

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

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BOYCE A. COONS
CHIEF GUNNER'S MATE (E-7), U.S. NAVY**

**NMCCA 200900366
Review Pursuant to Article 62(b), Uniform Code of Military Justice,
10 U.S.C. §862(b)**

Military Judge: LtCol Eugene Robinson, USMC.

Convening Authority: Commander, Naval Surface Warfare
Center, Washington Navy Yard, Washington, DC.

For Appellant: LT Michael E. Maffei, JAGC, USN; LT Gregory
Mantz, JAGC, USN.

For Appellee: LT Brian Burgtorf, JAGC, USN.

22 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

This case is before us on a Government interlocutory appeal pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862. The appellee is charged with raping his stepdaughter, B, on divers occasions between December 1999 and April 2001. The Government asserts that the military judge improperly suppressed the appellee's confession due to a lack of corroboration.

Background

The rape allegation came to light on 29 August 2008, when during the course of a domestic disturbance call, the appellee's 17-year-old stepson, D, informed police that the appellee had inappropriately touched, B. Record at 181. On 3 September 2008,

representatives from the Virginia Department of Social Services and the King George Police Department interviewed 16-year-old B at her high school. Civilian authorities concluded that they lacked jurisdiction and forwarded the matter to the Naval Criminal Investigative Service (NCIS), which opened an investigation. *Id.* at 167. On 3 October 2008, NCIS interviewed the appellee. During this interview, the appellee told investigators that he began abusing his then 7-year-old stepdaughter around December 1999, several months after the family arrived in Guam and shortly after he learned that his wife was having an affair with a co-worker. Prosecution Exhibit 1 for identification (PE 1) at 2.

The appellees's confession to NCIS reflects that five incidents of abuse took place in the appellee's living room. On each occasion, the appellee stated that he would first position the room's two couches together, face-to-face, creating a bed of sorts, and then he would lie on the couches with B while then 8-year-old D played on the floor. On these occasions, the appellee covered himself and B with a blanket and stated that he lay behind B with both facing the television. PE 1.

The appellee's confession further reflects his admission that he became sexually aroused the first time B pressed against his groin. On subsequent occasions, when the two lay on the couches, the appellee began touching B. The inappropriateness of the touching escalated with each incident. Initially, the appellee only touched B's chest under her shirt. During later incidents, he acknowledged that he took off B's pants and his own and slid his penis back and forth between the lips of her vagina until he ejaculated. The appellee also admitted to kissing B's vagina, making B kiss his penis and kissing B's bare chest.

When called by the Government at trial, B indicated that prior to the family's move to Guam in 1999, she and the appellee exchanged open mouthed kissing on the lips approximately four times. Record at 221. B stated that the appellee told her not to tell her mother about the kisses. B adamantly denied any other inappropriate contact and persisted in her denial even when confronted with her prior allegations to Virginia officials, a forensic interviewer, and several other individuals. *Id.* at 233, 235.

L, the appellee's wife, testified at trial and confirmed the appellee's statement that she had engaged in an extramarital affair with a co-worker during the relevant time period. L also testified that she first suspected that the appellee had touched her daughter inappropriately around 2005, when she found a poem B had written. *Id.* at 149, 237. When L confronted the appellee about the poem, he began crying. *Id.* at 152. In addition, D testified and confirmed the appellee's statements to NCIS that the appellee would sometimes push the living room couches together face-to-face. *Id.* at 175. On these occasions, D would often play on the floor while the appellee sat with B on the

couches. *Id.* at 176.

Procedural Posture

Prior to trial, the appellee filed a motion to suppress his statement to NCIS due to lack of corroboration. Appellate Exhibit III. The military judge took evidence and heard argument on the issue but reserved his ruling until trial. AE VII. The appellee elected to contest the charge before a military judge alone sitting as the finder of fact. At trial, when the Government tried to admit the appellee's sworn NCIS statement into evidence, the defense objected. Record at 254. Citing a lack of corroboration, the military judge suppressed the statement. *Id.* at 289. The Government gave timely notice and filed this appeal.

Lack of Corroboration

As this is an appeal under Article 62, UCMJ, we may review the military judge's decision only with respect to matters of law. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). This court is bound by the military judge's findings of fact unless they are clearly erroneous. In addition, we cannot find our own facts or substitute our own interpretation of the facts. *Id.* A military judge's ruling on a motion to suppress is reviewed for abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citations omitted). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *Id.* We review a military judge's conclusions of law *de novo*. *Id.* Having carefully reviewed the record, we find that the military judge's findings of fact are not clearly erroneous. We adopt them as our own.

It is well-established that a confession or admission may not be admitted into evidence absent corroboration. *United States v. Cottrill*, 45 M.J. 485, 489 (C.A.A.F. 1997). Corroboration of the essential facts must be established by independent evidence, direct or circumstantial, sufficient to justify an inference of their truth. MILITARY RULE OF EVIDENCE 304(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The independent evidence need not establish the reliability of the essential facts beyond a reasonable doubt or even by a preponderance of the evidence. *Cottrill*, 45 M.J. at 489. It need not be sufficient to establish the *corpus delicti*. *Opper v. United States*, 348 U.S. 84, 92 (1954). Rather, the amount of corroboration needed is "very slight" or "slight." *Cottrill*, 45 M.J. at 489. The purpose of the corroboration rule is to prevent convictions based solely upon false confessions which result from the "strain and confusion" caused by the "pressure of police investigation." *United States v. Yeoman*, 25 M.J. 1, 4 (C.M.A. 1987). To mitigate this danger, the rule requires independent evidence sufficient to demonstrate the "trustworthiness of the statement." *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A.

1988) (citation and internal quotation marks omitted).

We find that the military judge erred by applying an overly restrictive interpretation of the corroboration rule which he apparently derived from *United States v. Howe*, 37 M.J. 1062 (N.M.C.M.R 1993) which was cited heavily in his conclusions of law. In *Howe*, a service member was convicted of drug use based solely on his confession. *Id.* at 1063. The Government offered absolutely no evidence to corroborate the confession. Contrary to the military judge's assertion in the instant case, we do not find *Howe* to be "very analogous" to the facts here.

The instant case is more analogous to *United States v. Byrd*, No. 200601320, 2006 CCA LEXIS 293, unpublished op. (N.M.Ct.Crim.App. 29 Nov 2006). In *Byrd*, the military judge suppressed portions of a confession based on a lack of corroboration. The Government appealed. The court in *Byrd* held that the military judge erred as a matter of law insofar as he applied the pre-*Oppen* "corpus delicti" test rather than the less stringent "trustworthiness test." We find that the military judge in the instant case applied a similarly incorrect legal standard.

We are convinced that independent facts found by the military judge more than adequately raise an inference of the truth of the essential facts in the appellee's confession. D's testimony established that, while in Guam, the appellee would periodically arrange his living room couches in the highly distinctive manner described in the appellee's confession. Record at 175. D's testimony also confirmed the appellee's statement that he would then sit on the couches with 7-year-old B while 8-year-old D played on the floor. *Id.* at 176. The statements of B and D are both consistent with the appellee's in that none of them mention where the appellee's wife was during the relevant time frames. This demonstrates that the appellee had ample access and opportunity to abuse his stepdaughter as described in his confession. B's testimony also established that the appellee kissed her on the mouth on approximately four occasions. *Id.* at 221. This testimony provides clear and demonstrable evidence that the appellee had the intent to touch B in a highly inappropriate and sexual manner. It also potentially demonstrates a scheme or plan to groom B for the more serious sexual contact charged. Further, the appellee's wife confirmed the appellee's statement that she had engaged in an extra-marital affair during the relevant time frame. This provides a possible motive for the appellee's actions. Finally, the appellee has a demonstrable history of telling B to conceal inappropriate touching between the two, which he did following their mouth to mouth kissing. *Id.* at 236-37. These independent facts were found by the military judge and are sufficient to infer that the appellee had access and opportunity to abuse his stepdaughter as well as the motive and intent to do so. We find that these independent facts are sufficient to corroborate the truthfulness of the essential elements of the appellee's confession to NCIS.

Conclusion

We conclude that the military judge applied an incorrect legal standard. Therefore, the Government's interlocutory appeal is granted and the military judge's ruling is reversed. The case is remanded for further proceedings not inconsistent with this opinion.

For the Court

R.H. TROIDL
Clerk of Court