IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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v.	)	Crim. App. Dkt. No. 20100196
Specialist (E-4) JUSTIN P. SWIFT United States Army, *Appellant*	)	USCA Dkt. No. 16-0407/AR

TO THE JUDGES OF THE
UNITED STATES COURT OF APPEAL 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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2012) [hereinafter UCMJ]. The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ.

Statement of the Case

On 10 March 2010, an enlisted panel 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. (JA 001). The panel sentenced appellant to reduction to the grade of E-1, total forfeitures, confinement for fourteen years, and a dishonorable discharge. (JA 001). The convening authority approved the sentence as adjudged. (JA 001).

On 29 November 2012, the Army Court set aside the findings of guilt and sentence, dismissing both specifications without prejudice due to the government's failure to allege the terminal element. *United States v. Swift*, ARMY 20100196, 2012 CCA LEXIS 459, *4-5 (Army Ct. Crim. App. 2012)(sum. disp.). However, the Army Court authorized a new trial "under the jurisdiction of the same or different convening authority." *Id.* at *5. On 14 August 2013, this court affirmed the Army Court's decision. *United States v. Swift*, 72 M.J. 466 (C.A.A.F. 2013).

On 22 October 2014, on rehearing a military judge, sitting as general court-martial, convicted appellant contrary to his pleas, of two specifications of indecent acts with a child in violation of Article 134, UCMJ. (JA 014, 222-23). The military judge sentenced appellant to reduction to E-1, confinement for eleven years, and a dishonorable discharge. (JA 002). The military judge credited appellant with 1,142 days of confinement credit, which the convening authority approved in addition to approving the adjudged sentence. (JA 002).

On 21 January 2016, the Army Court affirmed the findings and sentence. (JA 006). On 21 March 2016, appellant petitioned this Court for review, which this court granted on 9 May 2016. On 23 June 2016, appellant filed his brief on the granted issues and specified issue.

Statement of Facts

A. Charged Offenses and Proof at Trial.

The victim, KS, is appellant's biological daughter. (JA 186). Appellant committed two indecent acts by touching KS's vagina with his hand. (JA 007). The first specification alleges appellant committed an indecent act between on or about 1 November 2003 and 31 December 2003 at Schofield Barracks, Hawaii, by touching the victim, KS's vulva with his hand. (JA 007). At trial, KS testified that the "first time that it happened" appellant committed the indecent act while she lived in Hawaii with him and her family when she was four years old. (JA 034).

She testified that appellant moved his hand over her vagina in a "massaging motion." (JA 031, 035-36). In his sworn statement, appellant admitted that the "first time [he] fondled [KS's] vagina" occurred when she was four years old "around Nov or Dec of 2003, when we were stationed at Schofield Barracks, Hawaii" and he admitted to using his hand to fondle KS's vagina. (JA 224).

The second specification alleges appellant committed an indecent act between 1 May 2007 and 5 September 2007 at Fort Bliss, Texas, by touching KS's vulva with his hand.[1] (JA 007). KS testified that appellant committed this indecent act while the family was stationed at Fort Bliss, Texas, when she was approximately seven years old. (JA 039, 064). KS testified that appellant "reached over and he started touching me . . . [i]n my vaginal area." (JA 039-40). She explained that appellant again moved his hand in the "same type of massaging motion." (JA 040). In his statement, appellant admitted to fondling KS's vagina while at Fort Bliss, Texas, "around" 6 June 2007. (JA 225).

B. Defense Counsel's Tactical Decisions.

Appellant essentially argues a variance between the charges and the evidence presented at trial. At trial, the government provided the defense with a verbal bill of particulars and the defense never objected or otherwise asserted at

[1] This specification also alleged appellant "[laid] his head upon KS' chest," but the military judge excepted this language from the specification in his finding of guilty. (JA 007, 222-23).

trial that the government failed to provide notice of the charged offenses. (JA 013, 037). At one point the military judge asked the defense, "you had mentioned requesting a bill of particulars. Do you need any further information?" (JA 037). The defense counsel stated, "No, Your Honor." (JA 037).

Although both parties filed written motions on uncharged misconduct, the parties agreed "a ruling in advance of trial was not necessary and [they] could take up the issue as it came up during the merits portion of the trial concerning any evidence of uncharged or similar misconduct being brought by the government in this case." (JA 012, 258-70). Accordingly, the trial proceeded with the burden on the defense to object to the admission of uncharged misconduct during trial. The defense only raised two objections related to uncharged misconduct and these objections were not in response to KS's testimony concerning the indecent act in the van or the indecent act in bed with KS's mother. (JA 034, 039-40, 123, 140).

In fact, the defense did not even object to the admission of KS's prior consistent statements concerning the indecent act in the van. (JA 205). Prosecution Exhibit 4 is a video-taped interview of KS and contains her statements about the indecent act in the van and uncharged misconduct. (JA 230). The government moved to admit the entire video as a prior consistent statement. (JA 131). Although the defense initially objected to the admission of the entire video,[2]

[2] The defense later agreed to the admission of the entire video. (JA 230).

the defense conceded the admissibility of KS's statements about the van incident. (JA 132). The following exchange occurred between the defense counsel and the military judge:

> CDC: Your honor, my recollection of the interview is that there are about two sentences that reflect a prior consistent statement and the rest of it is unrelated.
> MJ: *And, those statements would be the actual outcry regarding the offense?*
> CDC: *Yes, Your Honor.* So, if the witness testifies to those, *we understand that that evidence would come in.* But, we believe that the rest of the tape, or CD rather, is inadmissible.

(JA 132) (emphasis added).

Appellant never alleged a variance between the pleadings and proof at trial before the military judge. Upon hearing KS's testimony, the defense counsel did not move for a continuance to prepare a defense. After the government rested its case, the defense counsel did not move for a finding of not guilty pursuant to Rule for Court-Martial (R.C.M.) 917. (JA 191-92). Appellant did not allege variance as a legal error in his clemency submission to the convening authority. (SJA 3-5). Also, appellant did not raise material variance as an assignment of error or personally raise the issue under *United States v. Grostefon* before the Army Court. (JA 002-03).

Similarly, the defense never objected to the admission of his sworn statement. In fact, the defense counsel immediately stated "No objection, sir"

when the government moved to admit the sworn statement. (JA 160). In addition to not objecting to the admission of his sworn statement at trial, appellant did not allege legal error to its admission in his clemency submission to the convening authority and did not allege the sworn statement lacked corroboration as an assignment of error to the Army Court. (JA 001-02, 160; SJA 3-5).

C. Defense opportunity to present a defense against the indecent acts.

The defense channeled its efforts into presenting a defense against both the indecent act that occurred in the van and with KS's mother through the use of cross-examination, presentation of contrary evidence, and closing argument.

For the indecent act in the van, defense counsel cross-examined KS concerning her prior inconsistent statements and attempted to impeach KS on details concerning the indecent act. (JA 049-51, 055-58). Defense counsel also cross-examined the forensic interviewer on her interviewing techniques and argued the forensic interviewer used suggestive questioning. (JA 135, 213). In closing, the defense counsel attacked this indecent act and argued appellant lacked the specific intent "to gratify his lust or sexual desires." (JA 214-15).

For the indecent act that occurred while KS was in bed with her mother, defense counsel cross-examined KS extensively, highlighting each of her prior inconsistent statements and tried to establish a motive to fabricate. (JA 049-51,

053-57, 062). Defense counsel then argued this motive to fabricate in closing argument. (JA 210-11, 213, 215-16, 220).

Additional facts pertaining to this assignment of error will be addressed accordingly.

Summary of Argument

The Army Court properly conducted its Article 66(c) review in affirming the charge and its specifications based on the evidence presented at trial. The victim's testimony and appellant's statement refer to the same indecent acts alleged in the charge sheet. Although appellant essentially argues a variance between pleadings and proof, appellant fails to meet his burden to establish a material variance in this case. Moreover, appellant fails to establish plain error in the admission of his sworn statement because the victim's testimony corroborated the essential facts from his sworn statement. Since appellant benefited from the admission of his statement, he also cannot demonstrate material prejudice to substantial rights. Finally, given the overwhelming evidence of appellant's guilt, the indecent act specifications are legally sufficient.

Issue 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

In assessing a lower court's factual sufficiency review, this court "'will not overturn findings of fact by a Court of Criminal Appeals unless they are clearly erroneous or unsupported by the record.'" *United States v. McAllister*, 55 M.J. 270, 277 (C.A.A.F. 2001)(internal citations omitted). When an appellant alleges a variance between pleadings and proof, this court assesses de novo whether the alleged variance is fatal. *United States v. Treat*, 73 M.J. 331, 335 (C.A.A.F. 2014). However, when an appellant fails to object at trial, this court also reviews a military judge's findings under a plain error analysis. *See id.* Under the plain error analysis, appellant must demonstrate: (1) there was error, (2) the error was plain or obvious, and (3) the plain error affected substantial rights. *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F. 2006).

Law and Argument

The Army Court properly conducted its Article 66(c) review in affirming the findings and sentence. KS's testimony concerning appellant's indecent acts in the van and in bed with her mother are the same indecent acts alleged on the charge sheet. However, for the first time on appeal, appellant essentially argues a variance between the pleadings and the proof presented at trial. This court should affirm the Army Court's decision because appellant fails to meet his burden of establishing a material variance in this case.

A. KS's testimony and appellant's statement refer to the same indecent acts alleged in the charge sheet.

Contrary to appellant's new argument on appeal, the charge sheet, KS's testimony, and appellant's statement all refer to the same offenses. The first specification alleges appellant committed an indecent act between on or about 1 November 2003 and 31 December 2003 at Schofield Barracks, Hawaii, by touching KS's vulva with his hand. (JA 007). KS testified that the "first time that it happened" appellant committed an indecent act while she lived in Hawaii with him and her family when she was four years old. (JA 034). She testified that appellant moved his hand over her vagina in a "massaging motion." (JA 031, 035-36). In his statement, appellant admitted that the "first time [he] fondled [KS's] vagina" occurred when she was four years old "around Nov or Dec of 2003, when we were stationed at Schofield Barracks, Hawaii." (JA 224). Appellant admitted to using his hand to fondle KS's vagina. (JA 224).

The second specification alleges appellant committed an indecent act between 1 May 2007 and 5 September 2007 at Fort Bliss, Texas, by touching KS's vulva with his hand. (JA 007). KS testified that appellant committed this indecent act while the family was stationed at Fort Bliss, Texas, when she was approximately seven years old. (JA 039, 064). KS testified that appellant "reached over and he started touching me . . . [i]n my vaginal area." (JA 039-40). She explained that appellant again moved his hand in the "same type of massaging

motion." (JA 040). In his statement, appellant admitted to fondling KS's vagina while at Fort Bliss, Texas, "around" 6 June 2007. (JA 225).

Therefore, the specifications alleged in the charge sheet, KS's testimony at trial, and appellant's statement admitted at trial all dovetail into the same timeframe, same location, and describe the same indecent acts accomplished through the same method—appellant used his hand to massage or fondle KS's vagina.

B. The Army Court properly conducted its Article 66(c) review in affirming the charge and its specifications based on the evidence presented at trial.

The Army Court conducted a full, independent review of the evidence presented at trial and affirmed the findings. However, appellant argues the Army Court erroneously conducted its Article 66(c) review and asks this court to remand this case back to the lower court, relying primarily upon *United States v. Miller*. (Appellant's Br. 11-15). Appellant's reliance upon *Miller* is misplaced as this case is distinguishable. Indeed, in *Miller*, this court did not even address the lower court's reviewing authority under Article 66(c); instead, this court assessed whether a simple disorder was a lesser included offense of a violation of Article 95, UCMJ, and held that the conviction "may not be affirmed under *Article 59,* UCMJ." *United States v. Miller*, 67 M.J. 385, 386 (C.A.A.F. 2009)(emphasis added). This court never even referred to Article 66(c), UCMJ, throughout the entire opinion. *Id.* at 385-89

This case is also distinguishable from *Miller* because it does not involve a lesser-included offense; the evidence supporting appellant's convictions was presented at trial; and the defense was on notice and able to present a full defense on appellant's behalf as will be fully discussed in section D *infra*. Thus, the Army Court found appellant guilty of the charge and its specifications beyond a reasonable doubt in this case based on the evidence presented at trial and contained in the record. (JA 006). The Army Court stated, "On consideration of the entire record and the submissions of the parties, the findings of guilty and the sentence are affirmed." (JA 006). This court "'will not overturn findings of fact by a Court of Criminal Appeals unless they are clearly erroneous or unsupported by the record.'" *Miller*, 55 M.J. at 277. In this case, the government presented overwhelming evidence of appellant's guilt, which will be discussed in Issue III, *infra*.

C. Trial counsel's argument is not evidence.

Appellant next argues that the Army Court erred in affirming his convictions based on a purported divergence between pleadings and proof. Appellant argues the government charged appellant with indecent acts under the fanciful circumstances described in his confession and that these indecent acts are different from the indecent acts KS described in her testimony. (Appellant's Br. 12). In furtherance of this argument, appellant relies heavily upon the government's

statements in motions practice and in presenting argument. (Appellant's Br. 4-9, 12-16). Appellant's reliance upon trial counsel's argument, which was not evidence presented at trial, is misplaced. "We do note, however, that opening statements are not evidence . . . ." *United States v. Turner*, 39 M.J. 259, 262 (C.M.A. 1994)(internal citations omitted). "[C]ounsel's arguments are not evidence." *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983).

Federal precedent supports this basic legal proposition and also addresses appellant's argument on variance. In *Wilson*, the appellant argued, for the first time on appeal, a "fatal variance between the conspiracy stated in the indictment and the proof at trial." *United States v. Wilson*, 168 F.3d 916, 918 (6th Cir. 1999). The appellant "relie[d] primarily upon a statement made by the [prosecutor] in closing argument, that . . . the government proved two conspiracies instead of one." *Id.* at 924. The Sixth Circuit Court of Appeals found this argument to be "unpersuasive," holding that "the record of evidence supported a finding of a single conspiracy." *Id.* In reaching this holding, the court reviewed the record of evidence and reasoned that despite the prosecutor's "poor choice of words" in "characteriz[ing] . . . the evidence" an attorney's closing argument is "*not evidence*." *Id.* at 924 n.6 (emphasis added).

In *Lazarenko*, the government "was somewhat inconsistent in how it portrayed [money laundering] counts to the jury." *United States v. Lazarenko*, 564

F.3d 1026, 1037 (9th Cir. 2009). "Nonetheless, *argument is not evidence*." *Id.* (emphasis added). Instead of relying upon the prosecutor's argument, the Ninth Circuit Court of Appeals reviewed the evidence presented at trial and determined "the government showed that [appellant] laundered proceeds from extortion" and affirmed the appellant's convictions. *Id.* at 1038.

In this case, the trial counsel was inconsistent in her presentation of argument at trial. However, as the Sixth and Ninth Circuit Courts of Appeals recognized, this argument was not evidence. As fact finder, the military judge was not required to accept or adopt the trial counsel's arguments and interpretation of the evidence. Similarly, the Army Court was not bound by the trial counsel's argument. Consistent with *Wilson* and *Larazenko*, this court should review the evidence presented at trial to assess appellant's variance claim.

D. Appellant fails to meet his burden to establish a material variance in this case.

Appellant's variance argument can be broken into two components. First, he alleges the charged offenses were aimed at two indecent act incidents under the fanciful circumstances he described in his sworn statement. (Appellant's Br. 12). Second, he argues the evidence presented at trial through KS's testimony concerned distinct and separate indecent acts. (Appellant's Br. 12). However, as previously discussed, these incidents were the *same* two indecent acts and the Army Court properly affirmed the military judge's findings of guilt on these

offenses. "[I]t is well established that in order 'to prevail on a fatal variance claim, an appellant must show both that the variance was material and that he was substantially prejudiced thereby.'" *Treat*, 73 M.J. at 336 (quoting *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009). Appellant fails to satisfy this burden on both prongs.

1. The alleged variance was not material.

"The test for whether a variance is material is whether it 'substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense.'" *Id.* (quoting *Marshall*, 67 M.J. at 420). Since appellant was charged with committing two indecent acts and was convicted of committing two indecent acts, the seriousness of the offenses and the punishment of the offenses were the same. Thus, the last two prongs favor a finding that the alleged variance in this case was not material.

Likewise, the nature of the offense remained the same. Under this prong, if the evidenced adduced at trial changes "an integral part of an element of the offense" or the "core" of the offense courts will find a material variance occurred. *See id*; *see also, Finch*, 64 M.J. at 122. For example, in *Treat*, this court found a material variance between the alleged flight number of an aircraft in a missing movement offense and the aircraft's general description because a "'particular . . . flight is essential to establishing the offense of missing movement.'" *Treat*, 73

M.J. at 336 (quoting Manual for Courts-Martial, United States pt. IV, para. 11.c.(2)(b) and *United States v. Kapple*, 40 M.J. 472, 473-74 (C.A.A.F. 1994)). By contrast, in *Finch*, this court did not find a material variance despite the change in the location of an overt act for a conspiracy charge. *Finch*, 64 M.J. at 121. In finding the variance was not material, this court reasoned that "[a]lthough an overt act is an element of the offense of conspiracy . . . it is not the core of the offense." *Id.* at 122. This court further reasoned that the location of the overt act "was at issue throughout th[e] case, indicating that [a]ppellant was on notice that [the] issue[] would be litigated." *Id.*

In this case, the circumstances surrounding the indecent acts were not "an integral part of an element" of the offenses or the "core" of the offenses. As discussed in section A *supra*, the integral or core elements of these indecent act offenses remained the same. Specifically, the specifications, KS's testimony, and appellant's statement all concern the same timeframe, location, and indecent acts accomplished through the same method—appellant's use of his hand to touch KS's vagina.

Moreover, similar to *Finch*, the circumstances of the indecent acts were at issue throughout the entire trial, indicating that appellant was on notice that the circumstances of the indecent acts would be litigated. At trial, appellant attempted to discredit KS's testimony on the circumstances of the indecent acts through

cross-examination and the presentation of contrary evidence. The defense cross-examined KS by highlighting her prior inconsistent statements about the indecent acts, attempting to solicit a different version of what occurred for the indecent act in the van, and attempting to establish her purported motive to fabricate. (JA 050-58, 62). The defense also presented testimony from appellant's mother who contradicted KS on the circumstances for the indecent act in the van. (JA 198-200).

The government countered defense's tactics by highlighting KS's prior consistent statements on the circumstances and cross-examining appellant's mother on her alleged observations of the circumstances for the indecent act in the van. (JA 131, 201-02, 230). Additionally, the government proved the circumstances appellant described in his sworn statement were false. The government attacked appellant's statement that he mistook KS—a child—for her mother—a grown woman. The government introduced testimony and photographic evidence illustrating the physical differences between them. (JA 019-23, 246-48). To disprove appellant's story that he suffered from a sleep disorder, the government also introduced expert testimony that there are no medical records reflecting this diagnosis. (JA 171-74). In an attempt to minimize the impact of the expert's testimony, the defense cross-examined him on the limitations of his medical records review. (JA 174-76).

Simply put, just as the location of the overt act was at issue throughout the trial in *Finch*, the circumstances of the indecent acts were at issue throughout this trial with both parties presenting evidence and counter-evidence on those circumstances. Under *any* version of the circumstances of the indecent acts, appellant touched KS's vagina. (JA 007, 035-36, 039-40, 224-25). This indecent touching is the core of the indecent act offense and the core of the offense remained the same.

Additionally, the alleged variance did not change the theory of liability in this case. In *Marshall*, this court found a material variance between alleging the appellant escaped custody from an officer and proving at trial that appellant escaped the custody of a noncommissioned officer (NCO) through an agency theory of liability. *Marshall*, 67 M.J. at 421. This court reasoned that "had [the appellant] known he would be called upon to refute an agency theory or to defend against a charge that he escaped from [the NCO,] [a]ppellant is unlikely to have focused his defense and his closing argument on the lack of evidence that . . . he escaped from the custody of the [the officer.]" *Id.* By contrast, in *Hopf*, this court found there was no material variance even though the appellant was charged with committing aggravated assault on a named Korean male but was convicted of aggravated assault on an "unknown" Korean male. *United States v. Hopf*, 5 C.M.R. 12, 13 (C.M.A. 1952). There was no material variance because the

appellant "was convicted of the same assault for which he was charged, and the defense preparations to meet the charge were unaffected." *Marshall*, 67 M.J. at 420 (citing *Hopf*, 5 C.M.R. at 14 and explaining its rationale). Here, the theory of appellant's liability remained the same: he committed indecent acts by touching KS's vagina with his hand within the charged timeframes at the charged locations. Furthermore, the defense preparations to meet these offenses were unaffected as will be further discussed in section D.2 *infra*. Thus, the nature of the offenses remained the same and appellant has not satisfied his burden of demonstrating that the alleged variance in this case was material.

2. Appellant was not substantially prejudiced by the alleged variance.

This court places "'an increased emphasis on the prejudice prong' of the fatal variance analysis." *Treat*, 73 M.J. at 336 (quoting *Finch*, 64 M.J. at 121). "'Even where there is a variance in fact, the critical question is one of prejudice.'" *Finch*, 64 M.J. at 121 (internal citations omitted). Under this prong, an appellant can be prejudiced if the variance: (1) places the appellant "'at risk of another prosecution for the same conduct,' (2) mislead[s] him 'to the extent that he has been unable adequately to prepare for trial,' or (3) den[ies] him 'the opportunity to defend against the charge.'" *Treat*, 73 M.J. at 336 (quoting *Marshall*, 67 M.J. at 420). Here, appellant fails to establish any of these bases for prejudice.

First, appellant is not at risk for further prosecution. In *Hopf*, this court reviewed the facts in the record of trial and the charge sheet to ascertain whether the appellant was at risk for future prosecution. *Hopf*, 5 C.M.R. at 14-15. This court reasoned that,

> [i]n view of the specificity of proof of the description of the person assaulted, the location and time of the incident, and the nature of the injuries, it is difficult to perceive wherein [the appellant] would have any difficulty through the use of the charge, specification, and record of trial, in preventing a second prosecution for the same offense.

Id. Similarly, in *Lee* this court found no risk of future prosecution because "the facts of record can readily be established." *United States v. Lee*, 1 M.J. 15, 17 (C.M.A. 1975). In this case, there is no risk of future prosecution because the facts of record can be readily established and they match the specifications on the charge sheet as discussed in section A *supra*. Appellant can also use the Army Court's opinion to prevent future prosecution.

Second, appellant was fully able to prepare for trial. A full review of the record shows that appellant was on notice and not surprised by KS's testimony concerning the indecent acts in the van and in bed with her mother. As an initial matter, the government provided the defense with a verbal bill of particulars. (JA 013, 037). Although this communication between the parties was not further detailed on the record, the defense never objected or otherwise asserted at trial that the government failed to provide notice of the charged offenses. In fact at one

point, the military judge asked the defense, "you had mentioned requesting a bill of particulars. Do you need any further information?" (JA 037). The defense counsel stated, "No, Your Honor." (JA 037).

Moreover, the defense did not object to KS's testimony concerning the indecent acts. (JA 034, 039-40). Both parties filed written motions on uncharged misconduct but the military judge did not rule on the written motions because the parties agreed "a ruling in advance of trial was not necessary and [they] could take up the issue as it came up during the merits portion of the trial concerning any evidence of uncharged or similar misconduct being brought by the government in this case." (JA 012, 258-70). Thus, the trial proceeded with the burden on the defense to object to the admission of uncharged misconduct during trial. The defense only objected twice and these objections were not in response to the evidence concerning the indecent act in the van or the indecent act in bed with KS's mother. (JA 123, 140).

In fact, the defense did not even object to the admission of KS's prior consistent statements concerning the indecent act in the van. (JA 205). Prosecution Exhibit 4 is a video-taped interview of KS and contains her statements about the indecent act that occurred in the van and her statements that appellant encouraged her to host sex parties. (JA 230). The government moved to admit the entire video as a prior consistent statement. (JA 131). Although the defense

initially objected to the admission of the entire video, the defense conceded the admissibility of KS's statements about the van incident. (JA 132). The following exchange occurred between the defense counsel and the military judge:

> CDC: Your honor, my recollection of the interview is that there are about two sentences that reflect a prior consistent statement and the rest of it is unrelated.
> MJ: *And, those statements would be the actual outcry regarding the offense?*
> CDC: *Yes, Your Honor.* So, if the witness testifies to those, *we understand that that evidence would come in.* But, we believe that the rest of the tape, or CD rather, is inadmissible.

(JA 132) (emphasis added). As this exchange shows, defense counsel knew KS's testimony and statements concerning the van supported a charged indecent act.

The defense counsel's closing argument also reflected his understanding that the van incident was charged. Defense counsel stated,

> So, now let's talk about the incidents that are before the court. And, it is, granted, a little bit confusing as to drawing that line between what is 404(b) and where the allegations are and, you know, *we have obviously got a good handle on it now*. And, we are basically left with a couple of things, Your Honor. Now, *let's talk about the incident in Hawaii here first.*

(JA 213-14) (emphasis added). Defense counsel then proceeded to argue the military judge should not believe KS's testimony concerning the indecent act in the van. (JA 214). Reflecting his understanding that this was a charged indecent act, the defense counsel attempted to attack the specific intent element of the offense,

relying upon testimony from appellant's mother. (JA 214-15). Defense counsel argued, "The bottom line reality, Judge, is that the van incident in Hawaii was [appellant] checking to see if his daughter had urinated herself, which obviously eliminates the element of the intent to gratify his lust or sexual desires." (JA 214-15). Defense counsel then presented argument concerning the indecent act when KS was in bed with her mother. (JA 215).

Finally, defense counsel's conduct throughout the trial further shows that he was not surprised or unable to prepare a defense. Upon hearing KS's testimony, the defense counsel did not move for a continuance to prepare a defense. Instead, he merely requested a recess to "consult my experts and check my notes" prior to commencing with cross-examination. (JA 047). After the government rested its case, the defense counsel did not move for a finding of not guilty pursuant to Rule for Court-Martial (R.C.M.) 917. (JA 191-92). Appellant never alleged a variance between the pleadings and proof at trial before the military judge. Appellant did not allege variance as a legal error in his clemency submission to the convening authority. (SJA 3-5). Indeed, before the Army Court, appellant did not raise material variance as an assignment of error or personally raise the issue under *United States v. Grostefon*. (JA 002-03).

Third, appellant had a full opportunity to present a defense against the indecent acts. "This court looks closely at the specifics of the defense's trial

strategy when determining whether a material variance denied an accused the opportunity to defend against the charge." *Treat*, 73 M.J. at 336. "In so doing, [this court] consider[s] how the defense channeled its efforts and what defense counsel focused on or highlighted." *Id.* Although unsuccessful, defense counsel mounted a defense against both indecent acts.

For the indecent act in the van, the defense channeled its efforts into trying to discredit KS's testimony of what happened in the van. As previously discussed, defense counsel cross-examined KS concerning her prior inconsistent statements. (JA 049-51, 055-57). Defense counsel also attempted to impeach KS on details concerning the indecent act such as the color of the van. (JA 058). In an attempt to negate KS's prior consistent statements about this indecent act in the video-taped interview, the defense counsel cross-examined the forensic interviewer on her interviewing technique because she used a doll with KS. (JA 135). In closing argument, defense counsel then argued the forensic interviewer used suggestive questioning. (JA 213).

Defense counsel also asked KS whether she remembered appellant "telling [her] that he thought [she] had wet [herself] and that he needed to check [her] to see if [she] had wet [herself]?" (JA 058). Defense counsel then linked this line of questioning to the testimony from appellant's mother who testified as a defense witness that she was present for the van incident. (JA 198-99). The defense

counsel solicited from appellant's mother that appellant asked KS if she was wet and put his hand on KS's crotch to check. (JA 199). Focusing on this testimony, defense counsel then argued appellant lacked the specific intent "to gratify his lust or sexual desires." (JA 214-15).

For the indecent act that occurred while KS was in bed with her mother, the defense channeled its efforts into arguing KS fabricated the offense and argued, alternatively, the government did not disprove he suffered a sleeping disorder beyond a reasonable doubt. Again, defense counsel cross-examined KS extensively, highlighting each of her prior inconsistent statements. (JA 049-51, 055-57). Defense counsel also tried to establish a motive to fabricate, asserting KS fabricated the offenses due to her "Nana." (JA 053-54, 062). Defense counsel then argued this motive to fabricate in closing argument. (JA 210-11, 213, 215-16, 220). Defense counsel argued KS "knew about this rehearing, [and was] in the control of the one person who has had the most positive influence on her life, her Nana, [now] her story lines up much more closely with what [appellant] told CID . . . ." (JA 213).

In sum, although unsuccessful, appellant had a full opportunity to mount a coordinated defense against both indecent acts through the use of cross-examination, the presentation of contrary evidence, and closing argument. Thus, appellant cannot show substantial prejudice in this case because he is not subject to

future prosecution, he was on notice of the indecent acts, and he had a full opportunity to present a defense against them.

Issue 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

"When the defense fails to object to admission of specific evidence, the issue is waived absent plain error." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)(internal citations omitted). Under the plain error analysis, appellant must demonstrate: (1) there was error, (2) the error was plain or obvious, and (3) the plain error resulted in material prejudice to substantial rights. *Id.* (internal citation omitted).

Law and Argument

Appellant fails to establish any of the elements of the plain error test because the admission of his sworn statement was not in error, its admission was not plain error, and appellant has not suffered a material prejudice to substantial rights.

A. The admission of appellant's sworn statement was not in error because the essential facts contained in his statement were corroborated.

To admit a confession, the essential facts of the confession must be independently corroborated. *United States v. Adams*, 74 M.J. 137, 140 (C.A.A.F.

2015). The corroboration requirement "does not necessitate independent evidence of all the elements of an offense or even the corpus delicti of the confessed offense. Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted." (quoting *United States v. Cottrill*, 45 M.J. 485, 489 (C.A.A.F. 1997)). *Id.* "[N]o mathematical formula exists to measure sufficient corroboration." *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988). Indeed, "[t]he inference [of truthfulness] may be drawn from a quantum of corroborating evidence that this court has described as 'very slight.'" *United States v. Arnold*, 61 M.J. 254, 257 (C.A.A.F. 2005).

"What constitutes an essential fact of an admission or confession necessarily varies by case." *Adams*, 74 M.J. at 140. In *Cottrill*, the appellant alleged insufficient corroboration for his confession to indecent acts with his young daughter. *Cottrill*, 45 M.J. at 488. The corroborating evidence included his daughter's statement to a physician that "My Daddy touches my privates," her complaint that her "privates" hurt, and the physician's opinion that an unnatural opening in the child's hymen was caused by sexual abuse based on an inconclusive medical examination. *Id.* at 486, 489. Even though this corroborating evidence did not address the time, place, access, opportunity, motive, method, or other circumstances of the offense, this court held the corroborating evidence was sufficient. *Id.* at 489. Likewise, in *Rounds*, this court held there was sufficient

corroboration for an admission to drug use even though *no* witness observed the appellant actually using drugs. *United States v. Rounds*, 30 M.J. 76, 78-79, 80 (C.M.A. 1990). This court noted that witness testimony "dovetail[ed] with the time, place, and persons involved in the criminal acts admitted by appellant" and the testimony showed that appellant had "both access and the opportunity" to engage in the misconduct. *Id.* at 80. Accordingly, this court held "[t]his is enough." *Id.*

In this case, the essential facts from appellant's confession were corroborated by KS's testimony, her prior consistent statements, and her statements for medical diagnosis and treatment.

For the first specification, KS testified that the "first time that it happened" appellant moved his hand over her vagina in a "massaging motion" while she lived in Hawaii with him and her family when she was four years old. (JA 031, 035-36). During a forensic interview, KS also told a Victim Assistant Specialist the same details and the government admitted these prior consistent statements without defense objection. (JA 205). KS also told a mental health consultant that appellant "touched her private parts" and this statement was also admitted without defense objection. (JA 088). KS's testimony and statements corroborate appellant's statement that the "first time [he] fondled [KS'] vagina" occurred when she was four years old "when we were stationed at Schofield Barracks, Hawaii." (JA 224).

Even KS's description of how appellant used his hand to commit the indecent act—using a "massaging motion" to touch her vagina—matches appellant's description that he "fondled" KS's vagina. (JA 036, 224).

For the second specification, KS testified that appellant committed this indecent act while the family was stationed at Fort Bliss, Texas, when KS was approximately seven years old. (JA 039, 064). In responding to the trial counsel's questions, she testified that appellant "reached over and he started touching me . . . [i]n my vaginal area." (JA 039-40). She explained that appellant again moved his hand in the "same type of massaging motion." (JA 040). Her testimony corroborated appellant's statement that he fondled KS's vagina while at Fort Bliss, Texas "around" 6 June 2007. (JA 225).

Similar to the child victim in *Cottrill*, KS's testimony and statements in this case corroborated appellant's confession. Indeed, in this case, KS provided greater details than the victim in *Cottrill* who only stated the appellant touched her privates. Similar to the corroborating evidence in *Rounds*, KS's testimony and statements dovetail into the same timeframe, location, and describe the same indecent acts accomplished by appellant through the same method—using his hand to massage KS' vagina. This is "enough" corroborating evidence for these essential facts.

As previously stated, the inference of the truthfulness of the essential facts admitted "may be drawn from a quantum of corroborating evidence that this court has described as 'very slight.'" *Arnold*, 61 M.J. at 257. Thus, appellant's reliance upon *Rounds* and *Adams* is misplaced. In *Rounds*, this court assessed the corroborating evidence for a separate drug offense and found it was insufficient because the sole witness for that particular offense did not even see drugs present on the scene. *Id.* Such testimony "corroborated nothing, let alone [the appellant's] confession." *United States v. Grant*, 56 M.J. 410, 417 (C.A.A.F. 2002)(explaining the rationale in *United States v. Rounds*). In *Adams*, there was no corroborating evidence to support the appellant's larceny conviction. *Adams*, 74 M.J. at 141. No evidence was presented with respect to the appellant's opportunity or motive to commit the offense, the appellant's intent, the accomplices involved, the contraband stolen, the time of the offense, or the method of accomplishing the larceny by use of a weapon. *Id.* In concluding there was insufficient corroboration, this court emphasized, "the only direct evidence of the crime was the confession." *Id.*

Appellant's argument is premised on his erroneous assertion that KS's testimony and appellant's statement refer to distinct and separate indecent acts. (Appellant's Br. 21-23). "We first note that neither this court nor the judge must accept appellant's view of the record of trial and the inferences which might be

reasonably drawn therefrom." *Rounds*, 30 M.J. at 80. This court should reject appellant's arguments because, as fully discussed in Issue I, *supra*, KS's testimony and appellant's statement refer to the same indecent acts. Thus, *Adams* and *Rounds* are distinguishable because there is corroborating evidence in this case and appellant's confession is *not* the only direct evidence of his indecent acts. KS's testimony is also direct evidence and her testimony is significantly more than "very slight" corroborating evidence.

B. The admission of appellant's sworn statement was not plain error because the government introduced ample corroborating evidence prior to offering the sworn statement.

Appellant has not met his burden to demonstrate that this purported error was plain or obvious. The government introduced appellant's sworn statement towards the end of its case on the merits through a special agent. (JA 160). Five government witnesses testified prior to its admission into evidence. Appellant cannot show plain or obvious error when his statement was admitted on the heels of corroborating evidence through KS's testimony and her statements regarding the indecent acts. This is particularly true in this case where the defense counsel immediately stated "No objection, sir" when the government moved to admit the sworn statement.[3] (JA 160). Indeed, appellant did not object to the admission of

[3] Indeed, defense counsel's decision not to object to the admission of appellant's sworn statement for a purported lack of corroboration is yet another indication that the defense understood KS's testimony and statements referred to the charged

his sworn statement at trial, did not allege legal error to its admission in his clemency submission to the convening authority, and did not allege the sworn statement lacked corroboration as an assignment of error to the Army Court. (JA 001-02, 160; SJA 3-5).

C. Appellant did not suffer a material prejudice to his substantial rights by the admission of his sworn statement because he used it to support his defense.

The government's case was strong and the defense case was weak as will be fully discussed in Issue III *infra*. KS testified as to both indecent acts and her testimony was corroborated by her prior consistent statements, her statements for the purpose of seeking medical treatment, and her demeanor. Even in a sexual assault or indecent acts case, "a victim's testimony alone is sufficient to persuade a reasonable jury of the defendant's guilt beyond a reasonable doubt." *United States v. Gabe*, 237 F.3d 954, 961 (8th Cir. 2001).

Moreover, having benefited from the admission of his statement at trial, appellant now alleges error on appeal to this court. Appellant cannot demonstrate prejudice. Indeed, the record reflects that appellant's decision not to object to the admission of his sworn statement was tactical. In his sworn statement, appellant tells a fanciful story that he confused a child for his wife and suffers from a sleeping disorder that somehow made him accidentally touch his daughter's vagina

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indecent acts. Thus, as fully discussed in section D.2 of Issue I *supra*, the defense was on notice and not surprised.

while dreaming about an ex-girlfriend. (JA 224-26). Since appellant chose not to testify, he relied heavily upon this story to support his mistake of fact defense. Appellant's defense counsel used the sworn statement in closing, arguing appellant "is truthfully talking about those two incidents, in which case it's a mistake of fact." (JA 216-17). Thus, appellant benefited from the admission of his sworn statement and even continues to rely upon it to advance his implausible defense theory before this court in addressing Issue III. (Appellant's Br. 30-35).

Furthermore, defense counsel was savvy enough to still cross-examine the special agent concerning the circumstances of appellant's interrogation, soliciting testimony that the interrogation spanned approximately seven hours. (JA 165-70). Using that cross-examination, defense counsel argued alternatively that appellant's damning admissions in the sworn statement resulted from appellant's desire to "get the heck out of there after seven hours of interrogation." (JA 217).

In sum, given the strength in the government's case, the weaknesses in appellant's defense, and the benefits he derived from the admission of his sworn statement, appellant has not satisfied his burden of demonstrating a material prejudice to substantial rights in this case.

Issue III

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

Standard of Review

This court reviews "issues of legal sufficiency de novo." *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011).

Law and Argument

Appellant's convictions are legally sufficient and supported by overwhelming evidence of his guilt. Under the test for legal sufficiency, "evidence is legally sufficient if, viewed in the light most favorable to the Government, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* Appellant was convicted of committing two indecent acts with a child. (JA 007, 222-23). There are five elements of indecent acts with a child: appellant (1) committed a certain act upon KS, the victim; (2) KS was under sixteen years of age and not appellant's spouse; (3) the act was indecent; (4) appellant committed the act with intent to "arouse, appeal to, or gratify the lust, passions, or sexual desires of [appellant,] KS, or both;" and, (5) under the circumstances, appellant's conduct was "of a nature to bring discredit upon the armed forces." *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], App'x 27, para. 87.b.(1). It is uncontested that KS was under sixteen years of age and not married to appellant when he committed both offenses. (JA 034, 039, 064, 224-26).

As to the other elements, there was overwhelming evidence that appellant committed a "certain act" on KS—he touched KS's vagina with his hand—indecent conduct showing appellant's specific intent to gratify his sexual desires. Both KS and appellant described appellant's indecent touching of her vagina. (JA 031, 035-36, 39-40, 224-26). For the indecent act in the van, KS testified that appellant moved his hand over her vagina in a "massaging motion" and appellant admitted he "fondled" her vagina. (JA 031, 035-36, 224). For the indecent act while KS laid in bed with her mother, KS testified that appellant again moved his hand in the "same type of massaging motion" and appellant admitted to the same type of "fondling" of KS' vagina. (JA 040, 225).

However, appellant argues there was no testimony of the indecent acts, appellant lacked the specific intent due to a mistake of fact, and the sexual contacts were not indecent. (Appellant's Br. 24-35). This court should reject appellant's arguments as "[i]t is not [this court's] function to reweigh evidence and determine guilt or innocence anew." *United States v. Rogers*, 54 M.J. 244, 246 (C.A.A.F. 2000).

Contrary to appellant's assertion, there was ample testimony supporting appellant's indecent act convictions. As previously discussed in section A of Issue I *supra*, KS testified about both indecent acts and the military judge personally assessed her credibility. (JA 031, 035-36, 39-40). Her testimony was consistent

with her video-taped interview on the indecent act in the van and her outcry to Ms. Luna, a licensed clinical social worker. (JA 083, 088, 230). These statements, admitted as a prior consistent statement and a statement for the purpose of diagnosis and treatment, were additional substantive evidence of appellant's guilt.

Although appellant attacked KS's testimony with prior inconsistent statements, she explained that she was afraid. (JA 046). Dr. Foster, an "expert in the field of clinical psychology with a further expertise in forensic interviewing, reporting and recantation by child victims, and delayed disclosure" testified that there are several factors that adversely influence a child to recant such as the lack of maternal support and the closeness of the abuser-child relationship. (JA 182, 185). Both of these adverse factors were present in this case because appellant is KS's biological father and KS did not receive support from her mother. (JA 186). In fact, Child Protective Services investigated appellant and KS's mother multiple times and removed the children from the home at least twice. (JA 018, 026).

KS's fear was also corroborated by her demeanor when she disclosed her molestation to Ms. Luna. Ms. Luna described KS's demeanor when KS made the disclosure: KS was very anxious and scared. (JA 088-89). KS even crawled underneath a chair in fear and Ms. Luna testified that she assured KS that appellant would not learn about the disclosure. (JA 089).

In a legal sufficiency review, this court is "'bound to draw every reasonable inference from the evidence of record in favor of the prosecution.'" *United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008)(quoting *Rogers*, 54 M.J. at 246). Indeed, under this limited inquiry, this court must "'give full play to *the responsibility of the trier of fact* [to fairly] resolve conflicts in the testimony, to weigh[] the evidence, *and to draw reasonable inferences* from basic facts to ultimate facts.'" *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)(alteration in original)). Given KS's testimony, her prior consistent statements concerning appellant's indecent acts, and her demeanor, this court should find appellant's convictions legally sufficient.

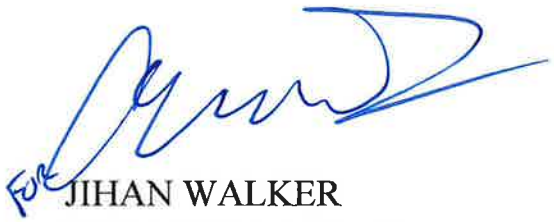
Appellant also regurgitates his prior argument from trial that he mistakenly believed he was touching his wife and suffers from a sleeping disorder. (Appellant's Br. 30-35). "Clearly, appellant on appeal is not free to ignore unfavorable parts of his pretrial statements in arguing legal insufficiency." *Cottrill*, 45 M.J. at 487. Indeed, in resolving questions of legal sufficiency, this court is "not limited to appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996). Appellant admitted to fondling his daughter's vagina on two occasions. (JA 224-26). He described fondling KS's vagina for ten to fifteen seconds. (JA 225).

Moreover, the government effectively rebutted appellant's self-serving fabrications about the circumstances of the indecent acts. Appellant did not and could not confuse KS with her mother because KS's mother was an adult female and her body was substantially different than KS who was only approximately seven years old at the time of the indecent act. (JA 022-23, 039, 246-48). Additionally, there is no evidence in appellant's medical records that he was diagnosed with a sleep disorder or received treatment for a sleep disorder. (JA 173-74). Finally, the government introduced evidence of appellant's uncharged misconduct including when appellant touched KS's vagina after she got out of a pool and when appellant "peed" on a couch in front of KS. (JA 036-37, 121). This evidence negated any alleged mistake by appellant, further demonstrating his propensity to engage in indecent acts with KS and his specific intent to gratify his sexual desires.

In sum, this court should affirm the Army Court's decision because the Army Court properly conducted its Article 66(c) review, the government presented overwhelming evidence of appellant's guilt, and appellant has not satisfied his burden in establishing a material variance or prejudice in this case.

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court affirm decision of the Army Court.



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22 July 2016

CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on July 25, 2016.

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