IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.D. HARTY **R.G. KELLY** **W.M. FREDERICK**

UNITED STATES

v.

Roy N. BYRD
Gas Turbine Systems Technician (E-2), U. S. Navy

NMCCA 200601320 Decided 29 November 2006

Military Judge: L.T. Booker. Review pursuant to Article 62, UCMJ, of General Court-Martial convened by Commander, Naval Region Mid-Atlantic, Norfolk, VA.

LT WILLIAM STOEBNER, JAGC, USN, Appellate Defense Counsel
LT TYQUILI BOOKER, JAGC, USN, Appellate Government Counsel

HARTY, Senior Judge:

This case is before us as an interlocutory appeal by the Government, filed pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 and RULE FOR COURTS-MARTIAL 908, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The general issues are (1) whether the military judge erred in redacting language from the appellee's written confession; and, (2) whether, after the victim testified that sexual intercourse did not occur, the military judge erred by denying the trial counsel an opportunity to delve into the victim's denial.

I. Standard of Review and Jurisdiction

We review a ruling on the admissibility of evidence under an abuse of discretion standard, under which we assess whether the military judge's findings of fact are clearly erroneous or whether the decision was influenced by an erroneous view of the law. *United States v. Dobson*, 63 M.J. 1, 19 (C.A.A.F. 2006)(citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). If the military judge excludes evidence offered by the Government that is "substantial proof of a fact material in the proceeding," the Government has a limited statutory right to

appeal that ruling. Art. 62(a)(1)(B), UCMJ; R.C.M. 908; *see United States v. Santiago*, 56 M.J. 610, 612 (N.M.Ct.Crim.App. 2001).

In reviewing an interlocutory appeal by the Government, we "may act only with respect to matters of law." Art. 62(b), UCMJ; R.C.M. 908(c)(2). We are "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous," and we lack the "authority to find facts in addition to those found by the military judge." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). However, "[w]e conduct a *de novo* review of his conclusions of law." *United States v. Stevenson*, 52 M.J. 504, 505 (N.M.Ct.Crim.App. 1999), *rev'd on other grounds*, 53 M.J. 257, 261 (C.A.A.F. 2000); *see United States v. Greene*, 56 M.J. 817, 822 (N.M.Ct.Crim.App. 2002).

Background

At arraignment, the appellee moved, pursuant to MILITARY RULE OF EVIDENCE 304(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), to suppress his oral and written statements made to a special agent of the Naval Criminal Investigative Service, due to a lack of corroboration. The military judge did not require the Government to present its evidence to corroborate the confession, choosing instead to have the evidence presented to the members and deciding the appellee's motion at that time. At trial, the Government presented its case-in-chief consisting of multiple witnesses including KS, the alleged 15-year-old victim of carnal knowledge, an indecent act, and indecent language.

The beginning of KS's direct examination was lost due to recording equipment error. The military judge summarized the lost testimony, stating that KS had earlier testified that there was no sexual activity between her and the appellee, Record at 262, and that he had sustained an objection to the trial counsel's attempt to follow up on that response with questions concerning whether KS's denial meant that she did not remember what happened between her and the appellee or whether she is actually denying that anything happened. *Id*. at 267-68. Before KS was recalled to begin her direct examination from the beginning, the military judge agreed to allow the Government to ask KS questions concerning alcohol use and whether it impaired her memory of the night in question. However, as to whether sexual activity occurred between KS and the appellee on that night, the military judge stated that "the government is stuck with the answer that she originally gave, 'no.'" *Id*. at 262.

KS was recalled, and her direct examination was restarted. She testified that she was at a Sailor's apartment where she was having sexual intercourse with Hull Technician Fireman Recruit (HTFR) M in a bedroom. *Id*. at 267. The appellee walked into the bedroom where KS was having sexual intercourse and made comments to the effect of "Let me get some of that" and then walked out of the bedroom. KS testified that this upset her, and she and HTFR

M got dressed and left the bedroom.[1] *Id*. Immediately following this testimony, the trial counsel asked the following question and received the following answer from KS:

> Q. To the best of your memory, did you have sexual intercourse with Byrd that night?
> A. Not that I remember.

Id. The military judge interrupted the examination at this point, stating:

> Members of the court, here is an area where it is really unfortunate that we had to do this again. Initially, the question was "Did you have intercourse with Byrd?" The answer was "no." That is the answer that I've told the government is the answer that you will accept and I sustained an objection to a question that Lieutenant Takla asked, it's similar to the one that he just asked, in the original portion of the trial. That same objection and that same ruling stand.

Id. at 267-68. The Government then questioned KS concerning her alcohol consumption on the night in question. KS testified that she consumed eight beers that evening, was "pretty drunk," and on an intoxication scale of one to ten, she believed she was "[a]bout an eight." *Id*. at 268. In response to cross-examination and questions submitted by the members, KS testified that after having sex with HTFR M, she went from the bedroom to the living room, she was not sure where the appellee was when she left the bedroom, and did not remember whether the appellee had ever been in the bedroom alone with her. *Id*. at 269-72.

The Government called five witnesses in its case-in-chief in hopes of providing enough corroboration to comply with MIL. R. EVID. 304(g). After hearing the evidence and arguments of counsel, the military judge ruled that the following language be redacted from the appellee's written confession:

a. The third paragraph on page one of the appellee's confession contains an admission that someone purchased alcohol "for us." Prosecution Exhibit 2 for Identification at 1. The words "for us" were ordered redacted because the military judge did not find any corroboration that the alcohol had been purchased for the appellee.[2] Appellate Exhibit XXIV at 3.

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[1] HTFR M testified, however, that the appellee stated "let me hit that," that he then told the appellee to leave the bedroom, that he and KS remained in the bedroom for another 30 minutes, and that he left the bedroom by himself, leaving KS in the bedroom. Record at 233-34.

[2] Whether the alcohol was purchased for the appellee is "immaterial as to guilt or innocence" of the offenses charged, and therefore not subject to the corroboration requirement. *See Opper v. United States*, 348 U.S. 84, 91 (1954).

b. The fourth paragraph on page one of the appellee's confession contains the sentence: "I had not had any sexual contact with any of the girls up until this point." Prosecution Exhibit 2 for Identification at 1. The sentence was ordered redacted because the military judge did not find it relevant, and because he was not convinced there was any sex between KS and the appellee after that point. Appellate Exhibit XXIV at 4.

c. The last two sentences in the fourth paragraph on page one of the appellee's confession read: "I had not wanted to get involved with the girls because I did not feel right because of their ages. I was aware that [V] was 14, that [KS] was 15, and that [A] was 16." Prosecution Exhibit 2 for Identification at 1. The military judge ordered this language redacted because "there was no testimony that [the appellee] had been informed, at the time of the event, of the ages of the girls, and two, because the phrase 'underage girls,' appearing in the third paragraph, is open to a number of interpretations. 'Underage' can mean under 18 for purchasing tobacco, under 21 for drinking, under 16 for engaging in intercourse."[3] Appellate Exhibit XXIV at 4.

d. The fifth paragraph on page one of the appellee's confession contains the following language:

> [A]nd when I came out of the bathroom, someone told me that I was supposed to go see [KS] in the bedroom. When I went in, [KS] was buck naked on top of the bed. [KS] and I performed oral sex on each other at the same time, then I put on a condom and we had vaginal intercourse. I never ejaculated during the oral sex or the vaginal intercourse. I kept asking [KS] if she wanted to stop while we were having sex, she eventually said that she was tired and we stopped. I never kept going once she indicated she wanted to stop.

Prosecution Exhibit 2 for Identification at 1. The military judge excluded the above language because KS testified that no sexual activity occurred, the timelines established by KS and A contrast with that provided by HTFR M, and because the military judge was "not satisfied that [the appellee] was alone in the bedroom with [KS] for any appreciable amount of time, and [was] not satisfied that [KS] was undressed when [the appellee] entered alone." Appellate Exhibit XXIV at 4.

e. The first paragraph on the second page of the appellee's confession contains the following language:

> After we had sex, we both went back to the living room and the girls left late that night. Sometime after I

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[3] In the third paragraph on page one of the appellee's confession, he states how he and his active duty friends met some "underage girls." Prosecution Exhibit 2 for Identification at 1.

> had sex with [KS], on another day, I found out from [R] that he had sex with [KS] also. I don't know if he had sex with (sic) before or after I had sex with [KS]. [R] had sex with [KS] only once to my knowledge, and McCarthy a few times. [Va] never had sex with anyone but [V]. [R] is the only person who had sex with [A].

Prosecution Exhibit 2 for Identification at 2. The military judge ordered this language redacted, except for the words "the girls left late that night" in the first sentence, because the facts established by the redacted language were irrelevant. Appellate Exhibit XXIV at 4.

f. The second paragraph on the second page of the appellee's confession states: "I don't know if [KS] had been drinking at all the night I had sex with her. I don't believe I had. I don't recall if the guys had been drinking either." Prosecution Exhibit 2 for Identification at 2. The military judge ordered this language redacted because he did not believe there was sufficient corroboration that the appellee had sex with KS, because KS denied there was sex and there were no eyewitnesses to the sex. Appellate Exhibit XXIV at 4.

g. The third paragraph on the second page of the appellee's confession states: "I told another sailor off the USS STOUT that I hang out with that I had sex with [KS]. [Va], [R] and [M] already knew." Prosecution Exhibit 2 for Identification at 2. The first sentence in this language is lined out and initialed by "RNB" at the beginning of the sentence and at the end of the sentence, indicating that the appellant did not approve that language when he signed his confession. *Id*. Although the first sentence does not exist as part of the confession, the military judge claims to have ordered both sentences redacted because "it essentially is a statement by the accused used to corroborate the same statement of the accused." Appellate Exhibit XXIV at 4.

h. The fourth paragraph on the second page of the appellee's confession states: "I regret getting involved with those girls. At the time I had sex with [KS], I knew it was wrong and shouldn't be doing it, but it just happened." Prosecution Exhibit 2 for Identification at 2. The military judge ordered this language redacted because it "contained a gratuitous expression of remorse that (a) was not offered as an exception to any hearsay rule and (b) was not in any event relevant." Appellate Exhibit XXIV at 4.

Discussion

I. Confession corroboration

Prior to *Opper v. United States*, 348 U.S. 84 (1954), the Government had to present independent evidence that the charged crime, the *corpus delecti*, had indeed occurred in order to corroborate a confession. This was known as the *Corpus Delecti*

Rule.[4] *Opper*, however, moved away from the *Corpus Delecti* Rule in favor of the trustworthiness test, stating:

> [W]e think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delecti. It is necessary, therefore, to require the Government to 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* . . . .

Id. at 93 (Emphasis added).

MIL. R. EVID. 304(g) codifies the trustworthiness test for confession corroboration in military practice, stating in part:

> 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 . . . has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth.

Our superior court has summarized the case law in this area as follows:

> The corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even the corpus delicti of the confessed offense. Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted. Moreover, while reliability of the essential facts must be established, it need not be done beyond a reasonable doubt or by a preponderance of the evidence.

United States v. Baldwin, 54 M.J. 464, 465 (C.A.A.F. 2001)(quoting *United States v. Cottrill*, 45 M.J. 485, 489 (C.A.A.F. 1997))(internal citations omitted). The issue, therefore, is whether the facts justify an inference as to the truth of the essential facts in the confession. *United States v. Seay*, 60 M.J. 73, 80 (C.A.A.F. 2004).

It appears from the military judge's conclusions that he applied the *Corpus Delecti* Rule, rather than the trustworthiness test, even though he cited to *United States v. Hall*, 50 M.J. 247, 251 (C.A.A.F. 1999), which clearly states the trustworthiness test. Appellate Exhibit XXIV at 3. His conclusions are,

[4] For a brief history of the Corpus Delecti Rule, *see* Major Russell L. Miller, *Wrestling with MRE 304(g): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1 (2003).

therefore, based on an erroneous view of the law. We will address the facts, as found by the military judge, and apply the proper test to determine admissibility.

Independent from the appellee's confession, the military judge found the following facts:

1. The appellee was at another Sailor's apartment with other Sailors, KS, and her female friends.

2. The appellee entered into a bedroom where KS was having sexual intercourse with HTFR M, and the appellee asked "can I hit that."[5]

3. Thirty minutes later, HTFR M left the bedroom by himself, leaving KS behind;[6] he saw the appellee enter the same bedroom; HTFR M and one of KS's female friends saw the appellee leave that bedroom. HTFR M noted that the appellee was in the bedroom with KS for about 15 minutes, and had a grin on his face when he came out of the bedroom.

4. KS had been consuming alcohol that night and may have been drunk.[7]

5. Several weeks later, while discussing KS and the night in question with HTFR M, the appellee stated that he had "hit that." HTFR M interpreted that to mean that the appellee was referring to having had sexual intercourse with KS.[8]

Appellate Exhibit XXIV. However, the military judge found the following facts weighed against corroboration:

1. It was not unusual to see the appellee smiling or happy.

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[5] The military judge appears to accept HTFR M's testimony on this fact as KS testified that the appellee stated something to the effect of "Let me get some of that." Record at 267.

[6] This is what HTFR M testified to, however, it is contrary to KS's testimony that she left the bedroom after having sex with HTFR M. Record at 267, 269.

[7] This is what HTFR M testified to, however, it is contrary to KS's testimony that she was drunk after consuming eight beers, some of them after leaving the bedroom. Record at 269-70.

[8] The appellee's statement to HTFR M that he had "hit that" was not only relevant to corroborating the appellee's confession, it was also admissible under MIL. R. EVID. 801(d)(2)(A) as an admission by a party-opponent. As such, it does not require corroboration itself, because it falls within the exception to the corroboration requirement. *See* MIL. R. EVID. 304(g) (exempting statements that are "offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions" from corroboration). *See United States v. Baldwin*, 54 M.J. 551, 555 (A.F.Ct.Crim. App. 2000).

2. HTFR M stated that KS makes a lot of noise while engaged in sexual intercourse, and HTFR M did not hear KS making any noise while the appellee was in the bedroom with her.

3. KS testified that the appellee's "hit that" comment angered her, that she stopped having sexual intercourse, and got dressed.

4. KS testified that she did not have sexual relations with the appellee and could not remember if he had been alone with her in the bedroom.

Id.[9]

The totality of these facts show that the appellee had the intent, or at least the immediate desire, to engage in sexual activity with KS, that he had the opportunity to be alone with KS, that he was alone with KS in a bedroom where she had just had sexual intercourse with another Sailor, and that KS had consumed alcohol prior to the appellee entering the bedroom. We conclude that the facts, as found by the military judge, provide a quantum of evidence that corroborates "the essential facts admitted to justify sufficiently an inference of their truth." MIL. R. EVID. 304(g); *see Seay*, 60 M.J. at 80.

Therefore, we find that the military judge abused his discretion by directing that certain parts of the appellee's confession be redacted. The language ordered redacted is substantial proof of a fact material in the proceeding, and an order excluding that language is subject to appeal under Article 62, UCMJ. We find merit in the Government's appeal and reverse the military judge's order redacting the appellee's confession.

III. Limiting examination

The military judge precluded the Government from asking questions to clarify KS's denial that sexual activity occurred between her and the appellee. The military judge's ruling on this issue appears to be the result of his erroneous application of the Co*rpus Delecti* Rule. This ruling prevented or excluded admissible evidence[10] that supported the Government's theory of

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[9] There are many other facts contained within the record of trial that are relevant to deciding the issue before us, however, those facts are not contained within the military judge's findings, and, therefore, they will not be considered.

[10] MIL. R. EVID. 401 establishes a low threshold of relevance. *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987)(citing *United States v. Tomlinson*, 20 M.J. 897, 900 (A.C.M.R. 1985)). Moreover, MIL. R. EVID. 402 provides a presumption of admissibility for relevant evidence. *United States v. George*, 40 M.J. 540, 543 (A.C.M.R. 1994). Relevant evidence is necessary if not cumulative and it "contribute[s] to a party's presentation of the case in some positive way on a matter in issue." *United States v. Abrams*, 50 M.J. 361, 362 (C.A.A.F. 1999)(*quoting* R.C.M. 703(f)(1), Discussion). The

the case, an alternative theory, or explanation of critical events.[11]

By denying the Government the opportunity to present evidence that could establish it's theory of the case, an alternate theory, or an explanation of KS's testimony, the military judge excluded "evidence that is substantial proof of a fact material in the proceeding." Art. 62(a)(1)(B), UCMJ. Because the military judge's ruling excluding the Government's evidence appears to be based on an erroneous view of the law, it is an abuse of discretion. We find merit in the issue raised in the Government's appeal and reverse the military judge's order prohibiting the Government from further questioning of KS about her belief that she did not have sexual relations with the appellee.

Conclusion

Based on our review of the record, we hold that the military judge erred by ordering the appellee's confession redacted and by denying the Government the right to pursue further questioning of KS's denial of sexual activity. Accordingly, the military judge's rulings are reversed. The case is remanded for further proceedings not inconsistent with this opinion. R.C.M. 908(c)(3).

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court

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prohibited testimony was admissible, because it was relevant to the issue of guilt or innocence.

[11] For example, one alternative plausible theory, flowing from the facts as found by the military judge, is that HTFR M left an intoxicated KS in the bedroom. The appellee then entered the bedroom and engaged in sexual activity with KS while she was too intoxicated to know that someone other than HTFR M was in bed with her. This would explain (1) why KS could not remember whether the appellee was alone with her in the bedroom; (2) why she did not think that she had sexual intercourse with the appellee; (3) if unconscious from alcohol consumption, why she did not make noise while the appellee had sexual intercourse with her; and, (4) why she thought she left the bedroom at the same time as HTFR M.