IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Chief Warrant Officer Two (CW2) RANDY E. JONES, United States Army, Appellant	)	Crim. App. Dkt. No. 20150370 USCA Dkt. No. 17-0608/AR

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Appellee	)	APPELLEE
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Chief Warrant Officer Two (CW2)	)	
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United States Army	)	
Appellant	)	USCA Dkt. No. 17-0608/AR

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

Issues Presented

I. WHETHER ADMISSION OF AN ALLEGED CO-CONSPIRATOR'S CONFESSION TO LAW ENFORCEMENT VIOLATED M.R.E. 801(d)(2)(E).

II. WHETHER ADMISSION OF THE SAME CONFESSION VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

III. WHETHER USE OF THE CONFESSION TO CORROBORATE OTHERWISE UNSUPPORTED ESSENTIAL ELEMENTS IN APPELLANT'S OWN CONFESSION VIOLATED M.R.E. 304(g) AND UNITED STATES v. ADAMS, 74 M.J. 137 (C.A.A.F. 2015).

Statement of Statutory Jurisdiction

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

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of larceny of military property of a value of more than $500.00 and one specification of larceny of military property of a value of $500.00 or less in violation of Article 121, UCMJ. (JA 10, 233). The military judge acquitted appellant of one specification of conspiracy to commit larceny under Article 81, UCMJ. (JA 233). The military judge sentenced appellant to a reprimand, confinement for seventeen days, and dismissal from the service. (JA 5). The convening authority approved the findings with the exception of the greater Article 121 offense for property of a value of more than $500.00 and approved the sentence as adjudged. (JA 4).

On August 3, 2017, the Army Court summarily affirmed the finding of guilty and the sentence. (JA 1). Appellant filed a Petition for Grant of Review with this Court on September 27, 2017. This Court granted appellant's petition on November 15, 2017.

Statement of Facts

Appellant deployed to Kandahar, Afghanistan, with the 760th Engineer Company in October 2013. (JA 13, 190-91). Appellant was a mobilized reservist who worked as a woodshop teacher in his civilian capacity. (JA 202-03). The unit's mission focused on deconstruction and retrograde operations, including teardown of various structures in theater. (JA 50). Appellant fell under the 82d Sustainment Brigade whose responsibilities included moving retrograde equipment out of theater. (JA 139-41). As such, the brigade was in charge of the Retro-Sort Yard (RSY), a collection point where the Army determined whether to keep various equipment in theater, destroy it, or return it to the United States. (JA 50, 63, 141).

Appellant's unit also utilized the RSY to supplement their own equipment, checking out tools as needed for their deconstruction operations. (JA 51). The RSY only issued equipment to authorized personnel and only for mission purposes. (JA 134, 143-44). RSY staff provided briefings on the policies and procedures, including approved uses of equipment, to anyone utilizing the RSY. (JA 143-44). Equipment from the RSY could not be mailed back home or kept for personal use. (JA 132-33, 143-44).

While deployed, appellant served as the Officer in Charge (OIC) of the Kandahar woodshop. (JA 56, 196). The woodshop met unit needs by completing

small carpentry projects, from signage to shelving. (JA 193-94). A previous military unit left behind the tools in the woodshop. (JA 205, 284). Appellant discussed the possibility of setting up a woodshop back in garrison with other soldiers, but his company commander and executive officer both opposed the idea. (JA 56-57, 198). In fact, there was no official plan or approval to create a similar woodshop in garrison. (JA 132).

Beginning in December 2013, appellant mailed tools and other military equipment, taken from either the RSY or the base woodshop, back to his home in North Carolina. (JA 30, 283-84). A postal worker employed at Kandahar identified appellant and confirmed he mailed boxes with her. (JA 186-88). Appellant's financial records show fourteen individual shipments over five months. (JA 237-42). In total, appellant shipped home seventeen boxes of military equipment between December 2013 and April 2014. (JA 77, 284).

Appellant's first sergeant at the time, Master Sergeant (MSG) Kenneth Addington, also mailed multiple tools back to his own home address in Tennessee. (JA 66-68). Twice, on March 30 and April 2, 2014, appellant and MSG Addington mailed packages from the Kandahar post office at the same time. (JA 29-30, 240, 264). On one occasion, MSG Addington signed out a pickup truck from the unit's Tactical Operations Center (TOC) on a Sunday morning to drive out to the RSY with appellant. (JA 100-01). Though MSG Addington and appellant's purpose at

the RSY was unclear, the soldier manning the TOC found the timing of their visit to the RSY unusual because it was outside of duty hours and at a time when most of the unit's soldiers were asleep. (JA 100-01).

In January or February 2014, Sergeant Major (SGM) Robert Garo, the Brigades S-3 SGM, visited the woodshop regarding a unit project. (JA 144). While there, appellant asked SGM Garo about the procedures for shipping military equipment back home. (JA 144). Sergeant Major Garo instructed appellant on the proper process for identifying equipment for use in garrison, conducting an inventory, and having any such equipment shipped in a conex box through government channels. (JA 144-45). He did not authorize appellant to ship any equipment personally through the postal service. (JA 145). Additionally, appellant's battalion established an "alibi," or amnesty, point in March or April 2014 for the turn-in of equipment. (JA 136-38). Nevertheless, appellant continued to mail military tools back home as late as April 20, 2014. (JA 242, 283).

Appellant provided a statement to the U.S. Army Criminal Investigative Command (CID) on April 22, 2014, confessing in full to a pattern of multiple larcenies of military property. (JA 149-50, 283-85). Appellant admitted to taking tools "from the woodshop" and mailing them to his home address on multiple occasions, as recently as two days prior to providing his statement. (JA 283-84). Appellant estimated the total value of the property as over $2,000. (JA 149, 283).

He stated that he intended to use the equipment either for "the Soldiers back at the unit or the students at school," referring to the school where he worked as a civilian. (JA 203, 284). Master Sergeant Addington also provided a confession to CID stating that both he and appellant took property from the RSY and mailed it to their homes. (JA 272-76).

A special agent from CID subsequently recovered seventeen boxes of tools and other military equipment from appellant's home in North Carolina. (JA 76-77). Appellant's wife had so many boxes of military equipment that she could not store them all in their garage and had to keep some of the boxes at a neighbor's house. (JA 77). Shipping labels confirmed that appellant mailed all of the boxes from Afghanistan to his wife at their home address. (JA 77). In addition to tools, the boxes included tactical body armor, a holographic rifle sight, and a ground resistance tester. (JA 277-79). Expert testimony later valued the rifle sight at $425.00 and the ground resistance tester at $999.00. (JA 120-21). This equipment would have no use in a garrison woodshop. (JA 57).

Appellant was charged with larceny of military property under Article 121, UCMJ, and conspiracy (with MSG Addington) to commit larceny under Article 81, UCMJ. (JA 2). At trial, the government admitted MSG Addington's confession into evidence, over defense objection, as a co-conspirator statement under Military Rule of Evidence 801(d)(2)(E) [hereinafter Mil. R. Evid.]. (JA 20-21).

Subsequently, the government admitted into evidence a heavily redacted copy of appellant's written confession to CID. (JA 153-54, 283-85). Additional facts necessary to address the issues presented are incorporated below.

Summary of Argument

Regarding Issues Presented I and II, the government concedes that MSG Addington's statement was improperly admitted under Mil. R. Evid. 801(d)(2)(E) because it was not in furtherance of a conspiracy and, therefore, its admission violated appellant's Confrontation Clause rights because the statement represented testimonial hearsay. However, both errors were harmless beyond a reasonable doubt.

Appellant confessed to the crimes of larceny in full. His confession was supported by physical evidence, financial records, and the testimony of multiple witnesses. In light of the other evidence presented at trial, MSG Addington's statement was only important to the charge of conspiracy and did not contribute to the guilty verdict for each larceny charge.

Regarding Issue Presented III, appellant's confession (as redacted and admitted at trial) was properly corroborated by other evidence as required by Mil. R. Evid. 304(g). Even absent MSG Addington's statement, the government provided sufficient independent evidence to raise an inference of truth for each essential fact stated in appellant's confession.

Issue Presented I

I. WHETHER ADMISSION OF AN ALLEGED CO-CONSPIRATOR'S CONFESSION TO LAW ENFORCEMENT VIOLATED M.R.E. 801(d)(2)(E).

Standard of Review

A military judge's admission of evidence is reviewed for an abuse of discretion. *United States v. Adams*, 74 M.J. 137, 139 (C.A.A.F. 2015) (citing *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003)). This Court reviews the military judge's findings of fact for clear error and his conclusions of law de novo. *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016) (citing *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015). The finding of a court-martial may not be set aside "unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. Where the error is of constitutional dimension, it "is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Hoffmann*, 75 M.J. at 128 (quoting *Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003)).

"To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the [fact finder] was totally unaware of that feature of the trial later held to have been erroneous . . . . To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the

[fact finder] considered on the issue in question, as revealed in the record." *Id.* (quoting *Yates v. Evatt*, 500 U.S. 391, 403 (1991)).

Law and Argument

Military Rule of Evidence 801(d)(2)(E) exempts as non-hearsay, "a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy." "Before admitting a co-conspirator's statement over an objection . . . . [t]here must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'during the course and in furtherance of the conspiracy.'" *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (quoting Fed. R. Evid. 801(d)(2)(E)).

In deciding preliminary questions on the admissibility of evidence, the rules of evidence do not apply except for those regarding privilege. Mil. R. Evid. 104(a). Consequently, in determining whether the criteria for a co-conspirator statement is met, trial courts may consider the contents of the statement itself. *Bourjaily*, 483 U.S. at 180. Military Rule for Evidence 801(d)(2)(E) requires that, in addition to considering the contents of the statement itself, there must be some additional, independent evidence supporting existence of a conspiracy.

Statements to law enforcement may qualify as co-conspirator nonhearsay when the statements are made in furtherance of an incomplete objective. *See United States v. Howard*, 770 F.2d 57, 61 (6th Cir. 1985) (admitting statements of

co-conspirator turned government informant); *United States v. Segura-Gallegos*, 41 F.3d 1266, 1272 (9th Cir. 1994) (holding statements made to undercover police officer not hearsay because statements were "in furtherance" of conspiracy). However, the Supreme Court has declined to find a confession to law enforcement in furtherance of a conspiracy. See *Fiswick v. United States*, 329 U.S. 211, 217 (1946) ("confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise."); *Wong Sun v. United States*, 371 U.S. 471, 490-91 (1963) (holding a codefendant's post-arrest confession to law enforcement inadmissible because it occurred after the conspiracy ended).

The government concedes that MSG Addington's written statement to CID was not in furtherance of a conspiracy and, as such, should not have been admitted into evidence as a co-conspirator statement under Mil. R. Evid. 801(d)(2)(E). However, the error was harmless beyond a reasonable doubt because the remaining evidence presented at trial overwhelmingly supported the military judge's findings. In fact, MSG Addington's statement was only valuable to the prosecution's case regarding the charge of conspiracy, for which appellant was found not guilty.

Appellant provided a full confession to CID admitting to the theft of military property. (JA 283-85). Even in the heavily redacted form admitted into evidence, appellant's statement to CID satisfied all of the elements for both larceny charges.

(JA 283-85). Appellant admitted that he took property from the Kandahar woodshop and mailed it to his home address on multiple occasions. (JA 283-84). Appellant acknowledged that these items were not his personal property, but rather tools already present at the woodshop upon his arrival, a fact corroborated by a defense witness. (JA 205, 284). He personally estimated the total value of the property stolen to be in excess of $2,000.00. (JA 283). Appellant admitted his intention to permanently keep the tools for personal use. (JA 284).

A Special Agent with CID recovered the stolen property from appellant's home. (JA 76-77, 277-79). The recovered property included over 850 individual items contained in seventeen separate shipping boxes. (JA 277-79). The military property found at appellant's home ranged from over a dozen power tools to other military equipment such as Protech tactical armor, an EoTech holographic rifle sight, and an Extech ground resistance tester. (JA 277-79). Expert testimony established the value of various individual items, providing evidence in support of both larceny charges (separated into items below and above a value of $500.00). (JA 111, 120-22). Specifically, the government introduced evidence for a hammer drill valued at $665.00, a rifle sight valued at $425.00, a ground resistance tester valued at $999.00, and a table saw valued at $379.00. (JA 111, 120-22). Those four items alone totaled $2,468.00 in cumulative value, without considering the hundreds of other tools recovered.

The government introduced financial records showing appellant spent nearly $600.00 of his own funds mailing this equipment home over a period of five months. (JA 237-42). Multiple witnesses testified that there was no official approval or support for setting up a woodshop in garrison, leaving no legitimate purpose for appellant to covertly mail this property home. (JA 56-57, 132, 198). Even after appellant was advised in detail on the appropriate method to ship military equipment back to garrison through military channels, he continued to personally mail military property to his home address. (JA 144-45, 242, 283-84).

Master Sergeant Addington's statement was primarily relevant as evidence of a conspiracy, a charge for which appellant was ultimately acquitted. (JA 233). In fact, in government's closing arguments counsel made only one brief reference to MSG Addington's statement while discussing the larceny charges, noting that the co-accused's statement corroborated the soldier from the TOC who testified that they went to the RSY together. (JA 214). Otherwise, MSG Addington's statement is entirely unmentioned by the government in their summation of the evidence supporting both larcenies. (JA 213-19) For the charged larcenies, MSG Addington's statement was at best cumulative, and utterly inconsequential, to the extensive other evidence presented.

Appellant confessed to the crimes of larceny in full, and his confession was corroborated by physical evidence, financial records, and the testimony of multiple

witnesses. In light of the other evidence presented at trial, MSG Addington's statement did not contribute to the verdict and its admission into evidence was harmless beyond a reasonable doubt.

Issue Presented II

II. WHETHER ADMISSION OF THE SAME CONFESSION VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

Standard of Review

A military judge's admission of evidence is reviewed for an abuse of discretion. *Adams*, 74 M.J. at 139 (citing *McCollum*, 58 M.J. at 335). "Whether admitted evidence constitutes testimonial hearsay is a question of law reviewed *de novo*." *United States v. Tearman*, 72 M.J. 54, 58 (C.A.A.F. 2013) (citing *United States v. Blazier*, 68 M.J. 439, 441-42 (C.A.A.F. 2010)). "[A] statement is testimonial if 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* (quoting *United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011)).

Forfeiture of the right to confrontation is reviewed under a plain error analysis. *Sweeney*, 70 M.J. at 303-04. Under this standard, an appellant "must demonstrate that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008) (quoting *United States v. Magyari*, 63 M.J. 123, 125

(C.A.A.F. 2006)). Because the error impacts a constitutional right, "[r]elief for Confrontation Clause errors will be granted only where they are not harmless beyond a reasonable doubt." *Tearman*, 72 M.J. at 62 (citing *Sweeney*, 70 M.J. at 306).

"To determine whether a Confrontation Clause error is harmless beyond a reasonable doubt, this Court has adopted the balancing test established in *Van Arsdall*, considering such factors as: '[1] the importance of the unconfronted testimony in the prosecution's case, [2] whether that testimony was cumulative, [3] the existence of corroborating evidence, [4] the extent of confrontation permitted, and [5] the strength of the prosecution's case.'" *Id.* (quoting *Sweeney*, 70 M.J. at 306) (citing *United States v. Van Arsdall*, 475 U.S. 673, 684 (1986)) (alterations in original). "This list of factors is not exhaustive, and '"[the] determination is made on the basis of the entire record."'" *Id.* (quoting *Sweeney*, 70 M.J. at 306). "To conclude that a Confrontation Clause error was harmless beyond a reasonable doubt, [this Court] must be convinced that the testimonial hearsay was unimportant in light of everything else the court members considered on the issue in question." *Id.* (citing *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009)).

Law and Argument

"The Sixth Amendment prohibits the admission of 'testimonial statements of a witness who did not appear at trial,' unless the witness is 'unavailable to testify,

and the defendant had had a prior opportunity for cross-examination.'" *United States v. Katso*, 74 M.J. 273, 278 (C.A.A.F. 2015) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)). "[A] statement is testimonial if 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at 279 (quoting *Sweeney*, 70 M.J. at 301).

"Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52. "[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.* at 53.

Because MSG Addington's confession to law enforcement did not properly constitute co-conspirator nonhearsay and was testimonial in nature, its admission at trial violated appellant's rights under the Confrontation Clause. Such an error satisfies the first two prongs of the plain error analysis. However, this error did not materially prejudice appellant's substantial rights, and was ultimately harmless beyond a reasonable doubt based on the *Van Arsdall* factors. Master Sergeant Addington's statement was irrelevant and "unimportant in light of everything else the [military judge] considered on the issue in question." *Tearman*, 72 M.J. at 62 (citing *Gardinier*, 67 M.J. at 306).

First, the prosecution's case only relied on MSG Addington's statement as it regarded the charge of conspiracy, for which appellant was acquitted. (JA 233). The co-conspirator statement was completely unimportant and unnecessary to prove the larceny charges. Appellant's own confession, corroborated by other independent evidence, formed the crux of the prosecution's case for larceny. In fact, appellant concedes that his own confession was "the government's key piece of evidence." (Appellant's Br. at 28).

Regarding the second and third factors, MSG Addington's statement was entirely cumulative to other independent corroborating evidence admitted at trial. Appellant's own confession established all of the elements for both charges of larceny. (JA 283-85). Another witness confirmed that MSG Addington visited the RSY with appellant, and financial records establish that MSG Addington and appellant mailed packages from the post office at the same time. (JA 100-01, 241, 264). Law enforcement recovered the stolen property from appellant's home. (JA 121-22, 277-79). Appellant stated his intent to keep the property for personal use—a declaration supported by his secretive transfer of the property at personal expense. (JA 144-45, 237-42, 283-84). Furthermore, multiple witnesses testified to the military nature of the property contained at both the woodshop and the RSY. (JA 30, 63, 144, 205). In short, MSG Addington's statement added no unique

evidence for the larceny charges that was not otherwise established at trial and was insignificant given the volume and quality of other evidence.

Finally, as discussed above, the government's case was extremely strong, buttressed by a full confession from appellant. (JA 283-85). Defense's theory focused entirely on appellant's supposedly innocent motive, proposing that appellant always intended to return the equipment to military control for use in a garrison woodshop. (JA 221-30). That assertion was undermined by the fact that appellant spent nearly $600 of his own funds to secretly mail home hundreds of pieces of equipment; that the equipment included body armor, a rifle sight, and an expensive ground resistance tester, all useless in a woodshop; and that appellant continued to do so despite being instructed on the proper method to inventory military equipment for shipment and use in garrison. (JA 144-45, 237-42, 277-79, 283). Master Sergeant Addington's statement was not necessary to adduce the appellant's intent: appellant's behavior only makes sense if he intended to secretly take possession of this equipment for his own use back home.

Four of the five *Van Arsdall* factors weigh heavily in favor of the government and any impact of the testimonial hearsay was both cumulative and de minimis. While the admission of MSG Addington's statement violated the Confrontation Clause, that evidence "was unimportant in light of everything else the [military judge] considered on the issue in question." *Tearman*, 72 M.J. at 62

(citing *Gardinier*, 67 M.J. at 306). Because there is no reasonable probability that the statement contributed to the conviction, the error is harmless beyond a reasonable doubt.

Issue Presented III

> III. WHETHER USE OF THE CONFESSION TO CORROBORATE OTHERWISE UNSUPPORTED ESSENTIAL ELEMENTS IN APPELLANT'S OWN CONFESSION VIOLATED M.R.E. 304(g) AND UNITED STATES v. ADAMS, 74 M.J. 137 (C.A.A.F. 2015).

Standard of Review

A military judge's admission of evidence is reviewed for an abuse of discretion. *Adams*, 74 M.J. at 139 (citing *McCollum*, 58 M.J. at 335).

Law and Argument

The version of Mil. R. of Evid. 304(g) applicable at trial provides, in pertinent part:

> An admission or confession of the accused may be considered as evidence against the accused . . . only if independent evidence . . . has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. . . . If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence.

"What constitutes an essential fact of an admission or confession necessarily varies

by case. Essential facts [this Court has] previously considered include the time, place, persons involved, access, opportunity, method, and motive of the crime." *Adams*, 74 M.J. at 140. "The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession." Mil. R. Evid. 304(g)(1).

This Court described the government's burden in this regard as "slight." *Adams*, 74 M.J. at 140 (citations omitted). "The corroboration requirement for admission of a confession at court-martial 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." *Id.* (quoting *United States v. Cottrill*, 45 M.J. 485, 489 (C.A.A.F. 1997)).

Appellant argues that two essential elements of his confession are corroborated only by MSG Addington's statement: (1) appellant's intent to permanently deprive the military of the stolen property, and (2) the source and military nature of the property. (Appellant's Br. at 29). The government does not dispute that these are essential facts of the larcenies as charged. However, the government presented abundant evidence at trial sufficient to raise an inference of the truth for each of these essential facts.

A. Appellant's Intent to Deprive

This court has "long recognized that [Article 121] requires the Government to prove beyond a reasonable doubt that an accused had a specific intent to steal." *United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001). However, "[a]n intent to steal may be proved by circumstantial evidence. Thus, if a person secretly takes property, hides it, and denies knowing anything about it, an intent to steal may be inferred . . . ." Article 121(c)(1)(f)(ii), UCMJ. Appellant confessed to CID that he intended to keep some of the military equipment for personal use at his civilian job. (JA 284). The manner in which appellant transferred this property back home amply provides an inference of truth for his admission that he intended to permanently keep the property.

Appellant spent $579.38 of his own funds to secretly mail home fourteen separate shipments of military equipment. (JA 237-42). Appellant persists in arguing that he was merely salvaging tools for a garrison woodshop. (Appellant's Br. at 29-30). However, no approved plan for a woodshop existed, and appellant never spoke with his chain of command about personally mailing tools home. (JA 56-57, 65). He visited the RSY at odd hours while most of the unit was asleep. (JA 100-01). Appellant sent everything to his personal address rather than to the unit. (JA 76-77, 83). Appellant eventually consulted with SGM Garo about proper procedures for shipping equipment to garrison but never attempted to avail himself

of that process. (JA 144-45). Instead, he continued covertly mailing items back to his personal residence. (JA 144-45, 242).

Appellant did not merely send back a few inexpensive tools; he shipped over 850 distinct items in seventeen separate boxes. (JA 277-79). Four items alone were valued over $2,400.00, and the recovered property included dozens of other power tools and carpentry materials. (JA 111, 120-22, 217). Appellant's argument fails to address why such a plan required him to ship home high-priced military equipment. Tactical body armor, holographic rifle sights, and ground resistance testers all possess significant market value but have no use in carpentry. (JA 102, 165-66, 277-79)

Appellant secretly mailed military property out of theater, to his personal home address, at significant personal expense, and continued to do so after being advised on the proper procedure for sending military equipment back to garrison. This is precisely the type of circumstantial evidence of intent to deprive contemplated by the statute; appellant's behavior only makes sense if he intended to secretly keep the property for personal use. The extensive evidence offered by the government showing appellant's behavior in carrying out these larcenies provides more than an inference of truth to support appellant's admission that he intended to permanently keep this property.

B. The Military Nature of the Property

Appellant confessed that the equipment he shipped home came "from the woodshop," though the government's theory at trial was that appellant stole property from both the Kandahar woodshop as well as the RSY. (JA 284). Article 121(c)(1)(h), UCMJ, states, "Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States." "[I]t is either the uniquely military nature of the property itself, or the function to which it is put, that determines whether it is 'military property' . . . ." *United States v. Sneed*, 43 M.J. 101, 103-04 (C.A.A.F. 1995) (emphasis removed) (quoting *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983)). The evidence presented at trial provides the necessary inference of truth that appellant took equipment from the installation woodshop and that any equipment stolen by appellant from either the woodshop or the RSY was military property, held and used by a military unit.

Appellant was the OIC of the unit woodshop, providing him with regular and unrestricted access to the tools therein. (JA 56). The equipment recovered from appellant's home primarily consisted of carpentry tools of the kind likely to be found in a woodshop. (JA 277-79). Considering the sheer quantity of equipment appellant shipped out of theater, there are few places in a deployed environment he could have obtained so many carpentry tools *except* the base woodshop. (JA 277-79). Appellant's access and opportunity at the woodshop and

the nature of the property recovered by law enforcement sufficiently provide an inference of truth to appellant's statement that he did, in fact, take tools "from the woodshop." (JA 284).

The woodshop was located on a military base and staffed by military personnel under the management of appellant's unit. (JA 56, 193-94). The carpentry tools in the woodshop had been left in theater by a previous military unit. (JA 60-61, 205). The woodshop manufactured a variety of small carpentry projects, all for military purposes and to fulfill mission requirements. (JA 193-94). In sum, the equipment located in the woodshop was in the possession and control of a deployed military unit and was in active operation producing items to meet mission requirements downrange. Any tools appellant stole from the woodshop were clearly "military property."

The government also provided evidence that appellant visited the RSY under suspicious circumstances and that appellant shipped home distinctly tactical equipment seemingly unrelated to the woodshop, such as body armor and a rifle sight. (JA 100-01, 277-79). The uniquely military nature of those specific items, combined with their origin in a deployed military environment, suffice to raise an inference that they are military property.

Likewise, any other property taken from the RSY would meet the statutory definition of "military property" based on "the function to which it is put." *Sneed*,

43 M.J. at 104 (quoting *Schelin*, 15 M.J. at 220). The RSY was a centralized collection point where the Army inventoried various property for further use in theater, retrograde to garrison, or destruction. (JA 63). The facility was under the command and control of appellant's brigade. (JA 141). Access to the RSY was strictly controlled, and equipment was only issued for mission-related use. (JA 134, 141-42). Whether originally abandoned by some other owner or slated for eventual destruction, at the time it was held at the RSY, all such property was being "held[,] or used by one of the armed forces of the United States." Article 121(c)(1)(h), UCMJ.

Appellant stated he took tools "from the woodshop," a statement supported by the opportunity and access afforded him as the woodshop OIC and the extensive collection of tools ultimately recovered from his home. (JA 56, 277-79, 284). Additional evidence suggests appellant took uniquely military items from the RSY as well. (JA 100-01, 277-79). Whether the property recovered from appellant's home originated in the woodshop or the RSY (or, most likely, a combination of the two), the equipment was military property under the control of and in use by appellant's military unit. *Adams* does not require that the independent corroborating evidence "be sufficient of itself to establish beyond a reasonable doubt the truth" that appellant stole military property from a military woodshop. Mil. R. Evid. 304(g)(1). Rather, the circumstantial evidence must satisfy the

"slight" burden imposed by *Adams* to raise an inference of truth to those facts. *See Adams*, 74 M.J. at 140 (citations omitted). Consequently, appellant's redacted confession was properly admitted into evidence at trial. (JA 283-85).

Conclusion

For the reasons outlined above, appellee respectfully requests this Honorable Court affirm the Army Court's decision and the findings and sentence in this case.

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I certify that a copy of the foregoing brief in the case of *United States v. Chief Warrant Officer Two Randy E. Jones*, Crim. App. Dkt. No. 20150370, USCA Dkt. No. 17-0608/AR was electronically filed with the Court (efiling@armfor.uscourts.gov) on January 25, 2018 and contemporaneously served on the Defense Appellate Division.

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