs of KS when she lived in both Hawaii and Texas as additional evidence of her relative size during these time-periods. (JA 246-48).

Even in the light most favorable to the government, the government failed to prove beyond a reasonable doubt that under the circumstances appellant's act was indecent and of a nature to bring discredit upon the armed forces. Appellant describes an accidental touching of KS. Appellant never intended to touch KS and in the dark bedroom mistook KS for his wife. As soon as appellant was aware that

KS was in the bed, he stopped. Appellant admitted that he came home after a long day at work. It was late and his wife was already in bed. When he reached over to rub his wife's vagina he did not know that his daughter was in bed. While appellant admitted that something did not feel right, it was not until his wife informed him that KS was in bed that he realized his mistake. Nothing the government presented conflicted with appellant's admission that he pulled his hand away instantly, as soon as he realized this mistake.

"'Indecent Acts' signify that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." U.S. DEP'T OF ARMY, PAM. 27-9, Military Judges' Benchbook para 3-87-1d. The mistake described by appellant is not indecent, as such a mistake does not fit the required definition. Furthermore, under all the circumstances to which appellant admitted, such a mistake is not service discrediting. Appellant returned home late at night after a long day of work, and, as soon as he realized his mistake, he stopped.

C. The government failed to prove Specification 2 of The Charge beyond a reasonable doubt because appellant's admitted act was merely reaching down to touch KS's vagina rather than actually touching it, and the act was done in a state of unconsciousness such that it was not indecent and was not of a nature to bring discredit upon the armed forces.

Appellant also admitted to Special Agent JS that he had a "dream about an old-flame." (JA 224). Appellant stated that in this dream "I reached down to touch her on her vagina. She said stop, that this wasn't right. I have a wife and it would be wrong for us to engage in intercourse so I stopped. As this was happening in my dream, I was performing it in real life with my daughter who in my dream was [AM]." (JA 224).

Special Agent JS and appellant had the following exchange regarding this incident:

> Q. The second time you fondled your daughter[']s vagina, where did this happen?
>
> A. Here on Fort Bliss, in our current house, and that was around 6 Jun 07.
>
> Q. Did you insert your finger in her vagina that time?
>
> A. I don't know.
>
> Q. Did you ever rub or put your penis near her vagina?
>
> A. No.
>
> Q. Did you ever touch her breasts?
>
> A. I remember my head being on [AM]'s chest in the dream. I don't know.

(JA 225).

The government used the testimony of CPT MO to establish there was no evidence in appellant's military medical records that appellant had a sleep disorder, however, CPT MO also admitted that he could not state that appellant never had a sleep disorder. (JA 173-76).

As a preliminary matter, appellant describes the action of reaching toward what he believed to be AM's vagina, rather than actually touching her vagina. While Special Agent JS re-characterizes this statement as "fondling," appellant never states he touched either AM's or his daughter's vagina on this occasion. Appellant admitted to reaching toward AM's vagina in his dream, at which point she said stop, and he did. The most appellant's statement shows is he was performing a similar action in real life with his daughter, such that he was reaching toward KS's vagina, at which point he was told stop, and he did. Similarly, appellant admitted that he remembered his head was on AM's chest in the dream, but did not know if he had performed this action in real life with his daughter. The government failed to prove that the alleged act even occurred.

Second, CPT MO specifically agreed that while there was no mention of a sleep disorder in appellant's military medical records, this did not mean appellant never had a sleep disorder. (JA 175-76). Captain MO stated that he would not know whether appellant ever had a sleep disorder. (JA 176). He further agreed that many

Soldiers do not report their medical issues to their military care providers. (JA 176). Thus, even if the act were completed, the government's evidence did not conflict with appellant's description of an unconscious state where appellant believed his daughter to be someone else. This unconscious mistake does not meet the requisite definition of an indecent act. Furthermore, under all the circumstances, the act described by appellant was not of a nature to bring discredit upon the armed forces as it was an unconscious mistake.

Thus, this Court should find The Charge and its specification legally insufficient, and appellant therefore asks this court to set aside and dismiss both The Charge and its specifications.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and dismiss The Charge and its specifications.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Swift*, Army Dkt No 20100196, USCA Dkt No. 16-0407/AR, was electronically filed with the Court and Defense Appellate Division on June 23, 2016.

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