UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KIRK A. SPARKS
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 201000275
GENERAL COURT-MARTIAL

Sentence Adjudged: 3 February 2010.
Military Judge: Maj Clay Plummer, USMC.
Convening Authority: Commanding General, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Col W.G. Perez, USMC.
For Appellant: LT James Head, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, USMC; Capt Mark V. Balfantz, USMC.

15 February 2011

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PAYTON-O'BRIEN, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of two specifications of aggravated sexual contact with a child, in violation of Article 120, 10 U.S.C. § 920. The appellant was sentenced to confinement for three years, reduction to the lowest enlisted pay grade, and a dishonorable discharge. As an act of clemency, the convening authority (CA) agreed to defer and waive forfeitures in favor of the appellant's dependents, but otherwise approved the findings and the sentence as adjudged.

The appellant avers that the military judge abused his discretion in allowing into evidence, under the residual hearsay exception, MILITARY RULE OF EVIDENCE 807, MANUAL FOR COURTS-MARTIAL (2008 ed.), statements communicated by the appellant's then four-year-old daughter [AS] to her maternal grandmother [MDB].

On 26 October 2010, we heard oral argument relative to the assigned error. After carefully considering the record of trial and the pleadings of the parties, we find the military judge did not abuse his discretion in admitting the hearsay statements of AS to her MDB under the residual hearsay exception. We are satisfied that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights exists. Arts. 59(a) and 66(c), UCMJ.

Background

During a visit at her grandmother's Utah home in March 2009, AS stated to her mother, Mrs. S, words to the effect that "little girls turn into little boys." Since AS seemed to be confused about whether girls could turn into boys, and finding the statement to be humorous, her mother asked AS to repeat the story to MDB. MDB in turn asked AS why she believed that. AS explained to MDB that the appellant, her father, told her that "daddy says that little girls turn into little boys," and he would have to "check" her to make sure she was still a little girl. MDB then asked AS how the appellant would check. AS explained to her grandmother that they would go into the bedroom where the appellant would touch her private parts, and she in turn would touch his private parts. These statements by AS initiated the investigation into the charges that the appellant faced at court-martial.

After an interview and polygraph examination with the Naval Criminal Investigative Service (NCIS), the appellant confessed to touching AS's vagina and having AS touch his penis.[1] At the time of AS's revelation to her grandmother about what her father had done to her, the appellant and Mrs. S had been married over six years. The marriage had been occasionally strained. When the statements by AS were made to her mother and grandmother, the appellant was on a field exercise. Prior to the March 2009 visit to her mother's Utah home, Mrs. S had been estranged from her mother, MDB. As such, MDB had not seen AS for approximately three years.

After her initial statements, AS was interviewed by a social worker and a pediatrician, but she did not repeat the statements she had made to her grandmother and other family members. At best, AS would only say that the appellant "bothered" her and his conduct "wasn't very nice," but she would not elaborate.

[1] According to the appellant's statement, the incident occurred between October and December 2008.

Forensic physical examinations of AS were inconclusive as to any sexual abuse.

Before trial, the Government gave notice and motioned the court to introduce the statements made by AS to MDB.[2] On 16 December 2009, during a motions hearing, the Government called AS to testify,[3] but she "froze" and began uncontrollably crying. The Government made another attempt to bring AS into the courtroom to testify at the motions hearing, but was not successful in securing any testimony from AS. MDB testified at the motions hearing as to the circumstances surrounding AS's March 2009 statements.[4] The military judge made findings of fact and conclusions of law, allowing into evidence AS's March 2009 statements to MDB under the residual hearsay exception of MIL. R. EVID. 807. Appellate Exhibit XXIV.

The Government thereafter attempted to call AS into court to testify at the trial. The record of trial reveals that immediately upon stepping into the courtroom, the child began to cry and was unable to testify. AS continued to cry until the military judge called a recess and she left the courtroom.[5] When the Government was unsuccessful in calling AS to the witness stand, it called MDB to offer the statements of AS into evidence.[6]

Military Rule of Evidence 807

There is no dispute that AS's statements to MDB were hearsay in nature; they were made out of court to MDB, and are being offered to prove the truth of the matter asserted. MIL. R. EVID. 801. Generally, hearsay is not admissible unless an exception

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[2] The Government's pretrial motion in *limine* under MIL. R. EVID. 807 also requested that the court allow into evidence AS's other statements to family members and to the social worker. The military judge granted the Government's motion only so far as the statements made by AS to MDB.

[3] AS was almost 5 years old when called to the witness stand for the first time in this matter.

[4] The prosecution also called KDB, AS's maternal aunt, for telephonic testimony, concerning the circumstances surrounding AS's initial revelation. At the time of AS's revelations, KDB and her partner, AG, were residing in the same household as MDB.

[5] In addition to the trial counsel calling AS to the witness stand, the record reflects that the day before trial, AS and Mrs. S met with prosecutors in an effort to review AS's potential testimony. AS and Mrs. S were given a tour together of the courtroom facilities. During the trial preparations, AS expressed concern to the prosecutors about who would be present in the courtroom during her testimony. Also, when asked by the trial counsel to talk about the case, AS indicated her refusal to talk about it by saying, "I don't want to talk about that." Trial counsel had previously flown to AS's home in Utah in an effort to prepare AS for trial.

[6] Upon conclusion of the Government's efforts at calling as to testify at trial, the military judge found AS to be unavailable under RULE FOR COURTS-MARTIAL 804, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

applies. MIL. R. EVID. 802. The residual hearsay exception under MIL. R. EVID. 807 is one such exception, which applies to "'highly reliable and necessary evidence.'" *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003)(quoting *United States v. Giambra*, 33 M.J. 331, 334 (C.M.A. 1991)). While recognizing that the legislative history of the residual hearsay exception indicates that the exception should be used rarely and only in exceptional circumstances, we bear in mind the military judge is given considerable discretion in admitting evidence as residual hearsay. *See United States v. Kelley*, 45 M.J. 275, 280-81 (C.A.A.F. 1996); *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003); *Wellington*, 58 M.J. at 425.

Admission of evidence in the form of hearsay statements is permissible under MIL. R. EVID. 807 if the statement is not covered by Rule 803 or 804, but has equivalent circumstantial guarantees of trustworthiness:

> [so long as] the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.

MIL. R. EVID. 807.[7] The proponent of the evidence must provide timely notice of the intent to offer the evidence at trial.[8] *Id.*

In assessing whether such statements have the equivalent circumstantial guarantees of trustworthiness, the Court of Appeals for the Armed Forces referred to a number of indicia of reliability, including, among other things: (1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; (4) whether the statement can be corroborated; (5) the declarant's age, and (6) the circumstances under which the statement was made. *Donaldson*, 58 M.J. at 488 (citations omitted). A military judge's factual findings on the existence of circumstantial guarantees of reliability are reviewed for clear error. *Id.* (citing *United States v. Workman*, 860 F.2d 140, 144 (4th Cir. 1988)).

In this case, the appellant's main contention is that the statements made by AS lack the equivalent guarantees of reliability required for the residual hearsay exception. Put simply, the appellant claims MDB and other witnesses to AS's

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[7] *See generally United States v. Czachorowski*, 66 M.J. 432, 434 n.3 (C.A.A.F. 2008)(citing *Whorton v. Bockting*, 549 U.S. 406 (2007)("Regardless of whether the evidence at issue is testimonial in nature, admission at trial still depends on compliance with the rules of evidence")).

[8] It is not disputed that the Government gave timely notice in this case.

revelations had motives to fabricate which makes MDB's testimony suspect.[9] We disagree, and upon review of the record of trial, we find that the military judge did not abuse his discretion in admitting MDB's testimony concerning the statements made to her by AS.

The military judge took into account that AS was 3 years old at the time of the alleged offenses in 2008, and had just turned 4 years old when she made the statements to MDB. While visiting immediate family, AS spontaneously told her mother, while they were in the basement of MDB's house, that "girls turn into little boys." This statement was made by AS apparently due to her confusion about whether girls can turn into boys. Record at 175 and 191; AE XXIV at 6. Mrs. S then took AS upstairs and told AS to repeat her statement to her grandmother, who had been previously employed as a nurse. It was at this time, without prompting from MDB, that AS told her that the appellant "checks me to make sure I'm still a little girl," or words to that effect. AE XXIV at 6. In response to AS's statement, MDB asked her in an open-ended manner "how" her daddy would check. In response to MDB's question, to which MDB had no preconceived notion as to the answer, AS indicated that she and the appellant would go into the bedroom, where he would touch her "privates" and she would touch his "privates." Record at 164, 193-94. The military judge considered that AS was able to identify to MDB who had touched her, where she had been touched, the manner in which she was touched, and used age-appropriate terms in her depiction of what occurred. AE XXIV at 6. *See Donaldson*, 58 M.J. at 489.

The appellant contends, however, that there are numerous factors which make MDB's testimony suspect, such as the evidence of Mrs. S taking money from the appellant's bank account to give to her mother to pay bills, the recent estrangement of Mrs. S and MDB, MDB's conviction for a misdemeanor theft offense, and the conflicts between the various witnesses about the circumstances surrounding AS's revelations. Certainly, there were some inconsistencies between the statements of MDB, her two daughters, and the family friend, as to exactly what AS said, the order in which AS's statements were made, or where each person was located in the house when AS's statements were made. However, the military judge was cognizant of all of these factors. He concluded that the conversation between AS and her grandmother started with what was perceived to merely be a comical statement by a young child, with the grandmother making an innocent inquiry not intended to incriminate the appellant in any way.

We agree with the military judge that AS's statements contain the necessary circumstantial guarantees of trustworthiness for

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[9] For purposes of the MIL. R. EVID. 807 motion, the military judge also considered evidence presented by both parties in the form of various statements of the family members, including KDB (AS's maternal aunt), AG (a female friend of KDB) and Mrs. S, AS's mother, as well as the pediatrician's report and the forensic interviewer's report.

admission as hearsay under MIL. R. EVID. 807. We note that the military judge did not consider the corroboration of AS's statements by the appellant's confession to NCIS on 10 July 2009. AE XXIV at 7. We agree with the military judge however, that if considered, it would only strengthen the rationale for admitting the evidence. *See Kelley*, 45 M.J. at 281. These statements were offered as evidence of a material fact (i.e., that the appellant had engaged in and caused sexual contact with AS) and satisfy the requirements under MIL. R. EVID 807. The Government also made reasonable efforts to procure other evidence in this case. AS was interviewed by a pediatrician and a social worker conducting a forensic interview following her disclosure. But, in all instances, AS was reluctant to provide information to those outside her immediate family. When AS was called to testify in court, she broke down and began to uncontrollably cry. While the military judge could have made other efforts to make AS more at ease in court, perhaps by first calling her into chambers to talk with her, or by utilizing a more child-friendly courtroom environment, such efforts were not required in this case. It was clear from AS's emotional breakdown in the courtroom, as well as her prior declarations to trial counsel that "I don't want to talk about that," in reference to the incident with her father, such further efforts to "get her to talk" would not have been successful under the circumstances. This case is distinguishable from *Czachorowski*, *infra,* in that the military judge in the present case did not merely rely on assertions from the trial counsel as to the unavailability of the victim. Here, the military judge actually observed the victim's unwillingness to cooperate in the courtroom, and received evidence in the form of sworn testimony as to the efforts undertaken by the Government to secure her testimony. We find that AS's statements are more probative on the point than other evidence which the Government could have procured through reasonable efforts. MIL. R. EVID. 807(B).

To the extent that the appellant points to inconsistencies that skew against the reliability of AS's statements, he fails to demonstrate that the military judge's findings of fact were clearly erroneous or that his decision was influenced by an erroneous view of the law.[10] While there may be points to consider against the admission of the statements as residual hearsay, the appellant has failed to demonstrate that the military judge abused his "considerable discretion" in his determination that the statements were accompanied by circumstantial guarantees of trustworthiness. *Donaldson*, 58 M.J. at 489 (citing *Kelley*, 45 M.J. at 281-82).

[10] Clearly erroneous means "more than just maybe or probably wrong; it must … strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *United States v. French*, 38 M.J. 420, 425 (C.M.A. 1993)(citations and internal quotation marks omitted).

***Crawford v. Washington* Analysis**

Our determination that AS's statements to her grandmother qualify as residual hearsay does not end the inquiry. We agree with the military judge that AS's statements were not testimonial in nature. In *Crawford v. Washington,* 541 U.S. 36 (2004), the Supreme Court held that testimonial out of court statements are not admissible against a defendant unless the defendant has actually cross-examined the declarant, irrespective of whether the statement falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. *Id.* at 68-69. And, although there is no specific definition of what constitutes a testimonial statement, the Supreme Court noted that testimonial statements are those made under the circumstances which would lead an objective witness to believe that the statement could be available for use at a later trial. *Id.* at 52, 68.

Even though the appellant would have us find AS's statements to be testimonial since MDB had prior training as a nurse and had prior nursing experience with child sexual abuse cases, we decline to make that leap in this case. While MDB stated that she was careful to ask AS open-ended questions, those questions were asked in the context of a familial relationship. The questions to AS by MDB commenced solely because AS's mother, Mrs. S, brought her upstairs from the basement of the house after AS had made a comical statement to her about "little girls turning into little boys." MDB's questioning of AS was not done because MDB was conducting an interview in her capacity as a nurse, but because she viewed the comments by her then-4-year-old granddaughter to be funny, and she was attempting to clear up her granddaughter's confusion about gender transformation. Furthermore, when AS initially made the statements about "little girls turning into little boys" to both Mrs. S and MDB, neither woman had any indication that the appellant was involved in any wrongdoing whatsoever with AS. In short, we do not have a case before us in which there was search for evidence. We hold that AS's statements to her grandmother were not made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. To the contrary, MDB's questions were posed out of nothing more than the normal and expected instinct by a grandmother to protect her granddaughter. *See United States v. Coulter*, 62 M.J. 520 (N.M.Ct.Crim.App. 2005).

Conclusion

Accordingly, we conclude that the appellant has failed to demonstrate that the military judge abused his discretion by

receiving AS's out of court statements to MDB into evidence. The findings and sentence as approved by the CA are affirmed.

Senior Judge MAKSYM and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court