IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40039 (f rev)
	)	
Master Sergeant (E-7)	)	USCA Dkt. No. 23-0085/AF
JONEL H. GUIHAMA	)	
United States Air Force	)	27 October 2023
Appellant.	)	

BRIEF ON BEHALF OF THE UNITED STATES

ZACHARY EYTALIS, Col, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(808) 372-7022
Court Bar No. 32903

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

JAMES P. FERRELL, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34917

MATTHEW D. TALCOTT, Col, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

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TO THE HONORALBLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

CERTIFIED ISSUE

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ADMITTING A CONFESSION THAT WAS NOT TRUSTWORTHY BECAUSE IT LACKED SUFFICIENT CORROBORATION.

INTRODUCTION

The general rule that an accused may not be convicted on his own uncorroborated confession exists to prevent errors in convictions based upon untrue confessions alone.

Smith v. United States, 348 U.S. 147, 152-153 (1954). Nevertheless, because this rule does infringe on the province of the primary finder of facts, its application should be scrutinized lest the restrictions it imposes surpass the dangers which gave rise to them. Id. at 153.

On 5 September 2018, FBI agents executed a search warrant at Appellant's house for child pornography. Contemporaneous with the search, Appellant confessed to downloading and sharing files of child pornography. He openly described his practice of sharing links of child pornography and what he described as some "bad stuff." But when questioned if he ever inappropriately touched a child, his mouth started trembling, his eyes became red and watery, and it looked like he was going to cry. Appellant initially denied the allegation, but during a post-polygraph interview, Appellant admitted to fondling his nephew and niece after they had all fallen asleep on the living room floor while watching a movie.

An investigation confirmed the existence of his nieces and nephew who described Appellant was the "fun" uncle who always spent time with them. They looked up to him and trusted him. One activity everyone remembered was "movie night." It did not happen at home, or at any other location, but when the children were with Appellant, they would routinely camp out on the living room floor and watch movies together. They would watch movies until all the other adults had retired and gone to bed, the children did not go to bed. They remained in the living

room lying next to the uncle they trusted and looked up to. The only part that the children did not remember is that once they had all fallen asleep, and unbeknownst to them, Appellate would molest them.

A military judge alone must determine whether independent direct or circumstantial evidence raises an inference of the trust of the admission or the confession. Mil. R. Evid. 304(c)(2). If an individual piece of independent evidence meets this threshold, the military judge may then use that evidence in the process of determining whether the accused's statement is trustworthy. United States v. Whiteeyes, 82 M.J. 168, 173, 174 (C.A.A.F. 2022).

The evidence this Court has considered for the purposes of corroboration is extensive. Presence at the scene or an opportunity to commit an offense may be considered as evidence of corroboration. United States v. Baldwin, 54 M.J. 551, 556 (C.A.A.F. 2000). A description of the location of the offense may raise an inference of the truth of a confession. Whiteeyes, at 172. 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. United States v. Arno, ARMY MISC 20180699, 2019 CCA LEXIS 86, *5 (A. Ct. Crim. App. Feb. 26, 2019) (unpub. op). A change in demeanor – evidence of consciousness of guilt – may also provide independent circumstantial evidence that

raises an inference of the truth of a confession. United States v. Clark, 69 M.J. 438, 444 (C.A.A.F. 2011); United States v. Cook, 48 M.J. 64, 66 (C.A.A.F. 1998).

Moreover, a person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography. United States v. Byrd, 31 F.3d 1329, 1339 (5th Cir. 1994). *See also* Whiteeyes, 82 M.J. at 180 (Hardy, J., concurring) (finding that an appellant's admission evidencing motive and intent admitted under Mil. R. Evid. 404(b) may be used to corroborate a confession under Mil. R. Evid. 304(c)).

The military judge did not abuse her discretion when she determined sufficient evidence of corroboration existed to admit Appellant's confession. Corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance. Smith, at156. A confession is admissible in its entirety if independent evidence has been admitted into evidence that would *tend to establish the trustworthiness of the admission or confession*. Mil. R. Evid. 304(c)(1) (emphasis added).

Indeed, the quantum of evidence required, the evidence this Court and service courts have considered, and the trustworthiness standard are indicative of the fact that this rule of evidence infringes on the province of the primary finder of facts and that applied incorrectly critical evidence of an appellant's guilt may be excluded. Its application should therefore be scrutinized lest the restrictions it

imposes surpass the dangers which gave rise to them. Accordingly, this Court should affirm the decision of the Air Force Court.

STATEMENT OF STATUTORY JURISDICTION

AFCCA reviewed this case under Article 66(d), UCMJ.[1] This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ.

STATEMENT OF THE CASE

The government accepts Appellant's statement of the case.

STATEMENT OF FACTS

On 5 September 2018, at approximately 0600hrs, agents from the FBI and Air Force Office of Special Investigations (AFOSI) executed a search warrant for the presence of child pornography at Appellant's house. (JA at 108.) Upon entering the dwelling, agents discovered Appellant, placed him in handcuffs, and removed him from the house while other agents completed a "tactical clear" of the residence. (JA at 35-36.) Agents escorted Appellant to an unmarked sedan where FBI agents conducted an interview. (Id.) Prior to conducting the interview, agents ensured Appellant was comfortable and read him his Miranda rights, which he

[1] Unless otherwise noted, all references to the UCMJ, punitive articles, Military Rules of Evidence, and the Manual, are to the MCM (2019 ed.).

waived. Agents next proceeded to interview Appellant for the next two hours. (JA at 37-38.)

Appellant listed seven different military assignments and stated that he arrived at Dyess Air Force Base, Texas in January 2009. (JA at 198.) He next moved to Turkey in 2013; and arrived at Joint Base Lewis-McChord, Washington in 2014. (Id.)

At some point, the agent asked if Appellant ever viewed or shared pornography. (JA at 217.) Appellant discussed how he was involved in group chats and shared links involving nude underaged teenagers; both boys and girls; Appellant described the images as "bad stuff." (JA at 226-228.) In order to remain a member of the chat group Appellant routinely sent links containing child pornography. (JA at 230, 234, 236.)

During the interview Appellant admitted being aroused by the images of child pornography, but he would not masturbate to the images because his wife "would kill him." (JA at 239.) The agent then asked if Appellant spent a lot of time around kids. Appellant responded that he did not have kids but had nieces and nephews. At this point in the interview, Appellant anticipated that the next questions would concern inappropriate behavior with other children. (JA at 239-240.)

SUBJ: I don't think anything like this. Like what this is all—discussion is about, it's not like what I look for on the outside.

SA1: Yeah. So, look we hear that a lot actually, and that—I totally, believe you, I understand that that's—but it's kind of an evolution right. So, there was, I think, probably a point in your life when you would have said that you would never look at or share images of nude children, right?

SUBJ: Mm-hm.

SA1: And then at some point it just became a little bit easier for you. Okay, you started looking at it, and you felt, probably a little bit bad the first time you looked at, and then maybe it was a little bit easier the next time, then eventually you masturbated, you gratified yourself to those images, and so, when you go back there and it's a little bit easier. And so, where that inevitably leads is it's easier for you to look at, you're more sexually gratified, it's easier the next time, you're more sexually gratified, to the point where you start to—you think about it in real life.

…

SA1: And so, I get you're telling me you think about them as family, but I mean, have you—have you ever—let me ask you just straight out, have you ever put your hands on a child in an inappropriate---

SUBJ: No----

SA1: ----and sexual way?

SUBJ: Mm-mm, I would not. I would not do that, uh-huh.
SA1: Have you ever had the opportunity to?

SUBJ: I mean, if you put it that way, there are opportunities, but it's not what I want to do, uh-uh.

> **SA1**: Look, I believe that it's not what you want to do, I just think that sometimes people—the way that they're hardwired sort of overcomes what their sort of moral compass tells them to do.
>
> **SUBJ**: Mm-hm. No, I never—I never would and never did that. I never---
>
> **SA1**: No.
>
> **SUBJ**: No, no, sir, I wouldn't. That's going overboard.
>
> **SA1**: Yeah. You're getting a little more emotional now than I think you were earlier---_

(JA at 239-241.) The agent later testified to a change in Appellant's demeanor. Appellant looked like he was going to start crying, his mouth trembled, and his eyes got red and watery. (JA at 120.)

At the end of the initial interview Appellant agreed to participate in a polygraph examination. (JA at 38.) After the polygraph, the agent stated that the polygraph "did not go like I was hoping it was going to go." The agent then stated, "you were clearly responding to some questions regarding sexual contact with a minor." (JA at 262.) Throughout the interview the agent offered Appellant's wife's infidelity as an excuse as to why Appellant would touch a minor in a sexual way. (JA at 262, 267, 268, 269, 273.) The agent suggested that Appellant may not have even known the age of the minor when the touching occurred; and also

suggested on multiple occasions that the touching was consensual. (JA at 268-269, 270, 271.)

Appellant rejected the agent's theory that he touched a minor because he felt betrayed by his wife. He stated that everything was "fine" between him and his wife and that they "just moved on." (JA at 273.) Appellant also rejected the theory that the event was consensual; "I'm going to say it doesn't seem consensual because he was sleeping. It was my nephew on my wife's side." (Id.) Appellant then described how he touched his nephew.

> But I didn't do anything to him penetration wise or whatever. I did the whole peeking and looking and I know that was bad, and that became a thing when he was sleeping, I was like, we'll knock out, watch TV. But then, I mean, that was it, that's what had happened. And then later on down the road it was just quiet, I stopped, I walked away from that kind of stuff…

(JA at 273.)

Appellant initially stated he only fondled his nephew's penis in summer 2011 while he was living at Dyess Air Force Base but visiting his wife's family in Missouri; and that his nephew was 12-13 years old at the time. (JA at 274, 301.) Appellant stated he, his nephew and nieces all passed out on the living room floor after watching a movie. The other family members were asleep in their bedrooms. (JA at 275.) Appellant stated that his nephew did not wake up during the fondling and has "no clue" that anything happened to him. (JA at 275, 279.)

Appellant later admitted to fondling his niece on the same night he fondled his nephew, while they were all sleeping in the living room. (JA at 282, 301.) He stated that she was "knocked out" at the time and did not see or notice anything. (JA at 283.) After the fondling, he did not go back to bed with his wife but instead "passed out" on the floor. (JA at 305.)

In describing the timeline of events, Appellant initially stated that the first incident of fondling involving both his nephew and niece occurred when he returned from deployment in January or February 2011 during his rest and recouperation (R&R) period. (JA at 284, 301.) Appellant stated that the second fondling occurred the summer of 2012. (JA at 284, 301.)

Appellant described the second time he fondled his nephew; it involved the same scenario of watching a movie and falling asleep in the living room. He fondled his nephew while he was asleep and then went back to bed with his wife. (JA at 285, 305.) Appellant described the second instance of fondling his nephew as if he were "watching a movie." (Id.)

Later in the interview, Appellant re-described the fondling to other investigators, Appellant stated that the first incident of fondling his nephew and niece occurred during the summer of 2011. (JA at 312-313.) Appellant stated the second incident with his nephew occurred the following summer when he and his wife visited her family. (JA at 313).

At trial, Appellant moved the court to suppress Appellant's confession for lack of corroboration. (JA at 409.) The government relied on independent evidence consisting of interview transcripts and leave taken during the timeframe Appellant confessed to committing the fondling. (JA at 54-547). The leave records showed that Appellant redeployed to Dyess AFB on 28 January 2011. These records also showed eight periods of charged leaver during the four-year period 2010 through 2013. (JA at 259.)

The interviews established that Appellant and his nieces and nephew would often watch movies together as group and fall asleep in the living room. (JA at 547.) The government also relied on the age of the victims, Appellant's relationship to the victims, and Appellant's possession of child pornography. (JA at 549).

The military judge denied the defense motion to suppress the confession. (JA at 619.) She found that the timeframe in which Appellant was alleged to have committed the fondling was corroborated by family-member testimony establishing Appellant was in Missouri. (JA at 618.) Leave records similarly established an opportunity for Appellant to visit Missouri. (Id.) The military judge relied on the ages of the victims, the fact that Appellant had a nephew and niece. She relied on the fact that Appellant and his nephew and nieces distinctly remembered falling asleep with Appellant while watching movies during the same

general timeframe of Appellant's confession. Finally, she also relied on the fact that the victims did not remember Appellant ever touching them. (Id.)

Although the military judge did not comment on Appellant's possession of child pornography in her ruling on the suppression motion, such evidence was presented by the government in its response to the defense motion to suppress the statements for lack of corroboration. (JA at 550.) The DC3 Cyber Forensic Laboratory Report, attached to government's response, revealed that Appellant's media devices contained 11,885 files (6,821 pictures and 5,064 videos) with hash values matching the National Center for Missing and Exploited Children (NCMEC) October 2018 hash set. (JA at 589.) Documents and spreadsheets were observed on some of the media devices which contained links and other potentially notable sites categorized as "Trade," "BOY," "GIRL," RANDOM," and "SORT." (JA at 590.)

At trial, the prosecution introduced Appellant's confessions and testimony from members of his wife's family as evidence that Appellant abused his nephew and niece. The military judge's fact-finding on the motion was substantially in agreement with evidence introduced by the prosecution on the merits.

Sergeant First Class Juliet Mendonez

Appellant's sister-in-law, Sergeant First Class Mendonez (SFC Mendonez) testified on the merits that her family lived in San Antonio until June or July 2012

when they moved to Missouri to stay with her parents. (JA at 134.) At that time, she had two daughters, ages eight (D.M. 2) and ten (D.M.), and one son who was 11 years old (A1C I.M.). (JA at 135.) She testified that while she lived in Texas, Appellant and her sister would visit each other frequently—any time there was a long weekend or a holiday. (JA at 137.) She stated that they would stay overnight when visiting and sometimes Appellant would stay overnight at her house. (JA at 465.)

When Appellant visited and stayed the night at SFC Mendonez's place, the children would sleep in the living room because they liked to watch movies. (JA at 138.) They would watch movies by themselves and sometimes be accompanied by Appellant. (Id.)

Airman First Class I.M.

Appellant's nephew, Airman First Class I.M. (A1C I.M.) similarly testified that his family moved from San Antonio to Missouri in 2012. (JA at 147.) While in San Antonio, Appellant frequently visited him; however, A1C I.M. did not remember Appellant visiting while they lived in Missouri. (JA at 144.) When Appellant visited him at his home in San Antonio, he remembered that one of the activities they would engage in was staying up late and watching movies. He also remembered falling asleep while watching these movies. (JA at 145.) He stated that his two sisters, Appellant, and Appellant's wife would watch movies. (JA at

146.) A1C I.M. testified that while he did not have a vivid memory of it, there were times when he was watching movies with only his sisters and Appellant. (JA at 146.) He did not have a memory of Appellant sexually abusing him. (JA at 151.)

D.M.

Appellant's niece (D.M.) testified that she "loved" Appellant because he was the "fun uncle." (JA at 156.) She testified that Appellant would visit her when she lived in Texas. (Id.) She testified that she remembered watching "a lot" of movies with Appellant and her brother. (JA at 156.) She would watch movies with Appellant "every night" along with her aunt and brother and little sister. (JA at 157.) She testified that they would set up a mattress in the living room because they would always fall asleep while watching movies. (Id.) D.M. testified that watching movies together on an air mattress in the living room was something that "solely" happened with Appellant. (JA at 162-163.) D.M. did not remember Appellant visiting Missouri. (JA at 157.) D.M. testified that Appellant never sexually abused her. (JA at 159.)

D.M.2

Appellant's younger niece (D.M.2) also described Appellant as the "fun" and "caring." (JA at 517, 522). If he ever visited, he would take them out to do activities or stay home and play games and watch movies. (JA at 520, 523.) She

stated that when she lived in Texas, Appellant would visit and stay the night at their house, or she would stay the night at his house. (JA at 166, 521-523.) She testified that her siblings and Appellant would watch movies in the living room in both houses and that they would fall asleep in the living room. (Id.) She specifically remembered Appellant falling asleep with her and her siblings. (JA at 166.) While she had a specific memory of watching "Men in Black," she testified that it happened multiple times at both houses in Texas. (Id.)

Mr. Denmark Mendonez

Appellant's brother-in-law, Denmark Mendonez, (Mendonez) testified that while he lived in Texas, he would frequently visit Appellant with his children. He also remembered one occasion his children stayed alone with Appellant while his wife was in Korea. (JA at 176.) Mendonez stated that when they visited Appellant, the children would sleep in the living room with Appellant because that is where they had the television. (JA at 177-178.) Mendonez also testified that "they" [Appellant and his children] would watch movies." (JA at 176.) But, if he and Appellant were together, "we're [sic] just drinking once in a while." (Id.)

Mendonez stated that Appellant visited him twice in Missouri. The first time was in May 2013. (JA at 181, 185) Appellant stayed overnight and slept in the living room with the children. (Id.) Mendonez could not remember the

specifics of the second visit to Missouri. On both visits to Missouri, Appellant traveled without his wife. (R. at 182.)

Charging Scheme

The charges preferred against Appellant with respect to the fondling reflected the 28 June 2012 change in UCMJ Article 120 law. (JA at 002.)

For Appellant's niece, D.M., Charge I and its Specification alleged Appellant engaged in sexual contact with D.M. between on or about 28 January 2011 and 27 June 2012. If the conduct occurred post 27 June 2012, Charge II, Specification 2 alleged Appellant committed a lewd act on D.M. between on or about 28 June 2012 and on or about 27 August 2013. (JA at 058.)

For Appellant's nephew, I.M., the Additional Charge and its Specification alleged Appellant engaged in a lewd act with I.M on divers occasions between on or about 28 January 2011 and 27 June 2012. If the conduct occurred post 27 June 2012, Charge II, Specification 1 alleged Appellant engaged in a lewd act with I.D.M. on divers occasions between on or about 28 June 2012 and on or about 27 August 2013 (JA at 058, 061.)

Air Force Court of Criminal Appeals Opinion

The Air Force Court of Criminal Appeals determined that Appellant's admissions to fondling his nephew and niece were corroborated, and that the two

convictions, founded on these admissions, were legally and factually sufficient. (JA at 003.)

In reviewing the military judge's denial of the defense motion to suppress Appellant's confession for lack of corroboration, the court applied an abuse of discretion standard. (JA at 29.) The court analyzed the corroborating evidence under Mil. R. Evid. 304(c) and the three-part test articulated in Whiteeyes to evaluate whether the military judge's ruling to admit evidence under Mil. R. Evid. 304(c) was an abuse of discretion. (JA at 30.)

The court noted that for the first time on appeal, the government identified two additional pieces of evidence as corroboration that would be admissible under Mil. R. Evid. 404(b). First, the "vast amount of child pornography" found on Appellant's media devices "confirmed his sexual interest in children and motive to commit the offenses" involving his nephew and niece. While trial counsel included this fact in its motion to the military judge, she did not argue that it was evidence of a motive, but instead that it buttressed the trustworthiness of the overall confession. (JA at 30.) Second, the government argued Appellant's change in demeanor during the initial questioning by the FBI when Appellant was first asked if he had ever touched a child, was evidence of his consciousness of guilt and supported the reliability of later admissions to touching his nephew and niece. (JA at 31.)

The court identified the issue with respect to Appellant's possession of child pornography as evidence of motive under Mil. R. Evid. 404(b), but did not address it. The court instead analyzed whether Appellant's change in demeanor could be used as independent evidence for corroboration purposes. (JA at 31.) The court only considered the change in demeanor evidence because it was "before the trier of fact," despite the fact that it was not addressed by the military judge's ruling. (JA at 31.)

The court found that the evidence of corroborations was independent evidence and that Appellant had opportunities to commit the crimes he confessed to committing in 2011 and 2012. (JA at 32.) The court further found that the change in demeanor constituted a "nontestimonial act" tending to show consciousness of guilt. The change in demeanor did not consist of "[o]ther uncorroborated confessions or admissions of the accused that would themselves require corroboration" to be admitted against Appellant. (JA at 33.)

The court also found that the evidence raised an inference of truth of Appellant's admissions despite a discrepancy between the independent evidence and the confession. Appellant stated that the touching happened in Missouri in January or February 2011; but Appellant's sister-in-law's family did not move to Missouri until 2012. (JA at 033-034.) The court paid little attention to the discrepancy in light of the consistency of the independent evidence, that the

circumstances of visits—wherever and whenever they occurred—showed that Appellant had access to his nephew and niece in the living room while they slept. (JA at 34.)

In denying the defense motion to suppress the statements for lack of corroboration, the military judge determined that Appellant's confession was not "so succinct" with respect to the dates. (JA at 618.) She found that Appellant used events as "signposts" from his memory to describe the period in which he committed the offense – specifically the offenses occurred after a return from a deployment in winter 2011 and before his subsequent transfer from Dyess AFB to Turkey in 2013. (Id.)

That neither victim remembered the touching also raised an inference of the truth as to the confession because it was considered along with other independent evidence. Namely the fact that Appellant's statement that neither of the children woke up. (JA at 34.)

The court acknowledged Appellant's argument that the government could not establish the exact time and place of the offense. The court accepted both points and at the same time dismissed their significance because independent evidence of the circumstances, setting, and the children's ages tended to establish the trustworthiness of Appellant's admissions. (JA at 35.)

SUMMARY OF ARGUMENT

The military judge did not abuse her discretion when she denied the defense motion and determined sufficient evidence of corroboration existed to corroborate Appellant's confession to fondling his niece and nephew. Independent evidence, admitted during the motion to suppress the states and at trial on the merits, tended to establish the trustworthiness of the confession.

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). 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." Id. "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." Id. The quantum of evidence needed to corroborate a confession has been described as being "slight." Jones, 78 M.J. at 42.

This Court applies a three-part test to determine if a confession is sufficiently corroborated. Whiteeyes, 82 M.J. at 175-176.. First, there must be either direct or circumstantial independent evidence. Id. Second, independent evidence must raise an inference of the truth of the admission or confession. Id.

Finally, the pieces of the evidence, considered together, must tend to establish the trustworthiness of the admission or confession. Id.

In this case, Appellant's confession was corroborated by independent evidence that raised an inference of the truth of the confession. Its trustworthiness is demonstrated by the multiple sources of independent evidence that taken together, provided Appellant with both the opportunity and motive to fondle his nephew and niece. Appellant confessed to fondling his nephew on two occasions and his niece on one occasion after the two children had fallen asleep watching movies between his return from his deployment in 2011 and the summer of 2012. Independent evidence consists of statements and testimony from the two named victims and their family members. This evidence placed the Appellant in living rooms in both Texas and Missouri on multiple occasions during the charged timeframe, watching movies late into the evening with the victims until they fell asleep.

Independent evidence also consisted of the Appellant's change in demeanor when questioned if he had ever inappropriately touched a minor. During his initial interview with the FBI, the topic of his niece and nephew was raised, and even before he was directly questioned as to whether he had touched them inappropriately, Appellant's demeanor changed; and it looked as if he were going to cry. (JA at 118-120.) This significant change in demeanor is non-testimonial

evidence of a consciousness of guilt related to Appellant's fondling. There is no other reasonable explanation for it. It was well into the interview, so the change was unlikely related to the overall circumstances. And there is no evidence that either his niece or nephew suffered some other misfortune that would cause him to become emotional. A change in demeanor may be non-testimonial evidence of consciousness of guilt. United States v. Moran, 65 M.J. 178, 188 (C.A.A.F. 2007). This is true especially under these circumstances. Appellant was able to openly discuss his possession and distribution of web links containing child pornography, and that he was trading in some "bad stuff." However, only when he was questioned about children was there any change in his demeanor. His mouth started to tremble, and it looked as if he was going to cry. (JA at 120.) Such a response is indicative of a consciousness of guilt with respect to his nieces and nephew and therefore raised an inference of truth with respect to his later confession.

Finally, Appellant's possession of over 10,000 images and videos of "boy" and "girl" child pornography, was independent evidence of Appellant's sexual interest in children and was therefore evidence of his motive to fondle his niece and nephew. A person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography. Byrd, 31 F.3d at

1339 . The evidence of motive therefore raised an inference of truth with respect to Appellant's confession.

These pieces of independent evidence, when considered together, establish the trustworthiness of the confession. Appellant had the opportunity to commit the offenses in the manner in which he described in his confession, had the motive to fondle his nephew and niece, and displayed a consciousness of guilt when questioned about it. Accordingly, this Court should affirm the decision of the Air Force Court.

Argument

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION IN ADMITTING APPELLANT'S CONFESSION BECAUSE INDEPENDENT EVIDENCE FROM MULTIPLE SOURCES RAISED AN INFERENCE OF THE TRUTH OF THE CONFESSION; AND THIS EVIDENCE, CONSIDERED TOGETHER, ESTABLISHED THE TRUSTWORTHINESS OF THE CONFESSION.

Standard of Review

This Court reviews a military judge's decision to admit a statement under Mil. R. Evid. 304(c), for an abuse of discretion. United States v. Whiteeyes, 82 M.J. at 172. A military judge abuses her discretion if her findings of fact are clearly erroneous, or her conclusions of law are incorrect. United States v. Nelson, 82 M.J. 251, 252 (C.A.A.F. 2022). "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." United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017) (internal quotation marks omitted) (citations omitted).

Law

As general rule, if an accused makes a timely motion or objection, an involuntary statement by the accused is inadmissible against him. Mil. R. Evid. 304(a). The voluntariness of a confession is determined under the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Voluntariness turns on whether an Appellant's will has been overborne by examining both the personal characteristics of the accused as well as the circumstances of the interrogation. Nelson, 82 M.J. at 255.

Separate from the question of whether a confession is voluntary, is whether a confession is adequately corroborated. An admission or a confession of the accused may be considered as evidence again 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). 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. 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).

The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of the facts stated in the admission or confession. Mil. R. Evid. 304(c)(4): The independent evidence need raise only an inference of the truth of the admission or confession. (Id.)

The amount and type of evidence introduced as corroboration *is a factor to be considered by the trier of fact in determining the weight, if any to be given to the admission or confession*. Id. (emphasis added).

In reviewing whether sufficient evidence of corroboration exists to admit a confession, this Court applies a three-part test. First, the military judge must decide whether the proffered evidence is in fact "independent evidence." Independent evidence cannot consist of "[o]ther uncorroborated confessions or admissions of the accused that would themselves require corroboration." However, the independent evidence may be "either direct or circumstantial." M.R.E. 304(c). Whiteeyes, 82 M.J. at 174.

The military judge must next decide whether each piece of independent evidence "raises an inference of the truth of the admission or confession." Id. If an individual piece of independent evidence meets this threshold, the military

judge may then use that evidence in the process of determining whether the accused's statement is corroborated. Id. A piece of independent evidence may reach this threshold even where it "raises an inference of the truth" only when considered alongside other independent evidence. Id.

In reviewing evidence of corroboration, this Court should consider the entire record because an appellee or respondent may defend the judgment below on a ground not earlier aired. United States v. Perkins, 78 M.J. 381, 386 (C.A.A.F. 2019); *see also* United States v. Bess, 80 M.J. 1, 11–12 (C.A.A.F. 2020) (approving Court of Criminal Appeals' decision to uphold the ruling of a military judge for a different reason than the ones on which the military judge relied); *see also*, Whiteeyes, 82 M.J. at 180 (Hardy, J., concurring) (considering the findings testimony of an expert witness in deciding whether statements were corroborated, even though "the military judge did not have the benefit of the expert witness' testimony when he ruled on Appellant's motion.").

Analysis

1. *The Circumstances Surrounding Appellant's Confession Should only Be Considered to Determine Whether the Confession is Corroborated by Independent Evidence.*

Appellant's claims that the circumstances surrounding his confession demonstrate that it is not trustworthy are beyond the scope of the granted issue. (App. Br. at 15, 16, 18, 25, 27, 37, 39). The issue before this Court is whether the

confession was sufficiently corroborated by independent evidence and not whether it was voluntary. Appellant's focus on the duration, location of the interviews, conditions, and the manner and content of the questions is either misplaced or an attempt to conflate the voluntariness of the confession with its corroboration and trustworthiness. (Id.) These circumstances should not be considered by this Court to determine the "trustworthiness" of the confession. (App. Br. at 18, 25-26, 36.) Nothing in Mil. R. Evid. 304(c) suggests that the military judge should conduct a balancing of all available evidence before deeming a confession "trustworthy" and admitting it. Instead, the Rule only asks if any "independent evidence" has been admitted that would "tend to establish the trustworthiness" of the confession.

Appellant acknowledges that the military judge found the confession voluntary. (App. Br. 25) AFCCA assessed the totality of the circumstances surrounding the confession and also found it voluntary. (JA at 050.) Appellant also acknowledges that neither Mil. R. Evid. 304(c) nor the methodology articulated in Whiteeyes require consideration of the circumstances of the confession in determining whether it is trustworthy. (App. Br. at 36). Accordingly, the analysis should focus on whether Appellant's statements were sufficiently corroborated independent evidence and if such evidence raised and inference of the truth with respect to his confession.

2. Discrepancies between the Confession and Corroborating Evidence do not Diminish or Disturb the Trustworthiness of the Confession.

The discrepancy between the corroborating evidence and the confession in terms which living room the fondling occurred and time of year are minor details that do not make the confession less trustworthy such that the confession should be excluded from evidence. These minor discrepancies were more properly considered by the trier of fact in determining the weight, if any, to be given the confession. *See* Mil. R. Evid. 304(c)(4) (amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession). Corroborating evidence must raise only an inference of truth as to the essential facts admitted. Id. The Court traditionally has described the quantum of evidence needed as being "slight." United States v. Jones, 78 M.J. 37, 39 (C.A.A.F. 2018).

The cited discrepancy did not render Appellant's confession less trustworthy because it did not disturb or diminish Appellant's access to the children involved, method, motive, or opportunity to commit the offense during the charged time frame. Appellant confessed that the fondling occurred in Missouri during a visit to his in-law in 2011 and again in summer 2012. (JA at 273-275) While the corroborating evidence did not place Appellant in a living room in Missouri with his niece and nephew during his confessed timeframe, it did, on numerous occasions, place him in a living room with his niece and nephew in Texas at either

his house or the house of his nieces and nephew. (JA at 137-138.) The discrepancy was dismissed by the Air Force Court because, regardless of the discrepancy, Appellant still had access to the same children with the same opportunity to commit the fondling in the method he described. (JA at 034.) And to demand exactitude as to the dates and location of the offenses would impermissibly raise the standard of proof from "slight" and "only an inference" to something greater. See United States v. Delgado, 2019 CCA LEXIS 314 (N.M. Ct. Crim. App. 2019) (unpub. op.) (finding clear error where the military judge required the government to show the confession was trustworthy by a preponderance of the evidence).

The passage of time and Appellant's apparent inability to remember every detail of his crimes does not mean that the independent evidence did not raise an inference of the truth of his confessions. It is common sense that Appellant may have forgotten or misremembered some of the details surrounding the fondling. At the time of the interview, Appellant had lived in nearly ten different duty locations including temporary duty assignments and deployments. (JA at 197-199.) The events Appellant described had taken place some six to seven years earlier. It is understandable that he might not have remember every detail surrounding the fondling. Indeed, in her findings of fact, the military judge highlighted some of Appellant's statements that suggested his uncertainty about the exact timing of the

offenses. (JA at 618.) She determined that Appellant's confession was not "so succinct" with respect to the dates. (Id.) She found that Appellant used events as "signposts" from his memory to describe the period in which he committed the offense – specifically the offenses occurred after a return from a deployment in winter 2011 and before his subsequent transfer from Dyess AFB to Turkey in 2013. (Id.)

That Appellant may have misremembered some of the details is revealed by his confession and other evidence. Appellant stated that the fondling occurred in Missouri, but also stated that he went back to bed with his wife after one of the incidents. (JA at 285, 305.) However, Denmark Mendonez testified that on both visits to Missouri, Appellant traveled alone. (JA at 182.) This evidence further supports a finding that Appellant may not have a perfect memory of the surrounding details and also that at least one of the of the fondling offenses occurred in Texas. The cited discrepancy does nothing to eliminate or even diminish Appellant's opportunity or his motive to commit the offense in the manner he described. It merely suggests that the fondling may have occurred when he was with his wife at either his house or at his in-law's house. What raised an inference of the truth of the confession was that Appellant was present with his niece and nephew in a living room watching movies during the timeframe of the charged offense, not the specific house in which it occurred.

This discrepancy in the confession and the corroborating evidence was therefore most likely the byproduct of the passage of time and an imperfect memory. It did not render impossible Appellant's version of events, it merely suggested that the living room in which the fondling occurred by not have been in Missouri, but instead a living room in Texas. And while this discrepancy is a proper matter for the trier for fact to consider, it was not of such a magnitude that the confession should have been excluded from evidence.

3. As the Trier of Fact, the Military Judge could believe some Portions of the Confession and Disregard Others

The military judge properly considered Appellant's confession as the trier of fact, assigned it the appropriate weight, and found him guilty of two of the four fondling specifications. Appellant asserts that the military judge must have dismissed portions of Appellant's confession when he found Appellant not guilty of offenses charged on or after 27 June 2012. (App. Br. at 24-25) Appellant argues that there is no evidence to support a finding that the second fondling occurred before or after 27 June 2012. (Id.) Appellant's argument is beyond the scope of the granted issue. The issue before this Court is whether the confession was sufficiently corroborated by independent evidence and not whether the evidence is legally sufficient to support a conviction. Appellant's focus on the weight the military judge, as the trier of fact, assigned to a certain piece of

evidence conflates legal sufficiency with the threshold question of whether sufficient evidence of corroboration exists to admit the confession in the first place.

The quantum of evidence needed to establish a confession's admissibility is far less than proof beyond a reasonable double or even a preponderance of the evidence. *See* Mil. R. Evid. 304(c)(4). The military judge assigned the confession the appropriate weight once it was admitted into evidence. And as the trier of fact, he did not have to believe or accept every part of the confession. Instead, he could properly believe one part of a witness's statement and disbelieve another. *See* United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979). Accordingly, the weight the military judge, as the trier of fact, assigned to certain piece of evidence during findings is irrelevant to this Court's analysis of whether Appellant's confession was corroborated.

4. The Military Judge did not Abuse her Discretion in Admitting Appellant's Confession because the Facts of this Case Meet the Standard Articulated in Whiteeyes

.

A. Independent Evidence Corroborates Appellant's Confession

Appellant's confession was corroborated by independent circumstantial evidence that was consistent with his confession.[2] *See* Whiteeyes, 82 M.J. at 174. Independent evidence included the following:

a. Leave records, Defense Enrollment Eligibility Reporting System (DEERS) records, AFOSI interviews, and testimony that Appellant had two nieces and one nephew whose ages were approximately eight, ten, and eleven during the charged timeframe. (JA at 135, 259, 548, 555.) Appellant had a close relationship with his nieces and nephews. (JA at 156.) He would either stay the night at their house, or they would stay the night at his house while both families lived in Texas. (JA at 137-138.)

b. AFOSI interviews and testimony that Appellant and his nieces and nephews routinely watched movies together on the living room floor and fell asleep together during the charged timeframe. (JA at 138. 145, 156-157, 176-177.)

c. AFOSI interviews and testimony that neither Appellant's niece or nephew recalled any incident where Appellant inappropriately touched or fondled them. (JA at 151, 159.)

d. Testimony from Special Agent Greg Witkop that Appellant's demeanor changed when he was questioned about inappropriately touching his niece and nephew. (JA at 120.)

e. A forensic analysis of Appellant's media devices that revealed 11,885 files (6,821 pictures and 5,064 videos) with hash values matching the National Center for Missing and Exploited Children (NCMEC) October 2018 hash set

[2] Appellant does not dispute that the military judge and AFCCA considered independent evidence to establish the truth of the confession. (App. Br. at 29).

(JA at 589) and forensic analysis showing Appellant categorized his links to child pornography in groups such as "BOY" and "GIRL." (JA at 590.)

B. The Independent Evidence Raised an Inference of the Truth of the Confession

Each piece of independent evidence raises an inference of truth of the Appellant's confession. Whiteeyes, 82 M.J. at 174 citing under Mil. R. Evid. 304(c)(2).

Appellant's Close Relationship with his Nieces and Nephew

The existence of Appellant's nieces and nephew raised an inference of the truth of the Appellant's confession not only because they existed but, also because of the strong relationship they shared together. It was this relationship – as testified to by the children – that allowed Appellant to be in position to perpetrate the fondling.

First, these children existed in the sexes and ages in which Appellant described them. (JA at 135, 555.) Had no such children existed or had investigators been unable to determine their ages or identity, there would not have been sufficient evidence to corroborate the Appellant's confession. The charged offenses were predicated on their existence which raised some inference of truth of the confession.

Second, Appellant and his nieces and nephews shared a strong relationship. During his confession, Appellant did not describe a distant niece and nephew who

he knew in name only or who he only saw on rare family get-togethers. Instead, he described nieces and nephews whom he saw on a routine basis and with whom he shared a close relationship. (JA at 137, 465.) Appellant's niece testified that she "loved" him and that he was the "fun" uncle. (JA at 156-157, 508-509.) She stated that she always wanted to be near him or by him; she described him as a "partner in crime." (JA at 509). Appellant's nephew similarly testified with respect to activities that he engaged with Appellant. (JA at 144, 478, 481.) The frequency of visits and the close relationship raised an inference of the truth of Appellant's confession because it gave him the opportunity to get close enough to the children to commit the fondling offenses. It made his confession more plausible. Had the children not liked or trusted Appellant, it is unlikely he would have been in a position to commit the fondling. In the absence of this trust, it is unlikely they would have watched movies together, because this is not something they did with other adults. (JA at 162-163.) Instead, it was likely because his niece and nephew liked and trusted him that they chose to watch movies together. As such, this activity was predicated on their friendship.

Lastly, this close relationship normalized his close contact with the children in front of the other adults such that it did not raise any suspicion. It was not unusual for Appellant to watch movies with the children. (JA at 138, 176.) And if he happened to fall asleep nobody suspected anything. On the other hand, had the

relationship been a distant one, it may have raised some eyebrows that he would fall asleep with the children after everyone else had retired to their bedrooms.

Accordingly, the existence of Appellant's nieces and nephews, in the sexes and ages he described and the relationship they shared independently raised an inference of truth with regard to Appellant's confession because the nature of their relationship allowed him to get close enough to the children to commit the fondling offenses.

Falling Asleep while Watching Movies on the Living Room Floor

That the nieces and nephew and their parents all provided statements and testified that the children would routinely watch movies with Appellant and fall asleep on the living room floor independently raised an inference of truth with regard to Appellant's confession. This evidence corroborated Appellant's confession and demonstrated the method Appellant used to isolate the children from their parents and provided him with an opportunity to fondle them.

Although it varies by case, this Court has previously considered evidence of method and opportunity as evidence that may corroborate a confession. United States v. Baldwin, 54 M.J. 464, 465-66 (C.A.A.F. 2001) (rejecting the proposition that an appellant's presence at the scene or opportunity to commit an offense cannot be considered on the question of corroboration). United States v. Melvin, 26 M.J. 145, 147 (C.M.A. 1988) (finding the method in which an appellant

committed a crime as evidence of corroboration). *See also* Arno, 2019 CCA LEXIS at *5 (motive and opportunity are not irrelevant considerations).

In Arno, the appellant and victim were deployed from April 2015 to April 2016. More than a year after the deployment, appellant confessed to sexually assaulting the victim during the deployed timeframe while she was asleep. The victim had no memory of the assault and suffered no physical injury. The Army court found the appellant's confession was sufficiently corroborated because the appellant had the opportunity to commit the offense when the appellant and victim would get intoxicated in her room. The court also found the appellant had a motive to commit the offense. 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. Arno, 2019 CCA LEXIS at *5.

Similarly, in this case, independent evidence placed Appellant in the same surroundings and location that he described in his confession thereby creating an inference of truth with regard to his confession. Appellant confessed to fondling his niece and nephew after they had all fallen asleep watching a movie and everyone else was "all knocked out in bedrooms or whatever." (JA at 275.) The second incident of fondling occurred under similar circumstances. (JA at 285,

305.) Independent testimony established that Appellant falling asleep with the children while watching a movie was a routine activity during the charged timeframe. (JA at 138, 145, 146, 157, 164-165.) As in Arno, this independent evidence established that Appellant was in the same place and situation that he described in his confession. It demonstrated that he did not imagine or make up the opportunity/scenario in which he fondled his niece and nephew. Instead, this independent evidence raised an inference of the truth with regard to his confession.

In addition to providing Appellant with the opportunity and placing him the situation he described in his confession, this evidence also raised an inference of truth of the confession because it was evidence of the method Appellant used to isolate the children from their parents. In other words, "movie night" is how Appellant separated the children from the other adults to include their parents. First, watching movies on the living room floor was something that only happened with Appellant; it did not happen while the children were at home or when they visited other locations including their grandparents' house. (JA at 162.) This fact supports a finding that "movie night" was the Appellant's idea – not something the other adults were particularly interested in. Second, other adults did not remain in the living room late into the night and watch children's movies until they fell asleep. Appellant states that after the second fondling incident he returned to bed with his wife. (JA at 285, 305.) He also stated that during the fondling everyone

else was "all knocked out in bedrooms or whatever." (JA at 275.) Demark Mendonez, testified that "they" [Appellant and his children] would watch movies." (JA at 176.) But, if he and Appellant were together, "we're [sic] just drinking once in a while." (Id.) Moreover, common sense suggests that the parents, rather than watch the children's movies, would take advantage of the time their children were occupied with a movie and socialize with the other adults. Even if the parents joined in watching movies, it is likely they would at some point retire to their own bedroom, leaving Appellant alone with their children and an opportunity to commit the charged offense. These facts support a finding that during "movie night" served as Appellant's method to isolate the children from other adults.

Lastly, this setting provided Appellant the perfect cover. He did not have to enter any bedroom to fondle the children and risk being caught and having to come up with some excuse as to why he was in their bedroom. Instead, he had easy access to the children; and no explanation was needed. And he had all night to commit the offense because everyone could see that he, just like the children, had fallen asleep while watching a movie. Appellant would either stay there until the morning leave when he was ready.

The independent evidence placing Appellant in the same situation he described in his confession raised an inference of the truth with regard to the confession. In other words, independent evidence that Appellant actually did fall

asleep in the living room with the children while visiting and watching movies suggested he was being truthful when he confessed to fondling them under such circumstances. It made it unlikely that Appellant just invented the crimes during his interview. However, the fact that this situation was completely contrived by Appellant also supported a finding that this was his method to isolate the children and fondle them. This "method" evidence further raised an inference of truth with regard to Appellant's confession. The military judge did not abuse her discretion in determining that this evidence raised an inference of the truth of Appellant's confession.

Lack of Memory of the Crimes was Consistent with Appellant's Description that They did not Wake up during the Sexual Contact

Evidence that neither Appellant's niece nor nephew remembered the fondling is independent evidence that raised an inference of truth with regard to Appellant's confession. It corroborated Appellant's confession because he stated that both children were asleep when he fondled them and were unaware that anything happened. (JA at 273, 282-283, 301.)

The absence of a fact may help corroborate a confession. United States v. Seay, 60 M.J. 73 (C.A.A.F. 2004). The military judge found that the children's lack of awareness "may justify a jury's inference that [Appellant]'s statements were true given the specific way the accused claims to have committed the charged

offenses," namely that Appellant's nephew and niece "were asleep and did not wake up while he inappropriately touched them." (JA at 619.)

This evidence raised an inference of the truth with regard to Appellant's confession because an admission to fondling the genitals of a pre-pubescent child would normally result in some awareness on the part of the child-victim. One would expect that a child of 9-12 years old would be able to describe the circumstances surrounding the incident. At a minimum such testimony, would likely include how the child took off their clothing or how the perpetrator was able to make contact of fondle the genitalia. However, and contrary these expectations, Appellant stated that neither child became aware of the fondling. Therefore, the children's independent testimony raised an inference of truth with regard to Appellant's confession. The fact that they did not remember the incidents was consistent with and corroborated Appellant's confession. The military judge did not abuse her discretion by considering this independent evidence as raising an interference of the truth of Appellant's confession.

Appellant's Emotional Response During his Questioning

Appellant's emotional response to FBI questioning about inappropriately touching children was a non-testimonial act that tended to show consciousness of guilt for fondling his niece and nephew; this evidence further raised an inference of truth with regard to Appellant's confession.

At the mere suggestion that Appellant may have a child Appellant looked like he was going to cry, his mouth trembled, and his eyes got red and watery. (JA at 118-120.) This change in demeanor occurred well into the interview, and contrary to Appellant's assertion, was unlikely related to the overall circumstances. (App. Br. at 34). Moreover, there is no evidence to suggest that his nieces or nephew suffered any misfortune or estrangement that would elicit such a negative emotional response. The only reasonable explanation for this change in demeanor was the overflowing guilt Appellant felt for fondling his niece and nephew.

This Court has held that a consciousness of guilt may not give rise to a presumption of guilt, it nonetheless can, within certain constraints, be entered into evidence and commented upon. United States v. Moran, 65 M.J. 178, 188 (C.A.A. F. 2007) citing United States v. Cook, 48 M.J. 64, 66 (C.A.A.F. 1998). Accordingly, Appellant remained free to attack this evidence at trial and assign a different meaning to it, but that did not change the fact that the evidence raised an inference of the truth of the confession.

Consciousness of guilt may be used in evaluating whether a confession meets the test for corroboration. Baldwin, 54 M.J. at 556. *See also* Delgado, 2019 CCA LEXIS 314 at *11 (acknowledging that demeanor evidence expressing consciousness of guilt can corroborate a confession); State v. McGill, 328 P.3d 554, 563 (Kan. Ct. Crim. App. 2014) (finding that the appellant's emotional

breakdown at the time of his confession bolstered the confession's reliability and trustworthiness).

However, subtle physical demeanor is not admissible as relevant to an accused's consciousness of guilt, because it is equally susceptible to other inferences. *See* Cook, 48 M.J. at 67 (holding that yawning by the accused during testimony of the effects of child abuse was irrelevant where the appellant was familiar with the evidence "because he previously had been counseled by the first sergeant for child abuse"); Id. at 66 (citing other examples of irrelevant demeanor by the accused, such as laughing during testimony that the accused threatened the life of the President, consulting with counsel during trial, or moving a leg up and down in a seemingly nervous fashion during trial).

In this case, there was a significant change in Appellant's demeanor when asked about touching a minor. The significance is underscored by the fact that prior to this display of emotion, he admitted to sending links of sexually explicit images of minors. (JA at 225.) Appellant admitted to viewing nude images of children between the ages of 12 to 13. (JA at 228.) He maintained his composure when asked if he is attracted to 12- and 13-year-olds. (JA at 231.) And he engaged in a detailed discussion of the mechanics and access to chat group that harbored child pornography. (JA at 233-236.) It was not until well into the first interview that he was asked about his access to children. Appellant looked like he was going

to start crying, his mouth trembled, and his eyes got red and watery. (JA at 120.) Given that this change in demeanor occurred well into the interview, it was unlikely this emotional response was related to the overall situation. Demonstrating consciousness of guilt when asked about touching children raised an inference of the truth of Appellant later confession to touching his niece and nephew. If Appellant were innocent of ever committing such conduct, one would have expected an immediate, emphatic denial – not for him to almost start crying. This was a significant change in Appellant's demeanor and was properly considered by AFCCA as evidence of Appellant's consciousness of guilt and corroborating evidence. Although the military judge did not consider Appellant's consciousness of guilt in her ruling, that evidence strongly supported that she reached the correct conclusion in admitting Appellant's confession. Moreover, an appellee or respondent may defend the judgment below on a ground not earlier aired. Perkins, 78 M.J. at 386. *see also* Bess, 80 M.J. at 11–12 (C.A.A.F. 2020) (approving Court of Criminal Appeals' decision to uphold the ruling of a military judge for a different reason than the ones on which the military judge relied); *see also*, Whiteeyes, 82 M.J. at 180 (Hardy, J., concurring) (considering the findings testimony of an expert witness in deciding whether statements were corroborated, even though "the military judge did not have the benefit of the expert witness' testimony when he ruled on Appellant's motion.").

Appellant's Possession of Child Pornography further Corroborated his Confession.

The discovery of over 10,000 images and videos of child pornography on Appellant's electronic devices further raised an inference of the truth with regard to Appellant's confession because it established a motive to commit the fondling offenses.[3] That Appellant had a demonstrated sexual attraction to underaged children made his confession to fondling his niece and nephew more plausible because he had a motive for the crimes.

Similar to evidence of method and opportunity, as discussed above, evidence of Appellant's motive may serve as corroborating evidence for his confession. *See* Arno, 2019 CCA LEXIS 86 at *5 (evidence that an accused had a specific motive to commit a crime can be considered when deciding whether a confession is trustworthy). *See also* Whiteeyes, 82 M.J. at 180 (Hardy, J., concurring) (finding that an appellant's motive and intent admitted under Mil. R. Evid. 404(b) may be used to corroborate a confession under Mil. R. Evid. 304(c)).

The connection between the possession of child pornography and pedophilia has been address by other courts and through congressional findings. *See* Byrd, 31

[3] While trial counsel raised Appellant's possession of child pornography during the hearing on the defense motion to suppress for lack of corroboration, trial counsel's theory was not motive but instead that the existence of the files contributed to the the overall trustworthiness of the confession. (JA at 549.) The military judge did not rely on this fact in her ruling. (JA 611-619.)

F.3d 1329. In Byrd, the court stated that child pornography and pedophilia were linked by an "abnormal sexual attraction to children" and upheld the admissibility of defendant's pedophilia to show his predisposition and rebut the claim that the defendant was entrapped into ordering and receiving child pornography. Byrd, at 1336 n.9.

In the Child Pornography Prevention Act of 1996, Congress found that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children." Pub. L. No. 104-208, § 121, 110 Stat. 3009, *3009-26 (1996).

Appellant's possession of child pornography demonstrated a sexual interest in minors and provided a motive to commit the fondling offenses. Moreover, the fact that Appellant categorized his links to child pornography in groups such as "BOY" and "GIRL," showed his sexual interest in both underage boys and girls. (JA at 590.) This tended to corroborate and explain why Appellant molested both his nephew and niece.

That Appellant's possession of child pornography only materialized after the fondling of his niece and nephew does not diminish the significance of this evidence. (JA at 35.) The possession of child pornography spanned for a period of nearly four years – up until his house was searched by federal agents. (JA at 058-060.) This sustained interest in child pornography is evidence that his interest in

child pornography and his motive to fondle his niece and nephew likely existed for years before he downloaded his first image of child pornography.

Appellant's possession and viewing of child pornography raised the inference that his confession to fondling his niece and nephew was truthful. This was not a person who had never otherwise shown any sexual interest in children suddenly confessing out-of-the-blue to a crime of child molestation. Such circumstances might have rendered the confession less believable. Instead, Appellant was a person whose motive to commit the admitted child abuse offenses was revealed by the other sordid activities in his life. This evidence further supports that the military judge did not abuse her discretion by admitting Appellant's confession.

C. *Overall Trustworthiness of the Confession*

Cumulatively, the independent evidence tended to establish the trustworthiness of the confession as required under the standard articulated in Whiteeyes. The independent statements provided to AFOSI and the testimony on the merits were consistent and largely unencumbered with any sort of bias or motive to distort the testimony. This evidence corroborated Appellant's confession; it routinely placed him in the exact situation that he described – on the living room floor in close proximity to his nieces and nephew, who cared for and trusted Appellant.

This same independent evidence also established the method in which Appellant was able to isolate the children from the other adults. It was Appellant who orchestrated "movie night." The children did not engage in this activity at home, at their grandmother's house, or in any other location. Appellant merely had to wait until all the other adults retired to their room in order to be left alone with the children. He did not have to sneak into their rooms in the middle of the night and keep an excuse at his fingertips. Instead, the children were right there and vulnerable.

Appellant's emotional response at the mere suggestion that he inappropriately touched a child added to the trustworthiness of his confession. There is no other reason this question would elicit such an emotional response in this context unless Appellant had a guilty conscience for inappropriately touching his niece and nephew. There was no evidence that either his nieces nor nephew were estranged from him or had suffered a misfortune that would otherwise elicit such a response.

Lastly, the near four-year history of possessing and viewing child pornography as evidenced by a forensic examination of Appellant's digital devices provided evidence of a motive to commit the fondling. This motive was immediately apparent to in the FBI agent who questioned him about the child pornography. Once Appellant had confessed to possessing images of child

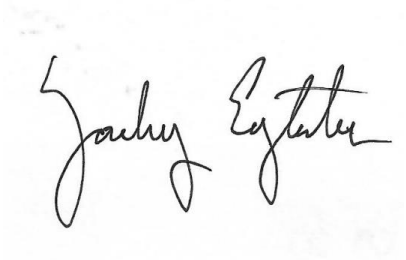
pornography the next set of questions involved his access to children. Other courts and Congress and similarly identified the connection between pedophilia and child pornography in that one may easily lead to the other. The connection is apparent in this case where the evidence supported a finding that Appellant started with fondling his niece and nephew, but when he lost access, or they moved away, he later started downloading child pornography.

In sum, the independent evidence established Appellant's opportunity, motive, and consciousness of guilt for committing the offenses in the way he described in his confession. This independent evidence met the standard articulated in Whiteeyes. Each piece of independent evidence taken separately provided an inference of the truth with respect to Appellant's confession. Cumulatively, it established the overall trustworthiness of it.

CONCLUSION

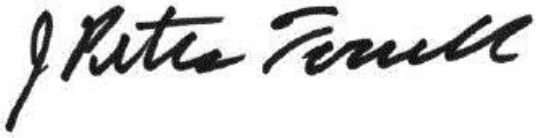
The military judge applied the correct law, properly recognizing that the quantum of corroboration required was slight and that the corroborating evidence need only raise an inference of the truth of the matters admitted. Her determination that the corroborating evidence met that low standard in Appellant's case was not arbitrary, fanciful, clearly erroneous, or clearly unreasonable. It was well within the range of options available to her based on the facts and the law. *See* United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004).

Additional evidence before the military judge included Appellant's change in demeanor and extensive possession of child pornography. This evidence provided further corroboration of Appellant's confession by demonstrating Appellant's consciousness of guilt and motive. Such evidence is properly considered by this Court and further demonstrates that the military judge correctly denied the defense motion to suppress the statements for lack of corroboration. Accordingly, this Court should affirm the decision of the Air Force Court of Criminal Appeals.

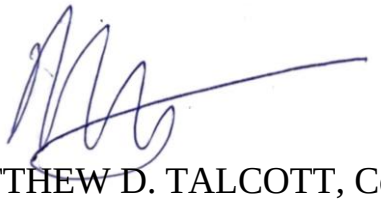


ZACHARY EYTALIS, Col, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(808) 372-7022
Court Bar No. 32903

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088



JAMES P. FERRELL, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34917



MATTHEW D. TALCOTT, Col, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

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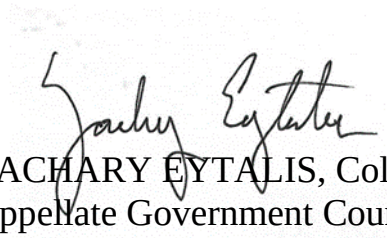

ZACHARY EYTALIS, Col, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(808) 372-7022
Court Bar No. 32903

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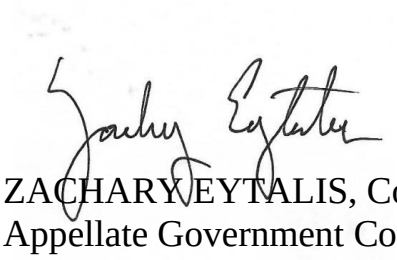

ZACHARY EYTALIS, Col, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(808) 372-7022
Court Bar No. 32903

APPENDIX

Caution
As of: October 27, 2023 10:46 PM Z

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.

Subsequent History: Affirmed by *United States v. Delgado, 2021 CCA LEXIS 657, 2021 WL 5815755 (N-M.C.C.A., Dec. 8, 2021)*

Petition for review filed by *United States v. Delgado, 2022 CAAF LEXIS 109 (C.A.A.F., Feb. 4, 2022)*

Motion granted by *United States v. Delgado, 2022 CAAF LEXIS 122 (C.A.A.F., Feb. 8, 2022)*

Motion granted by *United States v. Delgado, 2022 CAAF LEXIS 155 (C.A.A.F., Feb. 25, 2022)*

Review denied by *United States v. Delgado, 2022 CAAF LEXIS 294 (C.A.A.F., Apr. 18, 2022)*

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, 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

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

[2] *Id.* at 2.

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.

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 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.

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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.*

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 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.

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[10] *Id.*

[11] *Id.*

[12] *Id.* at 6.

[13] *Id.* at 5.

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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