IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
Specialist (E-4) **MICHAEL P. WHITEEYES** United States Army, Appellant	)	Crim. App. Dkt. No. 20190221 USCA Dkt. No. 21-0120/AR

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

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Granted Issue:

> WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S STATEMENTS TO LAW ENFORCEMENT IN VIOLATION OF MILITARY RULE OF EVIDENCE 304(c).

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

Granted Issue

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S STATEMENTS TO LAW ENFORCEMENT IN VIOLATION OF MILITARY RULE OF EVIDENCE 304(c).

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 (UCMJ), 10 U.S.C. § 866. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On April 2–5, 2019, a general court-martial panel with enlisted representation convicted appellant, contrary to his plea, of one specification of

sexual abuse of a child, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2016). (JA 16). Appellant was acquitted of one specification of rape of a child and one specification of sexual abuse of a child, in violation of Article 120b, UCMJ. (JA 16). The panel sentenced appellant to a reduction to the grade of E-1, forfeiture of all pay and allowances, five years' confinement, and a dishonorable discharge. (JA 17). On March 27, 2020, the convening authority approved the adjudged sentence. (JA 19).

On December 15, 2020, the Army Court affirmed the findings. (JA 12). The Army Court approved the portion of the sentence providing for a dishonorable discharge, confinement for four years and eleven months, total forfeiture of all pay and allowances, and reduction to the grade of E-1. (JA 12). Appellant petitioned this Court for review on December 28, 2020. This Court granted appellant's petition for review on March 10, 2020. *United States v. Whiteeyes*, 2021 CAAF LEXIS 209 (C.A.A.F. 2021).

Statement of Facts

1. Appellant sexually abused his stepdaughter, who is less than two-years-old, after she and her mother moved to Fort Drum to live with him.

Appellant and MM were married in December of 2017. (JA 105). That same month, MM and her eighteen-month-old daughter, EM, moved to Fort Drum

to live with appellant.[1] (JA 109). This was the first time appellant and EM lived together. (JA 108). Prior to their move to Fort Drum, MM and her infant daughter, EM, lived in Alabama. (JA 105, 109). Appellant first met EM when she was only six-months-old and spoke to her regularly over video chat. (JA 108). EM's father was not present in her life so appellant was her only father figure, and EM saw him as such. (JA 105–06). MM entrusted appellant with EM's care and allowed him to regularly change EM's diapers and bathe her. (JA 110).

Toward the beginning of 2018, appellant made multiple inappropriate comments regarding EM that greatly concerned MM. (JA 121–24). First, appellant said EM looked like she had "cum dripping from her face" when she spilled milk from her mouth. (JA 121–22). On a different occasion, appellant said EM looked like she was "sucking a dick" when she put a toy carrot in and out of her mouth. (JA 123–24). Shocked that appellant would say such sexualized comments about her toddler child, MM understandably chastised appellant after both instances. (JA 122, 124).

Even though appellant made sexualized comments about MM's toddler-age daughter, MM nevertheless did not believe appellant was capable of sexually abusing EM. (JA 124). Accordingly, MM continued to permit appellant to change EM's diapers. (JA 120). Unbeknownst to MM, appellant's sexual thoughts about

[1] EM was born on June 17, 2016. (JA 105).

EM progressed from inappropriate comments to actions. (Pros. Ex. 2, 49:22[2]). While changing EM's diaper sometime between April 2018 and June 2018, appellant used his hands to spread EM's labia apart and used his mouth to blow inside her vagina. (Pros. Ex. 2, 49:22).

2. Appellant's sexual abuse is discovered after the family moved from Fort Drum to Germany.

In July of 2018, appellant, MM, and EM moved on a permanent change of station (PCS) from Fort Drum to Vilseck, Germany. (JA 113). One month later, MM became disturbed after she found pornography on appellant's computer. (JA 139). MM confronted appellant and contacted his team leader, Sergeant (SGT) KS, for help. (JA 127–28, 141). After finding pornography on appellant's computer, MM encouraged him to seek help and believed it was best for him to receive treatment without her or EM present. (JA 141). After MM spoke to appellant's team leader, appellant sent the following text message to SGT KS on August 18, 2018:

> Hey sgt there is a real reason why my wife is leaving she believes that I sexually touched her daughter and as a concerned parent I believe that she needs to get tested for that I don't want risk of losing my job if it's true or not

[2] Prosecution Exhibit 2 is a DVD copy of the second interview Criminal Investigation Command (CID) conducted with appellant on September 27, 2018. The referenced timehacks are based upon the elapsed time as indicated by the video-playing software.

(JA 55). Two minutes later, appellant sent a follow on text saying, "And I would never do anything to hurt her daughter." (JA 55).

Appellant's team leader immediately forwarded this text message to their leadership who then contacted CID. (JA 176). Once CID's investigation began, MM and EM moved out of appellant's home. (JA 130). A few days later, MM and EM left Germany and moved back to Alabama. (JA 132).

CID interviewed appellant twice—once on August 18, 2018 and again on September 27, 2018. (*See* Pros. Ex. 1[3] and 2). During the first interview on August 18 2018, appellant told Special Agent (SA) TT that he did not believe EM was safe around him. (Pros. Ex. 1, 12:25). Special Agent TT then asked appellant whether he had sexual urges for EM and whether he was capable of doing sexual things to her. (Pros. Ex. 1, 12:35). Appellant responded, "I think she's fine because I see no problem with that. I mean yeah I'm going to have urges, but I just think that I need to stop it." (Pros. Ex. 1, 13:29). Appellant later said that EM was safe to be around him, however he wanted to be away from her. (Pros. Ex. 1, 18:18–19:30). Appellant wanted to be away from EM to "prevent [him] from touching her or thinking in a sexual way to her." (Pros. Ex. 1, 19:48). Appellant denied touching EM and requested a polygraph. (Pros. Ex. 1, 21:16).

[3] Prosecution Exhibit 1 is a DVD copy of the first interview CID conducted with appellant on August 18, 2018. The referenced timehacks are based upon the elapsed time as indicated by the video-playing software.

On September 27, 2018, appellant returned to CID for his polygraph examination with SA AB. (JA 62). During the interview with CID, appellant told SA AB that he sexually abused EM on two separate occasions. He stated both instances of sexual abuse occurred in EM's bedroom while he changed her diaper on top of a dresser that EM's grandfather made. (Pros. Ex. 2, 1:41:52; 1:44:50). During the first instance of sexual abuse, appellant said he spread EM's labia apart with his hands and blew into her vagina. (Pros. Ex. 2, 49:22). He explained that this instance took place "around the spring" in "either May or June" of 2018. (Pros. Ex. 2, 50:30). Appellant admitted that he knew blowing into her vagina was wrong and that he should not have done it. (Pros. Ex. 2, 52:35). On a separate occasion, appellant said he penetrated EM's vagina with the tip of his pinky finger. (Pros. Ex. 2, 1:20:30; 1:40:25). Appellant acknowledged that this action was wrong and was sexual in nature. (Pros. Ex. 2, 1:53:00). While appellant later told SA AB that he initially lied about digitally penetrating his toddler-age stepdaughter, he reiterated—several times throughout this CID interview—the veracity of his admission to spreading EM's labia and blowing into her vagina. (Pros. Ex. 2, 2:01:32–2:04:00; 2:19:30–2:20:30).

In the months following their return to Alabama, MM observed several of EM's unexplained and troubling new behaviors. (JA 133–35). First, EM would inexplicably run away and hide while saying, "shh, he's coming." (JA 133).

Beginning around September 2018, MM also observed EM attempt to insert toys into her vagina on multiple occasions. (JA 135–36). These toys included a doctor's stethoscope, toy carrots, toy corn, and her toy dinosaurs. (JA 135–36).

3. Appellant's statements to CID are entered into evidence at trial.

On March 27, 2019, appellant filed a motion to suppress three of his statements on the ground that each lacked sufficient corroboration under Military Rule of Evidence (Mil. R. Evid.) 304(c). (JA 41). Appellant's motion was filed only 6 days prior to trial and almost 3 months after he pleaded not guilty to the charged offenses. (JA 22, 41, 59). The military judge had previously denied a defense motion to suppress appellant's statements under Mil. R. Evid. 304(f)(6) and (7) and ruled that appellant's statements to law enforcement were offered voluntarily. (JA 51).

The statements appellant sought to exclude under Mil. R. Evid. 304(c) included: 1) appellant's text message to his team leader, SGT KS; 2) statements appellant made to SA TT on August 18, 2018; and 3) statements appellant made to SA AB on September 27, 2018. (JA 41). The government responded to appellant's motion to suppress on March 31, 2019 and asserted that there was sufficient evidence to corroborate appellant's statements. (JA 43).

The parties litigated whether appellant's statements were properly corroborated immediately following MM's trial testimony. (JA 147–69). During

her testimony, MM detailed appellant's sexual comments regarding EM. (JA 121–24). She also explained how, at Fort Drum, appellant regularly changed EM's diapers in EM's room on a dresser made by her grandfather. (JA 118–20). She explained that while the dresser moved about the house, it remained in EM's room during May and also for a week in June of 2018. (JA 119, 458). Additionally, MM discussed how EM's behavior suddenly changed in September 2018, only a few months after the period appellant admitted that he sexually abused her. (JA 135). Specifically, MM detailed how EM—uncharacteristically—repeatedly attempted to insert toys into her vagina after she and MM moved out of appellant's home. (JA 135).

The government argued appellant's statements to SA AB were sufficiently corroborated by: 1) appellant's sexualized comments about EM, which evinced a sexual intent toward her; 2) his comments to SA TT regarding the sexual urges he had toward EM and his concern that he may become sexually attracted to her in the future; 3) MM's specific testimony regarding appellant's opportunity to commit the charged offenses in EM's room on a particular piece of furniture; and 4) appellant's text message to SGT KS wherein he disclosed that his wife believed he had sexually abused EM and his expressed fear that he did not "want to risk losing [his] job, if it's true or not." (JA 159–60). The government further argued that appellant's text message to SGT KS did not fall under Mil. R. Evid. 304 and

therefore did not require corroboration. (JA 160–61). Finally, the government argued that appellant's statements to SA TT were also admissible under Mil. R. Evid. 404(b) as proof of appellant's motive and intent to sexually abuse EM and therefore did not require corroboration in accordance with Mil. R. Evid. 304(c)(3). (JA 161).

Prior to issuing his ruling, the military judge informed the parties that he intended to analyze the sought after statements through the legal framework identified in Mil. R. Evid. 304(c). (JA 166–68). First, the military judge ruled that the text message appellant sent to SGT KS fell outside the scope of Mil. R. Evid. 304 and therefore did not require corroboration. (JA 168). In an "abundance of caution," the military judge determined appellant's text message was corroborated by MM's and EM's departure from Germany and EM's visit to the doctor to be examined. (JA 168).

Next, the military judge ruled that appellant's statements to SA TT did not require corroboration because they were admissible under Mil. R. Evid. 404(b), a rule of evidence other than that pertaining to the admissibility of admissions or confessions. (JA 168). In an abundance of caution, the military judge conducted further analysis. (JA 168). He found appellant's statements to SA TT that he had "urges" toward EM were corroborated by his sexual statements about her. (JA 168).

Finally, the military judge ruled that appellant's statements to SA AB were corroborated by: 1) "that after the time period of the charged offense, [EM's] behavior changed, where she would get naked, take off her diapers, and poke objects and toys in her vagina"; 2) "that the appellant had an opportunity and explained the location of the offense or alleged offense, which was in [EM's] bedroom, on the changing table and on a specific dresser made by the grandfather, during the time of the charged offenses"; and 3) appellant's sexually charged statements regarding EM. (JA 169).

Following the military judge's ruling, the government called SGT KS to authenticate the text messages appellant sent to her. (JA 55, 170). The government then called SA TT and SA AB who each testified regarding the statements appellant made to them during the CID-recorded interviews conducted on August 18 and September 27, 2018. (*See* Pros. Ex. 1 and 2).

Summary of Argument

The military judge did not abuse his discretion when he determined appellant's statements to both SA TT and SA AB were sufficiently corroborated under Mil. R. Evid. 304(c). Indeed, the military judge properly required the government provide sufficient independent evidence to "raise an inference of the truth of the admission or confession." Mil. R. Evid. 304(c). This singular requirement—that the evidence tend to establish the trustworthiness of the

admission or confession—is consistent with the standard outlined within Mil. R. Evid. 304(c) and adopted by both the Supreme Court and nearly all of Federal Circuit Courts. Appellant's view that this Court should read in a requirement that the independent evidence establish a crime has been committed is an attempt at resurrecting the outdated and rejected *corpus delicti* [4] doctrine. The correct standard has one central focus, whether appellant's confessions and admissions are trustworthy.

Applying this correct standard to the facts of this case, the military judge properly found that appellant's statements to SA TT and SA AB sufficiently corroborated. The independent evidence corroborated that appellant had access to EM with the motive, means, opportunity, and requisite intent to commit the confessed crimes at the location and in the manner described by appellant. Further, appellant's unsolicited statement to SGT KS implied that there may be truth to his wife's belief that he sexually abused EM. The military judge's determination that such evidence tended to raise an inference of truth of appellant's statements was not unreasonable and therefore not an abuse of discretion.

[4] *Corpus Delicti* is "literally translated to the body of the crime" and "proof that a crime was committed and that someone, not necessarily the accused, committed it," constitute the concept of *corpus delicti*. *United States v. Chimal*, 976 F.2d 608, 610 (10th Cir. 1992) (citations and quotations omitted).

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019).

Law

A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law. *Id.*

"It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused." *Wong Sun v. United States*, 371 U.S. 471, 488–89 (1963). "Its purpose is to prevent errors in convictions based upon untrue confessions alone," and is founded on a recognition based upon judicial experience that "[c]onfessions may be unreliable because they are coerced or induced." *Smith v. United States*, 348 U.S. 147, 153 (1954) (internal citations and quotations omitted).

1. <u>The Military Rules of Evidence incorporate a trustworthiness standard for corroboration under Mil. R. Evid. 304(c).</u>

Military law has incorporated its version of the corroboration rule within Mil. R. Evid. 304(c). Military Rule of Evidence 304(c)(1) provides that "[an] admission or confession of the accused may be considered as evidence against the

accused . . . only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession." Mil. R. Evid. 304(c)(1). "If the independent evidence raises an inference of the truth of the admission or confession, then it may be considered as evidence against the accused." Mil. R. Evid. 304(c)(2), (4). "Not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety." Mil. R. Evid. 304(c)(2). "Corroboration is not required . . . for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions." Mil. R. Evid. 304(c)(3).

The current version of Mil. R. Evid. 304(c) resulted from a significant amendment to the rule in 2016 which sought to "bring[] military practice in line with federal practice." *Manual for Courts-Martial* [M.C.M.] (2016 ed.), Analysis of Military Rules of Evidence, A22-12 (citing *United States v. Opper*, 348 U.S. 84, 92–93 (1954) and *Smith v. United States*, 348 U.S. 147, 153 (1954)). This change represented a stark deviation from prior versions of the military's corroboration rule. *See, e.g.*, *United States v. Adams*, 74 M.J. 137, 139–40 (C.A.A.F. 2015) (explaining that since 1969 only those portions of a confession which are independently corroborated may be admitted); *United States v. Villasenor*, 6 U.S.C.M.A. 3, 5–7 (C.M.A. 1955) (rejecting *Opper* and stating ". . . a confession

or admission must be corroborated by some evidence, direct or circumstantial, bearing on each element of the crime alleged . . . .") (citation omitted). Versions of the rule in effect before the 2016 change expressly rejected admitting an entire statement under a "trustworthiness" standard. *Adams*, 74 M.J. at 140 n.7; *United States v. Isenberg*, 8 C.M.R. 149, 151–56 (C.M.A. 1955); *but see United States v. Rounds*, 30 M.J. 76, 81 (C.A.A.F. 1990) (applying a "less-demanding" "trustworthiness-corroboration test" rather than "the elements-corroboration (*corpus delicti*) test"). However, after the 2016 change to the rule, a confession or admission may be admitted in its entirety if independent evidence raises an inference of its truth. Mil. R. Evid. 304(c).

2. Under the trustworthiness doctrine, the independent evidence need only establish that the statement is trustworthy, not that the crime occurred.

The "trustworthiness" standard previously rejected by this Court when applying prior versions of Mil. R. Evid. 304(c), however, is consistent with both the current amended rule and Supreme Court precedent. *See* Mil. R. Evid. 304(c)(2) ("If independent evidence raises an inference of the truth of the admission or confession, then it may be . . . admitted into evidence in its entirety."); *Government of Virgin Islands v. Harris*, 938 F.2d 401, 410 (3d Cir. 1991) ("The United States Supreme Court adopted this trustworthiness doctrine as

the 'best rule' in two companion cases: [*Opper*[5] and *Smith*[6]]."). By adopting this trustworthiness standard, the Supreme Court rejected the notion that the independent evidence must establish the commission of the crime. *Opper*, 348 U.S. 93 ("However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*."). Instead, the Court explained that "one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense through the statements of the accused." 348 U.S. at 157. "Extrinsic proof [i]s sufficient which merely fortifies the truth of the confession[s], without independently establishing the crime charged." *Wong Sun*, 371 U.S. at 489 (quoting *Smith*, 348 U.S. at 156).

The government acknowledges that there is a Circuit split on whether an accused's confession or admission may be admitted in its entirety based solely upon a showing of trustworthiness.[7] In accord with the Supreme Court, however,

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[5] 348 U.S. 84.
[6] 348 U.S. 147.
[7] The First Circuit has instead adopted a standard similar to the prior version of Mil. R. Evid. 304(c) which requires independent corroboration of each essential fact. *See United States v. Tanco-Baez*, 942 F.3d 7, 25 (1st Cir. 2019) ("each essential fact that is admitted must be corroborated in order for the offense to be proved through the admission of such a fact."); *see also Adams*, 74 M.J. at 139–40. The Ninth Circuit has instead implemented a modified version of the *corpus delicti* standard which requires that "first . . . [the state] must introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred. Second, it must introduce independent evidence tending to establish the

an overwhelming majority of the Federal Circuit Courts have not required the government independently establish the commission of a crime but must instead only present independent evidence showing the statement is trustworthy. The Second Circuit Court of Appeals has explained this standard succinctly:

> [T]he corroboration must prove that the confession was reliable, and must prove any elements of the crime to which the defendant did not confess. But the confession, if proven reliable, may serve as the only evidence reaching the *corpus delicti*.

United States v. Irving, 452 F.3d 110, 118 (2d Cir. 2006). This standard—that independent evidence need only tend to show trustworthiness rather than that a

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trustworthiness of the admissions. . . ." *United States v. Lopez-Alvarez*, 970 F.2d 583, 592 (9th Cir. 1992).

crime has been committed—has also been adopted by the Third,[8] Fourth,[9] Fifth,[10] Sixth,[11] Seventh,[12] Eighth,[13] Tenth,[14] Eleventh,[15] and D.C.[16] Circuit Courts.

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[8] *Harris*, 938 F.2d at 409–10 ("Under the 'trustworthiness' doctrine, direct proof of the *corpus delicti* is not required; the evidence may even be collateral to the crime itself.")

[9] *United States v. Abu Ali*, 528 F.3d 210, 237 (4th Cir. 2008) ("To be sure, the independent evidence does not *prove* Abu Ali's guilt of any crime, but this is not necessary. In his own statements, Abu Ali confessed to committing each of the crimes charged.") (emphasis in original).

[10] *United States v. Ybarra*, 70 F.3d 362, 365 (5th Cir. 1995) (A confession is adequately corroborated where "[e]xtrinsic proof . . . fortifies the truth of the confession, without independently establishing the crime charged.")

[11] *United States v. Ramirez*, 635 F.3d 249, 256 (6th Cir. 2011) ("So long as portions of the defendant's statement are corroborated by substantial independent evidence that tends to establish the trustworthiness of the statement then the elements of the crime may be established by the defendant's statements.") (citations and quotations omitted).

[12] *United States v. Dalhouse*, 534 F.3d 803, 806 (7th Cir. 2008) ("Most commonly, [corroboration of a defendant's statement] is accomplished by presenting evidence that a few of its key assertions are true, which is sufficient to show that the statement as a whole is trustworthy.").

[13] *United States v. Kirk*, 528 F.3d 1102, 1112 n.10 (8th Cir. 2008) ("Indeed, we have previously held that corroborating evidence need not be criminal in and of itself to be persuasive.")

[14] *Chimal*, 976 F.2d at 610–11 (explaining independent "proof that a crime was committed" is not required but "[r]ather, the evidence merely must tend to establish the trustworthiness of the confession").

[15] *Fallada v. Dugger*, 819 F.2d 1564, 1570 (11th Cir. 1987) ("While all elements of an offense established by admissions must be corroborated, it is sufficient if the corroboration merely fortifies the trust of the confession without independently establishing the crime charged.") (citing *Smith*, 348 U.S. at 156).

[16] *Smoot v. United States*, 312 F.2d 881, 885 (D.C. Cir. 1962) ("There was no unconfessed element which the prosecution had the burden of establishing by independent evidence; its task was to 'bolster' the confession by independent evidence that it was trustworthy. When that was done, the confession was sufficient to convict as it covered all essential elements of the crime.").

3. While this Court has not yet weighed in on the application of the amended Mil. R. Evid. 304(c), the service courts have consistently interpreted it in line with the majority of the Federal Circuits.

While this Court has not yet weighed in on the proper application of the amended Mil. R. Evid. 304(c), two of the service courts have had the opportunity to conduct such analysis. *United States v. Delgado*, 2019 CCA LEXIS 314 (N.M. Ct. Crim. App. July 31, 2019); *United States v. Arno*, 2019 CCA LEXIS 86 (Army Ct. Crim. App. February 26, 2019) (review denied May 16, 2019). Consistent with the majority of the Federal Circuits, the service courts have been uniform in interpreting Mil. R. Evid. 304(c) to focus solely upon trustworthiness and not require independent evidence of the commission of a crime. *See Delgado*, 2019 CCA LEXIS 314 at *10 ("The analysis should not focus on the effect the [independent] evidence has on criminality, but rather on the effect the evidence has in corroborating the factual aspects of the confessional statement."); *Arno*, 2019 CCA LEXIS 86 at *5–6 (finding a military judge abused his discretion when she required "the corroboration evidence come only from evidence corroborating the criminal conduct to which the accused had confessed") (citations and quotations omitted).

The view of the service courts and the majority of Federal Circuit Courts aligns with former Chief Judge Baker recent explanation of *Opper*'s trustworthiness doctrine where he said:

> The first principle, therefore is that the purpose of the law is to establish the trustworthiness of the statement. . . . Thus, if substantial independent evidence indicates the statement is trustworthy, then appropriate inferences may be drawn from the statement beyond those for which there is independent evidence including the fact that a crime has been committed.

Adams, 74 M.J. at 142 (Baker, J. dissenting). Like the Federal Circuit Courts, Chief Judge Baker opined that *Opper* calls for a focus on independent evidence establishing the trustworthiness of the confession rather than that a crime has been committed. *Id*.[17]

4. To show a statement is trustworthy under Mil. R. Evid. 304(c), the amount of independent evidence needed to corroborate a confession is "slight."

While the Supreme Court required "the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement," Mil. R. Evid. 304(c) requires a lesser threshold amount as the "substantial" corroboration language was not incorporated into the rule. *Compare Opper*, 348 U.S. at 93 (requiring "substantial independent evidence" which "tends to establish the trustworthiness"), *with* Mil. R. Evid. 304(c)(4) (requiring the amount of independent evidence necessary to "raise only an inference of truth of

[17] The majority in *Adams* rejected the trustworthiness doctrine based upon the version of Mil. R. Evid 304(c) in effect at the time which required "independent evidence of each essential fact to be corroborated." *Adams*, 74 M.J. 140 n.7; Mil. R. Evid. 304(c) (2012 ed.).

the admission or confession."). Indeed, this court has defined the requirement of raising an inference of truth as a "very low standard." *United States v. Seay*, 60 M.J. 73, 80 (C.A.A.F. 2004). *See also United States v. Cottrill*, 45 M.J. 485, 489 (C.A.A.F. 1997) ("Moreover, while the reliability of the essential facts must be established, it need not be done beyond a reasonable doubt or by a preponderance of the evidence."). This Court has consistently defined the quantum of independent evidence required to "raise an inference of truth" as "slight." *See e.g. United States v. Jones*, 78 M.J. 37, 42 (C.A.A.F. 2018) (defining the amount of evidence necessary as "slight."); *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988) (defining the amount of evidence necessary as "very slight."); *United States v. Yeoman*, 25 M.J. 1, 4 (C.M.A. 1987) (defining the amount of evidence necessary as "slight").

"Corroborative facts may be of any kind, so long as they tend to produce confidence in the truth of the confession." *Kirk*, 528 F.3d at 1112. "It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. *Opper*, 348 U.S. at 93. Examples of essential facts previously considered by this Court include "the time, place, persons involved, access, opportunity, method, and motive of the crime." *Adams*, 74 M.J. at 140.

Analysis

The military judge did not abuse his discretion when he found appellant's

statements to be sufficiently corroborated and therefore admissible. [18] The facts relied upon by the military judge were not erroneous and he reached his reasonable conclusions after he applied those facts to the appropriate law. *Frost*, 79 M.J. at 109.

1. The military judge applied the appropriate standard, which requires only that independent evidence raise an inference of truth to appellant's statements, not that the crime has been committed.

The military judge correctly required independent evidence raise an inference of truth to appellant's statements prior to them being admitted as a whole. Appellant, however, asks this Court to read into Mil. R. Evid. 304(c) a requirement that—in addition to establishing the trustworthiness of appellant's statements—independent evidence must also establish that a crime has been committed. (Appellant's Br. 28–30). Such a reading is inconsistent with Mil. R. Evid. 304(c) and case law and should be disregarded by this Court.

Appellant's attempted revival of the *corpus delicti* doctrine is untenable.

[18] As a preliminary matter, the record supports a finding that appellant waived this issue as a matter of law. Mil. R. Evid. 304(f)(1) provides that any objection to the admission of a confession shall be made before the submission of a plea and that "[f]ailure to so move or object constitutes a waiver of the objection." This Court has previously held that waiver under Mil. R. Evid. 304(f)(1) applies to objections under Mil. R. Evid. 304(c). *United States v. Swift*, 76 M.J. 210, 217–18 (C.A.A.F. 2017). Given this Court's previous holding, appellant's ability to raise the issue of corroboration ceased—absent a showing of good cause—once he pleaded not guilty on January 2, 2019. Mil. R. Evid. 304(f)(1); (JA 59–60). The military judge never affirmatively made such a finding.

Appellant ignores the plain language of Mil. R. Evid. 304(c), which states "[t]he independent evidence need raise only an inference of the truth of the admission or confession." Mil. R. Evid. 304(c)(4). Further, a requirement that independent evidence establish that a crime has been committed, i.e. the *corpus delicti*, has been rejected by the Supreme Court and nearly every Federal Circuit Court. *See e.g. Opper*, 384 U.S. at 93; *Smith*, 384 U.S. at 156–57; *Irving*, 452 F.3d at 118; *Ramirez*, 635 F.3d at 256. Those courts have instead required only that independent evidence tend to show the trustworthiness of the confessions or admissions and not that a crime has been committed. *Id.* Implementing a position directly contrary to the trustworthiness standard adopted by the Supreme Court and the overwhelming majority of Federal Circuit Courts would run directly contrary to the purpose behind the amendment of Mil. R. Evid. 304(c). *MCM* (2016 ed.), Analysis of Military Rules of Evidence, A22-12 ("This change brings military practice in line with federal practice.").

The correct standard requires nothing more, and nothing less, than the independent evidence "raise only an inference of truth of the admission or confession." Mil. R. Evid. 304(c)(4). The military judge's analysis falls squarely within this framework. (JA 166–69). Accordingly, his findings of fact and conclusions of law should not be disturbed.

2. The military judge's conclusion that appellant's statements to SA TT were sufficiently corroborated was not an abuse of discretion.

The military judge correctly found the government—with respect to appellant's statements to SA TT—satisfied its burden under Mil. R. Evid. 304(c).[19] (JA 168–69). Appellant told SA TT that he had sexual urges toward EM and that she was not safe around him. (Pros. Ex. 1, 12:25–13:50). Appellant also told CID that he wanted some time away from EM to "prevent him from touching her or thinking in a sexual way to her." (Pros. Ex. 1, 20:35). These admissions aligned with MM's testimony about appellant's sexually charged comments about EM that indicate he viewed her in a sexual manner and capable of performing sexual acts. (JA 121–24). Appellant's sexualized view of EM raises an inference that he was speaking truthfully in his statement to SA TT; i.e., that he may have sexual urges for EM and wants her away to avoid "thinking in a sexual way to her." (Pros. Ex. 1, 13:24; 19:48). This direct corroborative evidence exceeds the "slight" quantum required to "raise an inference of truth" under Mil. R. Evid. 304(c). *See Jones*, 78

[19] As indicated by the military judge, he admitted these statements under Mil. R. Evid. 404(b) which may alleviate any requirement of corroboration as it is "a rule of evidence other than that pertaining to admissibility of admissions or confessions." Mil. R. Evid. 304(c)(3); (JA 168); *but see Smith*, 348 U.S. at 154 ("We hold the [corroboration] rule applicable to such statements, at least where . . . the admission is made after the fact to an official charged with investigating the possibility of wrongdoing. . . ."). In accord with Mil. R. Evid. 404(b), the military judge instructed the fact-finder their usage of this statement was limited to evincing appellant's state of mind, intent, or to rebut assertions of accident or innocent motive. (JA 219).

M.J. at 42. Accordingly, the military judge was well within the reasonable range of options and did not abuse his discretion when he found sufficient evidence to corroborate appellant's statement to SA TT. *See Frost*, 79 M.J. at 109.

3. The military judge's conclusion that appellant's statements to SA AB were sufficiently corroborated was not an abuse of discretion.

Similar to his findings regarding appellant's statements to SA TT, the military judge did not abuse his discretion when he found appellant's statement to SA AB was also sufficiently corroborated. (R. at 486). Appellant admitted to SA AB that he sexually abused EM in her bedroom as he changed her diaper on the dresser EM's grandfather built. (Pros. Ex. 2, 49:22; 1:40:25–1:43:00). Appellant explained that the first instance where he spread EM's vulva and blew into her vagina took place "around the spring" in "either May or June" of 2018. (Pros. Ex. 2, 50:30).

Appellant's admissions were corroborated by the testimony of MM. MM testified that appellant regularly changed EM's diapers in her bedroom on the dresser her grandfather built. (JA 118–20, 146). She further corroborated that the dresser built by the grandfather was in EM's bedroom in May and the beginning of June even though it moved about within the house. (JA 119, 458). Additionally, MM's testimony about appellant's sexually charged comments about EM show he viewed her in a sexual manner and capable of performing sexual acts and thus supported appellant's admissions of committing sexual acts upon her. (JA 121–

24).

MM's testimony regarding appellant's access to, and sexualized view of, EM showed that he had the motive, means, opportunity, and requisite intent to commit the confessed crimes at the location and during the time frame described by appellant to SA AB. Each of these facts independently tends to raise an inference that appellant was truthful in his statement to SA AB. *See Adams*, 74 M.J. at 140 (describing essential facts of a confession as including "the time, place, persons involved, access, opportunity, method, and motive of the crime") (citation omitted). As explained previously by the Army Court, "when an accused confesses to committing a certain crime in a certain place in a certain manner, evidence that the accused was actually at that place, and had specific motive to commit that crime, can be considered when determining whether the confession is trustworthy." *Arno,* 2019 CCA LEXIS 86, at *5. As such, this independent evidence alone was sufficient to corroborate appellant's statements and make them admissible.

The military judge, however, did not have to rely on this evidence alone to find corroboration of appellant's statements. In addition, there was also independent evidence, which directly corroborated appellant's criminal conduct. MM testified that after the time period of the charged offense, EM's behavior changed where, on multiple occasions, she would get naked, take off her diapers,

and poke numerous objects and toys into her vagina. (JA 135–36).[20] Additionally, while not part of the judge's ruling, appellant's confessions to SA AB were corroborated by his text message to SGT KS. (JA 55). There, appellant said that he did not "want to risk losing [his] job, if it's true or not" when referencing his wife's belief that he sexually abused her daughter. (JA 55). Appellant's unsolicited statements, which implied that it could be true that he sexually abused EM, tend to indicate that his later confessions to those acts were truthful.[21]

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[20] Appellant's charge that the military judge should have waited to hear the testimony of Dr. K or revisited his decision after Dr. K's testimony is without merit. (Appellant's Br. 40–41). Appellant's trial defense counsel never called Dr. K to testify—nor proffered anything about Dr. K's testimony—prior to the military judge's decision. Likewise, appellant's trial defense counsel did not ask the military judge to reconsider his decision after Dr. K had testified. Accordingly, consideration of Dr. K's testimony in assessing the military judge's decision is improper. Even if he had considered Dr. K's testimony, it actually would have furthered an inference that appellant was truthful in his admissions to CID. Dr. K referred to a child inserting toys into her genitalia as "concerning" and frequent or repeated insertion as "problematic sexual behavior." (JA 209, 213). He also explained that EM's behavior "could possibly be related to sexual abuse" and that he "would have to look into it." (JA 214–15). While he cautioned against concluding based solely on her behavior that she had been sexually abused (JA 215), these statements by Dr. K support an inference that appellant was truthful in his admissions to SA TT and SA AB. The ultimate conclusion of whether EM had been sexually abused was not required for corroborating appellant's statement but rather within the province of the fact finder to determine.

[21] The military judge seemingly did not use the statements to SGT KS as corroborative evidence because it was also included within the defense motion. (JA 41, 168). The military judge correctly ruled however that appellant's text message did not require independent corroboration. *Smith*, 348 U.S. at 154 ("We hold the [corroboration] rule applicable to such statements, at least where . . . the admission is made after the fact to an official charged with investigating the possibility of wrongdoing. . . ."). Given that this statement to SGT KS did not

The independent corroborating evidence within the present case goes well beyond that seen in *United States v. Faciane* where independent evidence showed a "troubled child" who inserted items within her vagina and that appellant had access and opportunity beforehand to sexually abuse her. 40 M.J. 399 (C.M.A. 1994). Within the present case, in addition to similar facts found in *Faciane*, there was additional independent evidence which raised an inference that appellant was truthful in his statements to CID. First, appellant's comments that EM appeared to be engaging in sexual behavior tend to show that appellant viewed of EM in a sexual manner. (JA 121–24). This independent evidence tending to show appellant's criminal mental state buttressed the other evidence in supporting an inference that appellant was being truthful within his confession. *See United States v. Green*, 2014 CCA LEXIS 536 at *9–10 (N.M. Ct. Crim. App. July 31, 2014) (distinguishing *Faciane* and finding sufficient corroboration due to "specific access, combined with the uncharacteristic inter27est [in bathing his daughter] displayed by the appellant."). Secondly, appellant directly implied that it could be true that he sexually abused EM within his unsolicited statement to SGT KS. (JA 55). These additional pieces of corroborative independent evidence—coupled with a revised corroboration rule of evidence and the heightened abuse of discretion

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require independent corroboration and its introduction preceded appellant's other statements, it may be used to corroborate the statement to SA TT and SA AB. Mil. R. Evid. 304(c)(2), (5).

standard not applied in *Faciane*—show that appellant's reliance upon that case is misplaced.

In sum, the quantum of evidence that the military judge needed to find appellant's statements to SA AB corroborated was "slight." *See Jones*, 78 M.J. at 42; *Arno*, 2019 CCA LEXIS 86, at *4. Here, the military judge was presented with a litany of corroborative evidence. Appellant's access, motive, means, opportunity, and intent at the time and place of the confessed offense were all established by MM's testimony. This evidence—in combination with evidence of EM's behavior and appellant's text message to SGT KS—was more than sufficient to raise an inference that appellant's statements surrounding the charged events were truthful. As such, the military judge's ruling was well within the reasonable range of options and not an abuse of discretion. *See Frost*, 79 M.J. at 109.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence.

MARC J. EMOND
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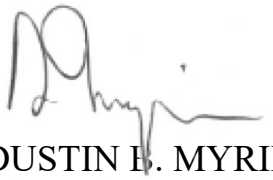

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MARC J. EMOND
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May 5, 2021

Appendix, Unpublished Cases

United States v. Arno

United States Army Court of Criminal Appeals

February 26, 2019, Decided

ARMY MISC 20180699

Reporter
2019 CCA LEXIS 86 *; 2019 WL 990799

UNITED STATES, Appellant v. Specialist GERALD D. ARNO, United States Army, Appellee

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Arno, 79 M.J. 52, 2019 CAAF LEXIS 416 (C.A.A.F., May 7, 2019)*

Stay denied by *United States v. Arno, 2019 CAAF LEXIS 679 (C.A.A.F., May 16, 2019)*

Review denied by *United States v. Arno, 2019 CAAF LEXIS 680 (C.A.A.F., May 16, 2019)*

Prior History: [*1] Headquarters, Fort Drum. Teresa Raymond., Military Judge. Lieutenant Colonel Jennifer A. Neuhauser, Staff Judge Advocate.

Core Terms

military, corroboration, alleged victim, confession, sexual, trustworthiness, suppress, deployment, corroborative evidence, quantum of evidence, introduce evidence, criminal conduct, no memory, conversation, incriminated, proffered, deployed, happened, tending, Motive, slight, tasted, guilt, night, sleep, sex

Case Summary

Overview
HOLDINGS: [1]-The military judge erred as a matter of law in suppressing statement made by the accused for lack of corroboration because nothing in Mil. R. Evid. 304(c) required that the evidence tending to establish trustworthiness was limited to the criminal act itself. The servicemember admitted to sexual conduct with a passed out person and motive and opportunity were not irrelevant considerations.

Outcome
Ruling set aside, government's appeal granted, case remanded.

LexisNexis® Headnotes

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN1[] **Admissibility of Evidence, Admissions & Confessions**

Mil. R. Evid. 304(c), Manual Courts-Martial requires that the government introduce evidence that would tend to establish the trustworthiness of the admission. The

quantum of the evidence required is slight. Nothing in the rule requires that the evidence tending to establish trustworthiness is limited to the criminal act itself. When an accused confesses to committing a certain crime in a certain place in a certain manner, evidence that the accused was actually at that place, and had the specific motive to commit that crime, can be considered when determining whether the confession is trustworthy. Motive and opportunity are not irrelevant considerations. Instead, the military judge required that the corroboration evidence come only from evidence corroborating the criminal conduct to which the accused had confessed. There is not much daylight between the standard articulated by the military judge, and a requirement that the government corroborate the corpus delicti of the offense; a standard which courts at all levels have rejected.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN2[] **Admissibility of Evidence, Admissions & Confessions**

Just because there is evidence that tends to establish the trustworthiness of an accused's confession does not mean that the truth of the confession has been determined. An accused is free to attack the admissibility of the evidence on other grounds or may seek to undermine the weight the factfinder should give the evidence.

Counsel: For Appellee: Lieutenant Colonel Tiffany D. Pond, JA; Major Jack D. Einhorn, JA; Captain Benjamin J. Wetherell, JA; Captain Benjamin A. Accinelli, JA (on brief).

For Appellant: Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Captain Allison L. Rowley, JA; Captain Catharine M. Parnell, JA (on brief).

Judges: Before WOLFE, SALUSSOLIA, and ALDYKIEWICZ, Appellate Military Judges.

Opinion

Per Curiam:

Today we determine that the military judge erred as a matter of law when she suppressed statements made by the accused for lack of corroboration. Accordingly, we grant the government's appeal pursuant to *Article 62, Uniform Code of Military Justice [UCMJ]*.[1]

BACKGROUND

The accused and the alleged victim were both soldiers who had deployed together to Honduras from April 2015 until April 2016. After the deployment, they continued to occasionally text each other. On 15 June 2017, in the midst of a text-message conversation, and apropos of nothing, the accused sent the alleged victim the following text:

> Well damn lol. Is it crazy that even though we never had sex I still **[*2]** remember what your pussy feels, smells, and tastes.

The text conversation continued without the alleged victim directly addressing what appellant had said. The accused then brought it up again:

> Well all I can say is one regret that I don't have is that I played with your pussy and tasted it while you were passed out[,] not the right answer but it happened.

After the subsequent involvement of law enforcement, the accused admitted to a U.S. Army Criminal Investigation Command (CID), special agent that he had digitally penetrated the alleged victim while she was asleep.

The defense moved to suppress the accused's statements for lack of corroboration under Military Rule

[1] On 23 May 2018, the convening authority referred the following specifications against the accused to a general court-martial: two specifications of sexual assault; two specifications of abusive sexual contact; and, one specification of indecent conduct in violation of Articles 120 and 134, UCMJ, *10 U.S.C. §§ 920* and *934 (2012)*. All of the charged offenses are alleged to have occurred on one occasion in September 2015 involving the same alleged victim.

of Evidence [Mil. R. Evid.] 304(c).

To corroborate the accused's statements, the government introduced evidence that the accused and alleged victim were both deployed together in Honduras, had hung out with each other and would get intoxicated together, and would both be in her room. There was also evidence the accused was sexually interested in the alleged victim and would make sexually suggestive comments to her. The alleged victim took a combination of medications that made her sleep heavily during the deployment.

The government also provided **[*3]** the court with a text message exchange from the Honduras deployment that begins with the accused asking, "We are good right?" The alleged victim responds by stating that she has no memory of the previous night's events, and asks the accused if she had remained clothed. After discussing whether or not she had vomited, and after she complains of a severe hangover, the accused stated, "I'd be [sic] lying if I said I didn't want to sleep with you last night."

The alleged victim had no memory of having any sexual contact with the accused. The government proffered no physical evidence to support that a sex act had happened.

The military judge granted the accused's motion to suppress the accused's statements. The military judge rejected the government's argument that the statements were corroborated.[2] The military judge found as follows:

> The Government produced only evidence confirming issues tangential to the subject matter of the confessions and admissions made by the Accused. None of the corroborating evidence produced had anything to do with the criminal conduct to which the Accused had confessed about which he felt guilty or incriminated himself.

Essential to the military judge's ruling was **[*4]** that the corroborating evidence must directly address the part of the accused's statement that admits guilt. The corroboration, the military judge ruled, "needs to address the 'acknowledgement of guilt' or 'incriminating statement.'" Here, as the accused admitted to sexual conduct with a passed out person, the military judge's ruling required the government to corroborate that the victim was passed out and that the sexual act occurred.[3]

The military judge therefore found that the government's proffered corroboration had "no relevance specifically to the confessions and admissions at all."[4]

LAW AND DISCUSSION

We conclude the military judge misapplied the law. ***HN1***[↑] Military Rule of Evidence 304(c) requires that the government introduce evidence that would "tend" to establish the trustworthiness of the admission. The quantum of the evidence required is "slight." *See* Mil. R. Evid. 304(c)(4) ("The independent evidence need raise only an inference of the truth of the admission or confession."); *see also* *United States v. Jones, 78 M.J. 37, 42 (C.A.A.F. 2018)* ("[The CAAF has] traditionally [] described the **[*5]** quantum of evidence needed as being 'slight.'") (citing *United States v. Adams, 74 M.J. 137, 140 (C.A.A.F. 2015))*.

Nothing in the rule requires that the evidence tending to establish trustworthiness is limited to the criminal act itself. When an accused confesses to committing a certain crime in a certain place in a certain manner, evidence that the accused was actually at that place, and had the specific motive to commit that crime, can be

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[2] The military judge also rejected the government's arguments that the text messages were separately admissible as a present sense impression and as residual hearsay.

[3] Immediately after professing a lack of memory of the night before, the alleged victim asks the accused, "What happened?" and "Did I keep my clothes on?" While other interpretations are possible given the record, one interpretation is that the alleged victim was expressing a concern that she had engaged in sexual conduct that she could not recall.

[4] In her initial ruling on the motion to suppress the military judge concluded her ruling by stating:

> The sending of sexually suggestive or explicit texts is not sufficiently indicative of sexual assault. To conclude otherwise would be to indict an entire generation in our current sexting-heavy society.

The text messages in question are not merely "sexually suggestive" or "explicit." The messages admit to "tasting" and "play[ing] with" the genitals of a woman who is "passed out." A person who is asleep or unconscious is incapable of giving consent as a matter of law. *See* *UCMJ art. 120(b)(2)*. To conclude that the messages are not "indicative of sexual assault" is grossly inconsistent with the UCMJ. However, this language was not included in the military judge's final ruling, which is the focus of this court's opinion.

considered when determining whether the confession is trustworthy. Motive and opportunity are not irrelevant considerations.

Instead, the military judge required that the corroboration evidence come only from evidence corroborating the "criminal conduct to which the Accused had confessed . . . ." There is not much daylight between the standard articulated by the military judge, and a requirement that the government corroborate the *corpus delicti* of the offense; a standard which courts at all levels have rejected. *See, e.g.,* ***Opper v. United States, 348 U.S. 84, 75 S. Ct. 158, 99 L. Ed. 101 (1954)***; *United States v. Seay, 60 M.J. 73 (C.A.A.F. 2004)*; *United States v. Egan, 53 M.J. 570 (Army Ct. Crim. App. 2000)*.

Now, to be sure, ***HN2***[⬆] just because there is evidence that tends to establish the trustworthiness of an accused's confession does not mean that the truth of the confession has been determined. An accused is free to attack the admissibility of the evidence on other grounds or may seek **[*6]** to undermine the weight the factfinder should give the evidence.

CONCLUSION

The military judge's ruling suppressing the accused's statements is SET ASIDE, the government appeal is GRANTED, and the case is returned to the military judge for action consistent with this opinion.

End of Document

United States v. Delgado

United States Navy-Marine Corps Court of Criminal Appeals

July 31, 2019, Decided

No. 201900065

Reporter
2019 CCA LEXIS 314 *; 2019 WL 3545840

UNITED STATES, Appellant v. Ignacio DELGADO, Hospital Corpsman Third Class Petty Officer (E-4), U.S. Navy, Appellee

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: [*1] Appeal by the United States pursuant to *Article 62*, UCMJ. Military Judge: Lieutenant Colonel Roger E. Mattioli, USMC. Arraignment 19 November 2018 by a general court-martial convened at Naval District Washington, District of Columbia.

Core Terms

confession, military, corroboration, trustworthiness, shower, independent evidence, stomped, daughter, finished, sexual abuse, demeanor, suppressing, abused, trip, psychotherapist, essential facts, happened

Case Summary

Overview

HOLDINGS: [1]-In the government's interlocutory appeal of the military judge's ruling excluding evidence that was substantial proof of a fact material in the proceeding under Unif. Code Mil. Justice art. 62, *10 U.S.C.S. § 862(a)(1)(B)*, the court granted the appeal, concluding that the military judge abused his discretion by suppressing the appellee's confession and admissions pursuant to Mil. R. Evid. 304(c), Manual Courts-Martial (2016). The military judge ruled that the government had the burden to prove the trustworthiness of the accused's confessions for admissibility by a preponderance of the evidence, and that assigned burden of proof was clearly erroneous.

Outcome
Appeal granted.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1 **Judicial Review, Standards of Review**

The court of criminal appeals is bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous, and the court may not engage in its own factfinding. A military judge's ruling on a motion to suppress is reviewed for an abuse of discretion. Factfinding is reviewed under the clearly erroneous standard and conclusions of law under a de novo standard. The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be

arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN2[] Admissibility of Evidence, Admissions & Confessions

The criminal justice system has long required that before an accused's confession can be used as the sole basis for a conviction, some independent evidence must corroborate it. Mil. R. Evid. 304(c), Manual Courts-Martial (2016) was change to bring military justice practice in line with federal criminal practice. The essential facts test was replaced with a trustworthiness standard: An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession. Rule 304(c)(1). The current rule requires a more holistic approach focusing on the overall trustworthiness of the admission or confession as a whole and eliminates a one-for-one factual corroboration requirement. The entire confession can be admitted into evidence even though every element or fact as confessed is not corroborated. Rule 304(c)(2).

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN3[] Admissibility of Evidence, Admissions & Confessions

Under Mil. R. Evid. 304(c), Manual Courts-Martial (2016), a fact-based analysis of the confession and independent evidence is still appropriate in order to determine if the confession or admission is sufficiently corroborated. The Supreme Court suggests a fact-based analysis as a roadmap to answering the question of trustworthiness, finding that the government must introduce substantial independent evidence which would tend to establish the trustworthiness of the statement, it is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Changing the language of Rule 304 did not eliminate the requirement to corroborate facts; it merely returned the focus to the overall trustworthiness of the confession.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN4[] Admissibility of Evidence, Admissions & Confessions

Corroboration must be established by independent evidence that raises only an inference of the truth of the admission or confession, Mil. R. Evid. 304(c)(4), Manual Courts-Martial (2016), and tends to establish the trustworthiness of the admission or confession. Rule 304(c)(1). Therefore, the standard for corroboration and trustworthiness is lower than even a preponderance of the evidence. Independent evidence used to corroborate a confession does not have to prove the offense beyond a reasonable doubt, or even by a preponderance. The quantum of evidence needed for corroboration is small and traditionally described as slight.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN5[] Admissibility of Evidence, Admissions & Confessions

In addition to independent evidence corroborating factual aspects as confessed, courts may also find corroboration through independent evidence of the nontestimonial acts of an accused.

Counsel: For Appellant: Lieutenant Kurt W. Siegal, JAGC, USN; Captain Brian L. Farrell, USMC.

For Appellee: Lieutenant Michael W. Wester, JAGC, USN.

Judges: Before CRISFIELD, FULTON, and

HITESMAN, Appellate Military Judges. Senior Judge HITESMAN delivered the opinion of the Court, in which Chief Judge CRISFIELD and Senior Judge FULTON joined. Chief Judge CRISFIELD and Senior Judge FULTON concur.

Opinion by: HITESMAN

Opinion

HITESMAN, Senior Judge:

This is an interlocutory appeal by the government, filed pursuant to *Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §862 (2016)*. The government appeals the military judge's ruling "which excludes evidence that is substantial proof of a fact material in the proceeding." *Art. 62(a)(1)(B), UCMJ*. The government alleges that the military judge abused his discretion by suppressing the appellee's confession and admissions pursuant to MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 304(c), MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2016 ed.). We conclude **[*2]** that the military judge abused his discretion and we grant the government's appeal.

I. BACKGROUND

On 29 January 2018, the appellee arranged for his wife to meet him at his psychotherapist's office. The appellee told his wife he had something to tell her and he arranged for a babysitter to watch their three children. After his wife arrived, and with the psychotherapist present, the appellee had a difficult time speaking and began to cry. He confessed that he sexually abused their daughter, ED, who was between 18 and 21 months of age at the time of the abuse.

Two weeks after the disclosure, the appellee's psychotherapist informed Maryland State Child Protective Services (CPS) that the appellee had admitted to sexually abusing his daughter. The Naval Criminal Investigative Service (NCIS) and CPS began an investigation during which they interviewed the appellee's wife; forensically interviewed two of the children; ED and AD, and searched the appellee's electronic media. "NCIS found no physical evidence corroborating the accused's admission."[1] The appellee's statements to his wife on 29 January 2018 at his psychotherapist's office are the only evidence that he sexually abused his daughter.

[*3] The appellee moved to suppress the statements arguing that the statements lack sufficient corroboration under MIL. R. EVID. 304(c). At the *Article 39(a)*, UCMJ, session, the government only offered the written statement of the appellee's wife to NCIS as independent evidence corroborating the admissions and confession. The written statement of the appellee's wife recounts the appellee's confession of sexual abuse at the psychotherapist's office and corroborates some of the details stated by the appellee. In particular, the appellee's wife stated that the family visited Utah in the summer of 2016 and described the family practice of showering with the children. The appellee's wife further stated that it was the normal routine to stomp on the floor when the child was finished showering as a signal for the other parent to bring a towel for the child and get them ready for bed. Finally, the statement describes the appellee's demeanor while he was disclosing the sexual abuse of his daughter.

The military judge issued a written ruling on 15 February 2019 suppressing the confession on the basis that the government failed to meet its burden to introduce independent corroborating evidence. The military judge entered findings of fact **[*4]** addressing the appellee's disclosures:

> o. The accused then stated, "It has to do with ED. I didn't do anything to her. She masturbated me when we were in the shower together."
> p. Upon prodding from [his psychotherapist], the accused stated "it" happened four times.
> q. [His wife] then asked for further details of the abuse, to include when it happened, where she was at the time, and for a more detailed description of the abuse.
> r. The accused stated it happened a year and a half prior, shortly after the last family trip to Utah, over a three-month period.
> s. [His wife] asked, "where was I? Did you wait until I wasn't home and then say to ED 'let's go take a shower'? Or was it when I was home and you just did it before stomping your foot on the ground"?
> t. The accused responded, "that one."
> u. [His wife] elicited additional details, to include the fact that ED used both hands to accomplish the act,

[1] Appellate Exhibit (AE) XXXII at 3.

> that he did not have to teach her how to do it, and that ED was able to masturbate him to ejaculation twice, while on the other occasions he had to "finish" himself.
> v. Finally, when asked if he tried to make it fun or funny, the accused stated, "yes, something like that."[2]

This ruling led to the government's **[*5]** interlocutory appeal sub judice.

II. Discussion

Other than his confession, there is no evidence that the appellee sexually abused his daughter. There is no DNA evidence, no witnesses, and the alleged victim cannot provide any incriminating testimony or evidence.

The government contends that, under Mil. R. Evid. 304(c), the military judge should not have suppressed the confession because he abused his discretion by applying the wrong legal test. Having carefully reviewed the record and pleadings, we reverse the military judge's ruling for the reasons outlined below.

A. Abuse of Discretion

In this appeal, we may act only with respect to matters of law. *Art. 62(b), UCMJ*; Rule for Courts-Martial (R.C.M.) 908(c)(2), MCM (2016 ed.). ***HN1***[] We are bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous, and we may not engage in our own factfinding. *United States v. Gore, 60 M.J. 178, 185 (C.A.A.F. 2004)*. We review a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Jones, 78 M.J. 37, 41 (C.A.A.F. 2018)*. "[W]e review factfinding under the clearly erroneous standard and conclusions of law under a de novo standard." *United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011)* (quoting *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995)*). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, **[*6]** fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000)* (internal quotation marks omitted). Finding legal error, we conclude that the military judge abused his discretion when he suppressed the appellee's confession.

B. Corroboration of Confessions

HN2[] Our criminal justice system has long required that before an accused's confession can be used as the sole basis for a conviction, some independent evidence must corroborate it. *See Escobedo v. Illinois, 378 U.S. 478, 488-89, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964)*. Mil. R. Evid. 304 governs how confessions and admissions are used in courts-martial. Mil. R. Evid. 304(c) was changed in 2016 in an effort to bring military justice practice in line with federal criminal practice. The essential facts test was replaced with a trustworthiness standard:

> An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession.

Mil. R. Evid. 304(c)(1), MCM (2016). Where the previous rule required independent evidence to corroborate each essential fact before that fact was introduced as part of a confession or admission, the current rule requires a more holistic approach **[*7]** focusing on the overall trustworthiness of the admission or confession as a whole and eliminates a one-for-one factual corroboration requirement. The entire confession can be admitted into evidence even though every element or fact as confessed is not corroborated. Mil. R. Evid. 304(c)(2), MCM (2016).

HN3[] A fact-based analysis of the confession and independent evidence is still appropriate in order to determine if the confession or admission is sufficiently corroborated. The Supreme Court suggests a fact-based analysis as a roadmap to answering the question of trustworthiness, finding that the government must "introduce substantial independent evidence which would tend to establish the trustworthiness of the statement, . . . [i]t is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." ***Opper v. United States, 348 U.S. 84, 93, 75 S. Ct. 158, 99 L. Ed. 101 (1954)***. Changing the language of Mil. R. Evid. 304 did not eliminate the requirement to corroborate facts; it merely returned the focus to the overall trustworthiness of the confession.

[2] *Id.* at 2.

C. Errors in the Military Judge's Ruling

1. Findings of fact

The military judge's findings of fact are well supported by the record and do not constitute clear error.

2. Legal principles

HN4[] Corroboration **[*8]** must be established by independent evidence that "raise[s] only an inference of the truth of the admission or confession," MIL. R. EVID. 304(c)(4), and "tend[s] to establish the trustworthiness of the admission or confession," MIL. R. EVID. 304(c)(1). Therefore, the standard for corroboration and trustworthiness is lower than even a preponderance of the evidence. *Smith v. United States, 348 U.S. 147, 156, 75 S. Ct. 194, 99 L. Ed. 192, 1954-2 C.B. 225 (1954)* (stating that independent evidence used to corroborate a confession "does not have to prove the offense beyond a reasonable doubt, or even by a preponderance"); *United States v. Jones, 78 M.J. 37, 42 (C.A.A.F. 2018)* (finding that the quantum of evidence needed for corroboration is small and traditionally described as slight).

The military judge correctly identified and recited the current version of MIL. R. EVID. 304(c) and noted that it was recently changed to abandon the essential facts test in favor of the trustworthiness standard. However, the military judge also ruled that "[t]he government has the burden to prove the trustworthiness of the Accused's confessions for admissibility by a preponderance of the evidence."[3] We find that the assigned burden of proof is clearly erroneous.

3. Application of the correct legal principles to the facts

a. Family trip to Utah

Upon questioning by his wife, the appellee described the timing of the abuse as **[*9]** a three-month period following the family's last trip to Utah. This provided the only evidence of when the abuse occurred. The military judge found the fact that the family "took a vacation to Utah in July 2016" provided "tangential corroboration" but did "not tend to establish the trustworthiness of the admission or confession."[4]

The appellee stated that the abuse happened a "year and a half prior, shortly after the last family trip to Utah, over a three-month period."[5] In this case, independent evidence that there actually was a family trip to Utah in the summer of 2016 reasonably corroborates the appellee's statement about when the sexual abuse occurred.

b. Family showering routine

The appellee stated that his daughter "masturbated [him] when [they] were in the shower together" and confirmed that it happened when his wife was home and that he did it "before stomping [his] foot on the ground."[6] His wife's expected testimony would confirm, as a matter of routine family practice, that the appellee showered with the children and stomped "on the floor as a way of signaling to the other parent, who was usually downstairs, that they needed help with bedtime."[7]

The military judge found that **[*10]** evidence that the appellant showered "with his children does not support an inference of criminality, nor is it sufficient to corroborate a confession."[8] The military judge also ruled that evidence that the appellee stomped when the shower was finished was "not indicative of sexual abuse."[9] The military judge did not properly analyze evidence that the appellee showered with the children and stomped when finished, as the appellee described in his admission. Because those two acts in and of themselves were not criminal acts, the military judge erroneously held that they did not corroborate the appellee's statement. This was error because the military judge did not evaluate the impact of this evidence as corroboration and on the overall trustworthiness of the confession.

The analysis should not focus on the effect the evidence

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[3] *Id.* at 4.

[4] *Id.* at 5.

[5] *Id.* at 2.

[6] *Id.*

[7] *Id.* at 1.

[8] *Id.* at 5.

[9] *Id.*

has on criminality, but rather on the effect the evidence has in corroborating the factual aspects of the confessional statement. The appellee stated that he abused his daughter in the shower and confirmed that he stomped his foot on the ground when finished and that his wife was home at the time. The military judge found as fact, based on the appellee's wife's **[*11]** statement, that it was a common family practice for a parent to shower with the children and stomp when finished to signal to the other parent. This evidence provides at least some corroboration of the appellee's confession pertaining to location, opportunity, and method of the abuse in the same manner as he admitted.

c. Appellee's demeanor

HN5[↑] In addition to independent evidence corroborating factual aspects as confessed, courts may also find corroboration through independent evidence of the nontestimonial acts of an accused. *See* *United States v. Clark, 69 M.J. 438, 444-45 (C.A.A.F. 2011)* (finding an accused's demeanor admissible before factfinder "where it is relevant to an accused's consciousness of guilt"); *United States v. Baldwin, 54 M.J. 551, 555-6 (A.F. Ct. Crim. App. 2000)* *aff'd*, *54 M.J. 464 (C.A.A.F. 2001)* (finding corroboration where the nontestimonial acts of the accused show his consciousness of guilt); *State v. McGill, 50 Kan. App. 2d 208, 328 P.3d 554, 563 (Kan. Ct. App. 2014)* (finding a defendant's demeanor and behavior bolstered the trustworthiness of his statements).

The government avers that the military judge's ruling was arbitrary and an abuse of discretion because he failed to use the proper standard. The military judge agreed that demeanor evidence could corroborate a confession but found that there were other reasons why the appellee might be nervous or concerned, to include his fear that his **[*12]** "marriage would be ruined."[10] The military judge was "unwilling to use [the wife's] description of the [appellee's] demeanor as corroboration of the content of the confession itself."[11] The military judge's reasoned approach was not arbitrary and his conclusion was within the range of options available to him.

4. Legal error

We find that the military judge's analysis under the law was partially incorrect, incomplete, and, as a matter of law, constituted an abuse of discretion. In this case, the military judge considered the limited facts provided by the appellee in his confession and the independent evidence of corroboration provided by the appellee's wife. We find that the military judge generally applied a fact-based corroboration analysis and evaluated the overall trustworthiness of the confession. He did not apply the supplanted essential facts test, as averred by the appellant, which would exclude from evidence those particular statements of fact that were not corroborated by independent evidence.

The record shows that the military judge considered the factual basis of the appellee's confession, to include the family trip to Utah, the practice of showering with his daughter and **[*13]** stomping on the floor when finished, and the appellee's demeanor when confessing to his wife. However, after considering these facts and the corroborating evidence raised, the military judge found that the "[g]overnment has not met their burden of introducing independent evidence, either direct or circumstantial, that would tend to establish the trustworthiness of the accused's admissions."[12] As we have already found, the military judge incorrectly held the government to a preponderance of the evidence standard of proof, and here further compounded that legal error by using it to reach the overall trustworthiness finding.

The military judge considered evidence that the appellee showered with his daughter and stomped when finished, and found that this conduct was "not indicative of sexual abuse," did "not support an inference of criminality," and he was not willing "to attach a criminal connotation to the fact that a parent bathed with their child."[13] This analysis was incomplete because it did not address the evidence's impact on the trustworthiness of the confession and admissions.

The correct analysis requires an examination of corroborating evidence and a determination of whether that **[*14]** evidence tends to establish the trustworthiness of the statement. The military judge should have considered the evidence establishing the family trip to Utah, the appellee's practice of showering with his daughter and then stomping when finished, and the appellee's demeanor and other nontestimonial acts and

[10] *Id.*

[11] *Id.*

[12] *Id.* at 6.

[13] *Id.* at 5.

used these facts to evaluate the overall impact on the trustworthiness of the confession and admissions.

We find the military judge erred as a matter of law in suppressing the appellee's admissions and confession. We are mindful that "[t]he military judge alone is to determine when adequate evidence of corroboration has been received" and our ruling does not dictate admissibility. MIL. R. EVID. 304(c)(5), MCM (2016). However, our ruling requires the military judge to apply the correct law to the facts before ruling on the admissibility of the confession.

III. CONCLUSION

Having carefully considered the military judge's findings of fact, principles of law, and conclusions of law, we conclude that he abused his discretion and grant the government's appeal. The military judge's ruling in Appellate Exhibit XXXII is vacated and the record of trial is returned to the Judge Advocate General for remand to the trial **[*15]** court for further proceedings consistent with this opinion.

Chief Judge CRISFIELD and Senior Judge FULTON concur.

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United States v. Green

United States Navy-Marine Corps Court of Criminal Appeals

July 31, 2014, Decided

NMCCA 201300276

Reporter
2014 CCA LEXIS 536 *; 2014 WL 3772864

UNITED STATES OF AMERICA v. JEREMY R. GREEN, AVIATION ELECTRICIAN'S MATE AIRMAN (E-3), U.S. NAVY

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Review denied by *United States v. Green, 2014 CAAF LEXIS 1056 (C.A.A.F., Oct. 31, 2014)*

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 7 March 2013. Military Judge: CAPT Kevin O'Neil, JAGC, USN. Convening Authority: Commanding Officer, Naval Air Station, Lemoore, CA. Staff Judge Advocate's Recommendation: LT D.A. Christenson, JAGC, USN.

Core Terms

confession, corroboration, military, independent evidence, posted, daughter, website, essential facts, bathing, comments, uncharacteristic, interrogation, sexual abuse, specifications, sentence, sexual

Case Summary

Overview
HOLDINGS: [1]-Where appellant was convicted of child rape, aggravated sexual contact with a child, and sodomy with a child, the military judge did not err in denying a motion to suppress his confession because the independent evidence sufficiently corroborated his confession under Mil. R. Evid. 304(g), Manual Courts-Martial; [2]-The military judge focused on appellant's interest in bathing his daughter and the forensic evidence indicating that he visited a website about incest; [3]-Evidence of appellant's postings on a social media website was available as independent corroboration, because he posted these comments months before anyone suspected him and there were no circumstances of police coercion.

Outcome
Findings and sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans Law > Military Justice > Judicial

Review > Standards of Review

HN1[] Admissibility of Evidence, Admissions & Confessions

The United States Navy Marine Corps Court of Criminal Appeals reviews a military judge's ruling that a confession is sufficiently corroborated for an abuse of discretion. An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law. This standard envisions that a judge has a range of choices and will not be reversed so long as the decision remains within that range.

Governments > Courts > Common Law

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN2[] Courts, Common Law

The independent corroboration rule acts as a bulwark against the danger of false or coerced confessions. The common law corroboration requirement has extended beyond confessions to admissions of essential facts or elements of the crime, subsequent to the crime even where those admissions were intended to be exculpatory in nature. The only exception is statements immaterial as to guilt or innocence.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN3[] Admissibility of Evidence, Admissions & Confessions

As to the relationship between corroboration and the admissions or confessions, the government must introduce substantial independent evidence which would tend to establish the trustworthiness of the statement but that it is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Substantial independent evidence can establish the trustworthiness of the statement even if it only relates to one element of the crime, or if it simply bolsters the trustworthiness of the confession alone without relating to any element of the confessed to crime. One mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense through the statements of the accused.

Evidence > ... > Exemptions > Confessions > Corpus Delicti Doctrine

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN4[] Confessions, Corpus Delicti Doctrine

In Opper, the U.S. Supreme Court rejected the "corpus delicti" rule previously adopted in some federal and state courts whereby a suspect's confession must be corroborated by facts that establish the corpus or the entirety of the crime. Mil. R. Evid. 304(g), Manual Courts-Martial, the military rule on corroboration follows the same non-corpus delicti approach embraced in Opper.

Evidence > Types of Evidence > ***Circumstantial*** Evidence

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN5[] Types of Evidence, Circumstantial Evidence

See Mil. R. Evid. 304(g), Manual Courts-Martial.

Evidence > Inferences & Presumptions > Inferences

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN6[] Inferences & Presumptions, Inferences

The quantum of independent evidence necessary to corroborate a confession is very low as it must raise only an inference of truth as to the essential facts admitted.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN7 **Admissibility of Evidence, Admissions & Confessions**

Extrinsic proof is sufficient if it merely fortifies the truth of the confession, without independently establishing the crime charged.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN8 **Admissibility of Evidence, Admissions & Confessions**

Mil. R. Evid. 304(g), Manual Courts-Martial, provides that other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. Mil. R. Evid. 304(c)(2), Manual Courts-Martial, defines an admission as a self-incriminating statement falling short of an acknowledgement of guilt, even if it was intended by its maker to be exculpatory. This language tracks the Opper holding extending the corroboration requirement to admissions falling short of a full confession. However, Opper only envisions statements made by an accused while under suspicion of the confessed to offense.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN9 **Admissibility of Evidence, Admissions & Confessions**

An accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and corroboration should be required.

Counsel: For Appellant: LT Carrie Theis, JAGC, USN.

For Appellee: Maj David Roberts, USMC.

Judges: Before R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD, Appellate Military Judges. Senior Judge MCFARLANE and Judge MCDONALD concur.

Opinion by: R.Q. WARD

Opinion

OPINION OF THE COURT

WARD, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant pursuant to his pleas of wrongful appropriation and communicating indecent language in violation of Articles 121 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 921* and *934*. The military judge also convicted the appellant, contrary to his pleas, of one specification of rape of a child, two specifications of aggravated sexual contact with a child, and two specifications of sodomy with a child in violation of Articles 120 and 125, UCMJ, *10 U.S.C. §§ 920* and *934*. The military judge sentenced the appellant to confinement for 140 months, reduction to pay grade E-1 and a dishonorable discharge. The convening authority approved the sentence as adjudged and, **[*2]** in accordance with the pretrial agreement, waived automatic forfeitures of pay and allowances for the benefit of the appellant's family members. With the exception of the punitive discharge, the convening authority ordered the sentence executed.[1]

On appeal, the appellant raises the following assignments of error:

1) That the military judge erred in denying the appellant's motion to suppress his confession;

[1] We note that the Convening Authority's action, General Court-Martial Order No. 1-13, incorrectly lists the finding for Charge I, Specification 4 as guilty when in fact the military judge found the appellant not guilty of this offense. Record at 272. We will order corrective action in our decretal paragraph.

2) That the military judge erred in his special findings under RULE FOR COURTS-MARTIAL 918(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.);

3) That the appellant's convictions for rape of a child, aggravated sexual contact of a child and sodomy with a child are legally and factually insufficient;

4) That the appellant's guilty plea to wrongful appropriation is improvident; and

5) That the appellant's guilty plea to communicating indecent language is improvident.[2]

Having carefully considered the record of trial, the parties' pleadings and oral argument, we conclude that the findings and sentence are correct in law and fact and no error materially prejudicial to a substantial right of the appellant occurred. *Arts. 59(a)* and *66(c)*, UCMJ.

Factual Background

The charges and specifications stem from a pattern of sexual abuse committed by the appellant against his then two-and-a-half year old daughter and his infant son. This occurred between May and July 2011, shortly before the appellant deployed in late July 2011. It was also during this time that the appellant's wife noticed a change in the appellant's behavior as he displayed a new interest in caring for his children. With a toddler and a newborn, she welcomed her husband's involvement and sharing of parental care. Unbeknownst to her, it was during this period that the appellant sexually abused their children upstairs in their home after giving one a bath or changing a diaper. Each time he did this his wife would either be in the shower, taking a nap, or downstairs with the other child.

After the appellant began taking on more responsibilities for the children, his wife **[*4]** began noticing some changes in her daughter. She noticed her daughter having more frequent urination accidents, something that surprised her since the daughter had been potty-trained by that time for several months.

As the appellant prepared to deploy in late July, his wife began to suspect him of having an affair. After he deployed, she left him and took both children back to her hometown. Using his password, she hacked into her husband's email account and discovered links to a Facebook profile name of "Bobby Warren". When she looked up the profile of "Bobby Warren", she discovered her husband's picture and several disturbing posted comments. One post in particular concerned her because "Bobby Warren" seemingly expressed an interest in incest. Alarmed, she contacted a family friend and local police for assistance. Ultimately, she reported her suspicions to agents from the Naval Criminal Investigative Service (NCIS).

Soon thereafter NCIS agents initiated an investigation. With only the generalized information provided by the appellant's wife, consisting primarily of the "Bobby Warren" Facebook posts, agents had little to go on before they interrogated the appellant.[3] However, in a series **[*5]** of interviews with NCIS investigators, the appellant described in detail numerous instances of sexually abusing his children.

Prior to trial, the appellant sought to suppress his confession arguing that the Government lacked sufficient independent corroboration. After taking testimony from several witnesses and reviewing documentary exhibits, the military judge denied the motion after finding that four items of evidence proffered by the Government adequately corroborated the appellant's confession.[4]

Corroboration of the Appellant's Confession

In his ruling, the military judge relied on the following to conclude that the appellant's confession was sufficiently corroborated:

1) The appellant's uncharacteristic interest in bathing his daughter and son as described by the appellant's wife;
2) Independent evidence that the appellant accessed the website "literotica";
3) Independent evidence of the appellant's postings under the Facebook pseudonym "Bobby Warren"; and

4) Evidence that the daughter's regression in potty **[*6]** training could be caused by sexual

[2] We have reviewed assignments of error 2 - 5 and **[*3]** find them without merit. *United States v. Clifton, 35 M.J. 79, 81-82 (C.M.A. 1992)*.

[3] A forensic examination of the daughter found no physical evidence of sexual trauma. Appellate Exhibit XXI. Additionally, a forensic interview of her was inconclusive. AE XXIII.

[4] AE XVI.

abuse.[5]
Appellate Exhibit XVI at 9-10.

HN1[] We review a military judge's ruling that a confession is sufficiently corroborated for an abuse of discretion. United States v. Seay, 60 M.J. 73, 77 (C.A.A.F. 2004). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008) (citation omitted). This standard envisions that "a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Id.* (citations and internal quotation marks omitted).

Originally from common law, HN2[] the independent corroboration rule acted as a bulwark against the danger of false or coerced confessions. **Opper v. United States, 348 U.S. 84, 89-90, 75 S. Ct. 158, 99 L. Ed. 101 (1954)**. In *Opper*, the Supreme Court extended the common law corroboration requirement beyond confessions to "admissions of essential **[*7]** facts or elements of the crime, subsequent to the crime" even where those admissions were intended to be exculpatory in nature. **Opper, 348 U.S. at 90-92**. The only exception, the Court found, was statements "immaterial as to guilt or innocence." **Id. at 91**.

HN3[] As to the relationship between corroboration and the admissions or confessions, the Court held that the Government "must introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. . . . [but that] [i]t is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." **Id. at 93**.[6] That same year the Supreme Court held that the "substantial independent evidence" can establish the trustworthiness of the statement even if it only relates to one element of the crime, or if it simply bolsters the trustworthiness of the confession alone without relating to any element of the confessed to crime. *See* Smith v. United States, 348 U.S. 147, 156, 75 S. Ct. 194, 99 L. Ed. 192, 1954-2 C.B. 225 (1954) ("[O]ne available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." (Citation omitted)).

The military rule on corroboration has long followed the same non-*corpus delicti* approach embraced in **Opper**.[7] The current rule, HN5[] MILITARY RULE OF EVIDENCE 304(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) provides that:

> An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or ***circumstantial***, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth.

HN6[] The quantum of independent evidence necessary to corroborate **[*9]** a confession is "very low" as it "must raise only an inference of truth as to the essential facts admitted." Seay, 60 M.J. at 79-80.

We now turn to the four items of evidence cited by the military judge as sufficient corroboration under MIL. R. EVID. 304(g).

1. The appellant's uncharacteristic interest in bathing his children

The appellant first takes issue with the military judge's finding that the appellant's "uncharacteristic"[8] interest in bathing his children served as independent evidence corroborating the truthfulness of his confession.

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[5] Contrary to the appellant's argument, we find no clear error in the military judge's factual findings as to this evidence and we find no merit to the appellant's argument that the military judge improperly combined this item of evidence with other independent evidence to conclude that the appellant's confession was adequately corroborated. Appellant's Brief of 18 Oct 2013 at 32.

[6] HN4[] In *Opper*, the Supreme Court rejected the "*corpus delicti*" rule previously adopted in **[*8]** some federal and state courts whereby a suspect's confession must be corroborated by facts that establish the corpus or the entirety of the crime.

[7] *Compare* MANUAL FOR COURTS-MARTIAL, App. 22, at A22-13 (2012 ed.) with MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 140a, at 251-52. Our superior court has long embraced the non-*corpus delicti* rule as well. *See, e.g.,* United States v. Maio, 34 M.J. 215, 218 (C.M.A. 1992) (explicitly rejecting the *corpus delicti* rule, instead relying on the trustworthiness of the confession); United States v. Rounds, 30 M.J. 76, 80 (C.M.A. 1990) (finding that independent proof of each element not required, independent evidence must only raise inference of truth as to essential facts stated in confession).

[8] AE XVI at 7.

Likening his case to *United States v. Faciane, 40 M.J. 399 (C.M.A. 1994)*, the appellant argues that normal parental access even when combined with bizarre behavior by a child is insufficient to corroborate a father's confession to acts of child sexual abuse. Appellant's Brief of 18 Oct 2013 at 16-17.

As the appellant correctly notes, our superior court held in *Faciane* that a father's exclusive visitation was insufficient to corroborate his later confession to acts of molestation. However, the appellant's behavior as described by his wife went well beyond what was at issue in *Faciane*. Here, the military judge focused more so on the uncharacteristic interest the appellant displayed in bathing his daughter, something his wife noticed at the **[*10]** time. Despite his sudden willingness to bathe his daughter and ready her for bed, as many as four to five nights a week, the appellant's wife testified that the appellant still remained largely uninterested in any other parental responsibilities or care. Record at 40-43; 166-67. Furthermore, the appellant admitted during his interrogation that he always committed these acts on his daughter in her room following her bath while his wife was either in the shower or downstairs with their son. Prosecution Exhibits 7 and 9.

The nature of this interaction as described during the appellant's confession coincides with the uncharacteristic interest the appellant displayed with his daughter as described by his wife. Like the military judge, we find that this specific access, combined with the uncharacteristic interest displayed by the appellant, corroborated some of the essential facts of his confession.[9]

2. Independent evidence that the appellant accessed the website "literotica"

During his first interrogation,[10] the appellant described how he first sexually abused his daughter after reading stories of incest on the website "literotica" and becoming curious. PE 7. An hour later into the interrogation, he recounted how after reading these stories online from his smart phone he thought about creating his own story. *Id.* Near the end of the interrogation that day, he referenced the website again, commenting **[*12]** that the stories were "pretty explicit" and ultimately led him to sexually abusing his children. *Id.*

The following day, NCIS agents again interrogated the appellant concerning the details he previously provided. The appellant again explained that after reading the material on this website, and then bathing his daughter, "something clicked." PE 9.

On appeal, the appellant argues first that this website is not an essential fact to his confession. Alternatively, he argues that it is too attenuated since the forensic evidence only indicates that he visited the website in March 2012, approximately eight months after his offenses. We disagree with both contentions.

As to his first contention, no one was aware of the website's existence until he volunteered the name. Considering that, in his own words, this website and its content "led" to his crimes, we reject the notion that this website and the role it played are not essential facts of his confession. Were we to accept the premise to the appellant's argument, then independent evidence **[*13]** of confessed facts falling short of an element, such as motive, access, and opportunity, could never corroborate a confession - a premise rejected by the Supreme Court sixty years ago in ***Opper*** and *Smith*.[11] We decline to adopt this repackaging of the *corpus delicti* rule.

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[9] The appellant also takes issue with the military judge's finding that "[i]n May 2011, the [appellant] extended his assistance to bathing his son." AE XVI at 4. The appellant's wife testified that during this time of displaying an interest in bathing her daughter, the appellant would also offer to watch her son **[*11]** while she took a nap. Record at 42. As the appellant correctly notes, his wife did not testify that the appellant similarly took his son upstairs to bathe him. We agree that this portion of the military judge's finding was clearly erroneous as it was unsupported by the record. However, as described below, we conclude that the balance of the remaining corroborative facts as cited by the military judge "tend[ed] to establish the trustworthiness" of the appellant's statements in his confession concerning both children. ***Opper, 348 U.S. at 93***; *see also Wong Sun v. United States, 371 U.S. 471, 489, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)* (holding that ***HN7***[⬆] "extrinsic proof" is sufficient if it "'merely fortifies the truth of the confession, without independently establishing the crime charged.'" (quoting *Smith, 348 U.S. at 156*)).

[10] The appellant returned from deployment in late February 2012. NCIS agents interrogated him on 6 and 7 March 2012, and again on 2 April 2012. PE 4-7, 9 and 10.

[11] *See also United States v. Baldwin, 54 M.J. 464, 466 (C.A.A.F. 2001)* (finding father's unexplained presence in daughter's bedroom and visit to the chaplain two days later were corroborative of essential facts to confessed sexual abuse); *Maio, 34 M.J. at 219* (finding access to drugs during time in question was corroborative of confessed drug use).

The appellant's second argument focuses on the lack of temporal proximity between the forensic evidence recovered from his phone and the facts of his confession. Even with the lack of proximity, at a basic level confirmation of this website and filename suggestive of incest creates some inference of truth to these related facts in his confession. Lack of temporal proximity may influence the weight to be given, but it does not exclude this fact as irrelevant as the appellant argues. To the contrary, we find it is a factor in evaluating the inferential weight to this evidence. *See United States v. Cravens, 56 M.J. 370, 376 (C.A.A.F. 2002)* (finding scientific test establishing drug use at some point within a four to **[*14]** five month period preceding admitted use sufficiently "proximate in time" to corroborate admitted use); *United States v. Hall, 50 M.J. 247, 252 (C.A.A.F. 1999)* (finding evidence of drug use occurring three months after confessed use was still corroborative of confession).

3. Independent evidence of the appellant's postings under the Facebook pseudonym "Bobby Warren"

At trial, the parties stipulated that under the Facebook pseudonym "Bobby Warren" the appellant posted the following comments:

> "I am feeling very horny right about now. Could use some young pink p****. mmmm" posted 3 February 2011; and
>
> "I WANT SOME P****. SOME YOUNG JUICY P****" posted on 4 July 2011.

PE 1 at 2. During the motion hearing and at trial, the Government introduced additional evidence that "Bobby Warren" also posted the following comment on 4 July 2011: "does anyone on here like incest?" PE 2 at 5. The military judge concluded that the two comments posted on 4 July 2011 "expresses an implied desire for sexual contact with young females" and therefore "in combination with the [other corroborative evidence] support[s] an even stronger inference of truth to the [appellant's] admissions." AE XVI at 8-9 (footnote omitted).

The appellant challenges the military judge's above conclusion on three bases: **[*15]** 1) that under MIL. R. EVID. 304(g) these Facebook posts amount to separate admissions that themselves require corroboration and therefore cannot be used to corroborate his confession; 2) that these comments are inadmissible under MIL. R. EVID. 304(g) because they do not amount to essential facts of his confession; and 3) that these comments are inadmissible under MIL. R. EVID. 404(b).[12]

HN8[↑] MIL. R. EVID. 304(g) provides in pertinent part: "Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence." Subparagraph (c)(2) of the rule defines an admission as "a self-incriminating statement falling short of an acknowledgement of guilt, even if it was intended by its maker to be exculpatory." This language tracks the *Opper* holding extending the corroboration requirement to admissions falling short of a full confession.[13]

More importantly, however, *Opper* only envisions statements made by **[*16]** an accused while under suspicion of the confessed to offense.[14] We find no such circumstances here. The appellant posted these comments months before anyone suspected him of any offense, and we find no circumstances of police coercion or other dangers of false confession present.[15] Moreover, nowhere in these posts is there an "admission of one of the formal 'elements' . . . or of a fact subsidiary to the proof of [an] 'element[]'" to the confessed crime. *Smith, 348 U.S. at 155*. We find therefore that these posts were available as independent corroboration under MIL. R. EVID. 304(g) and *Opper.*

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[12] Because we find no merit in these latter two arguments, we address only the first.

[13] "We think that***HN9***[↑] an accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and that corroboration should be required." ***Opper, 348 U.S. at 90*** (citations omitted).

[14] "We conclude that exculpatory statements, however, may not differ from other admissions of incriminating facts. Given when the accused *is under suspicion*, they become questionable just as testimony by witnesses to other extrajudicial statements of the accused." ***Id. at 92*** (emphasis added).

[15] Based on his review of the appellant's confession and his own forensic evaluation, Dr. Rex Frank, a forensic psychologist retained by the defense, found no evidence of coercion by NCIS interrogators and concluded that "[d]ata reviewed did not support the elicitation of a false internalized or false compliant confession . . . in response to [the appellant's] interrogation **[*17]** by NCIS Agents [however] [t]he evaluation did not exclude the possibility of a voluntary false confession." Defense Exhibit A at 27.

Conclusion

Consequently, we find no error by the military judge in concluding that the aforementioned independent evidence sufficiently corroborated the appellant's confession because it "fortif[ied] the truth of the confession, [despite not] independently establishing the crime charged." *Wong Sun, 371 U.S. at 489* (citation, internal quotation marks and footnote omitted).

The supplemental court-martial order will reflect a finding of Not Guilty for Charge I, Specification 4. The findings and sentence as approved by the convening authority and corrected herein are affirmed.

Senior Judge MCFARLANE and Judge MCDONALD concur.

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CERTIFICATE OF FILING AND SERVICE

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 May 5, 2021.

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