United States Navy–Marine Corps Court of Criminal Appeals

Before
CRISFIELD, STEPHENS, and LAWRENCE
Appellate Military Judges

UNITED STATES
Appellee

v.

Antonio X. ZAMORA
Staff Sergeant (E-6), U.S. Marine Corps
Appellant

No. 201900087

Decided: 10 September 2020

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Jeffrey V. Munoz (arraignment)
John L. Ferriter (motions)
John P. Norman (trial)

Sentence adjudged 3 November 2018 by a general court-martial convened at Marine Corps Base Camp Pendleton, California, consisting of officer and enlisted members. Sentence approved by the convening authority: confinement for one year and a dishonorable discharge.

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

For Appellee:
Major Kerry E. Friedewald, USMC
Lieutenant Joshua C. Fiveson, JAGC, USN

Senior Judge STEPHENS delivered the opinion of the Court, in which Chief Judge Emeritus CRISFIELD and Judge LAWRENCE joined.

PUBLISHED OPINION OF THE COURT

STEPHENS, Senior Judge:

Appellant was convicted, contrary to his pleas, of one specification each of sexual assault and unlawful entry under Articles 120 and 134, Uniform Code of Military Justice [UCMJ].[1]

Appellant raises two assignments of error [AOEs]: (1) the military judge abused his discretion by admitting evidence of a recording between Appellant's wife and the victim that was testimonial hearsay; and (2) the military judge erred by admitting the recording under the residual hearsay exception found in Military Rule of Evidence [Mil. R. Evid.] 807. We find no prejudicial error and affirm.

I. BACKGROUND

A. An On-Base Party And a Secret Recording

At Camp Pendleton, Appellant and his wife, SZ, lived next door to another Marine and his wife, MG. One Sunday evening, MG held a party while her husband was away. Many neighbors, including Appellant and SZ, attended. MG drank to excess. At some point, Appellant, who was also drinking alcohol, accidentally poured water on MG, causing her to become upset and end the party by making everyone leave.

Before leaving, SZ helped MG into her bed and left her there, still fully dressed. When SZ left MG's home, she was unable to lock the front door and exited through the garage. When SZ went back to her house, she could not find her husband. She texted neighbors trying to find him but to no avail. He returned home later that morning wearing clothes belonging to MG's husband.

MG woke up Monday on her bed, naked, and had foggy, uncertain memories of Appellant having intercourse with her. She also had vomit on her stomach and vaginal area and noticed vomit on the bedroom floor. Appel-

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[1] 10 U.S.C. §§ 120, 134 (2012 Supp. IV 2017).

lant's pants, underwear, and cell phone were also on the floor. His shirt was in her bed.

Later on Monday, SZ brought Appellant over to MG's house to apologize for spilling water on her during the party. MG had no memory of the event and very hazy memories of the party in general.

On Tuesday, MG texted SZ asking if she could help her "fill in the blanks" about what happened during the party.[2] MG already suspected Appellant had sexually assaulted her while she was too intoxicated to consent. Instead of replying to her texts, SZ came to her door. When she showed up in person, this caused MG some apprehension, so she placed her phone on video record mode. She surreptitiously recorded her conversation with SZ to avoid a "he said she said" situation.[3]

For her part, SZ was calm and friendly during the conversation and did not seem to know she was being recorded. SZ told MG how she had to hold her up at some point during the party because MG was so intoxicated. She told her that a few minutes after Appellant poured water on her, she ended the party by kicking everyone out. Concerning her intoxication, SZ told MG she was already "pretty drunk"[4] when she arrived to her party and that when she put her to bed, she was "gone."[5] SZ told MG that she helped her upstairs into her bedroom and put her into bed with all of her clothes on, and then left the house through the garage because she was unable to lock the front door.

Their conversation lasted about five minutes. After she returned to her house, SZ texted MG, "Hey I forgot that I did have something big to ask you."[6] SZ followed-up with a text containing pictures of the clothes Appellant wore home from the party. She asked if the clothes belonged to MG's husband. SZ implored her, "plz say no," and "Plz tell me I need to know,"[7] but MG did not respond.

Later that day, MG and her husband reported a sexual assault to the Naval Criminal Investigative Service [NCIS]. MG referenced the recording

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[2] App. Ex. XXI at 5.

[3] R. at 65.

[4] Pros. Ex. 8 (00:58).

[5] *Id*. (3:18).

[6] Def. Ex. A at 1.

[7] *Id*. at 3.

several times in her NCIS interview. She made clear that her intent in making the recording was to provide it to law enforcement if she decided to report a sexual assault.

B. Litigation over the Recording and Its Use at Trial

The Government correctly anticipated SZ would invoke her marital privilege under Mil. R. Evid. 504 and decline to testify. As such, it moved in limine to admit MG's recording of their conversation, arguing it was non-testimonial hearsay and offering it under Mil. R. Evid. 807 as residual hearsay. The Government argued, essentially, that because SZ had no knowledge or belief her statements were to be used for a law enforcement or prosecution function, her recorded statements were not testimonial. The Government further argued that because of SZ's probable invocation of her right to not testify, the information in her statements would be unavailable anywhere else and because she had no apparent reason to be untruthful, her statements were inherently trustworthy. Appellant responded that because MG was deliberately attempting to gather evidence, the entire conversation was testimonial, and that due to SZ's own intoxication that evening, her statements were generally unreliable. The military judge admitted the recording and issued a written ruling, where he analyzed testimonial hearsay under the Confrontation Clause of the Sixth Amendment to the Constitution and residual hearsay under Mil. R. Evid. 807, and then conducted a balancing test under Mil. R. Evid. 403.

The Government charged Appellant with sexually assaulting MG under three different theories: by bodily harm; due to her being asleep, unconscious, or otherwise unaware; and while she was incapable of consenting due to intoxication. During trial, the Government referred to the recording and relied upon it in its case. Appellant was convicted under the bodily harm and incapacity theories. He was also convicted of unlawful entry, which was demonstrated by SZ's statements from the recording about how she left the front door unlocked when she departed the house.

II. DISCUSSION

A. The Confrontation Clause and Testimonial Hearsay

1. The Confrontation Clause

The Sixth Amendment and its Confrontation Clause was ratified in 1791 and was generally uncontroversial at the time. It states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[8] There are no recorded debates in the First Congress over the Confrontation Clause. However, like many of our fundamental constitutional rights, the reason for the protection can be found in English and early American history.

In 1603, Sir Walter Raleigh was infamously tried for treason.[9] Raleigh, once a favorite of the Crown, found himself implicated in a supposed plot on behalf of the King of Spain to undermine the new English king, James I. The Crown's central "witness" against Raleigh was his friend and alleged co-conspirator, Lord Cobham. But Cobham never appeared before the jury or the judges. Raleigh was never able to question Cobham, and the jury was never able to see how Cobham reacted in the physical presence of the man he accused of treason.

The Crown's agents, in the form of the Privy Council, questioned Cobham while he was under arrest in the Tower of London and kept him there during the trial. Cobham eventually provided a letter implicating himself and his co-conspirator, which he later recanted, before providing another written statement attesting to Raleigh's guilt. Raleigh objected and claimed he would be able to show Cobham was lying, or under duress, in making the statements, and would recant if he would be produced for cross-examination.[10] At his

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[8] U.S. Const., amend VI.

[9] Citations from Raleigh's trial are taken from T.B. Howell, *State Trial of Sir Walter Raleigh* (Franklin Classics, 1816) [hereinafter Howell]. The entire collection of English state trials from 1163 to 1820 can be found online. *See* Francis Hargrave et al., *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors* (5th ed. 1828), *available at* https://catalog.hathitrust.org/Record/009403393.

[10] Raleigh's trial strategy was two-fold. First, he argued the law required more than one witness for a conviction of treason. Second, he appeared to know the Crown would never allow Cobham to be produced, and he highlighted the unfairness of such (in)action, going so far as to claim that if Cobham "will speak it before God and the

trial, Raleigh pleaded: "I beseech you, my lords, let Cobham be sent for, charge him on his soul, on his allegiance to the king; if he affirm it, I am guilty,"[11] and, "My lords, vouchsafe me this grace: let him be brought, being alive, and in the house; let him avouch any of these things, I will confess the whole Indictment, and renounce the king's mercy."[12]

The one witness the prosecutor, Sir Edward Coke,[13] did produce, was a boat-driver named Dyer. When Dyer visited a merchant's house in Lisbon, a Portuguese gentleman asked him if the king had been crowned yet. When Dyer responded, "No, but that I hopes that he should be so shortly," the gentleman, according to Dyer, said, "Nay, . . . he shall never be crowned; for Don Raleigh and Don Cobham will cut his throat ere that day come."[14] The jury needed "not a quarter of an hour"[15] to reach its verdict. Raleigh was convicted and sentenced to death.[16]

Raleigh's defense of himself found favor with the public. Various legal reforms were instituted to strengthen the common-law right of confrontation.[17] In common law criminal trials, and in particular treason trials, the right (and custom) to confront one's accuser was solidified by statute. The "continental" or "civil law" practice of using affidavits from witnesses examined ex parte by judges, or other government officials, became rare and generally limited to the civil law courts. Starting in 1765, the British vice-admiralty courts, which followed the civil law custom, prosecuted American colonists for violating the Stamp Act. Both John Adams and George Mason publicly criticized this

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king, . . . I put myself on it, God's will and the king's be done with me." Howell, *supra*, at 105.

[11] *Id*. at 90.

[12] *Id*. at 103.

[13] Coke's *Institutes of the Laws of England*, along with Blackstone's *Commentaries*, was the most widely-read and influential legal treatise in the American colonies. His reputation was marred by his conduct at Raleigh's trial. *Id*. at 61.

[14] *Id*. at 106

[15] *Id*. at 114.

[16] His death sentence was commuted for 15 years. *Id*. at 117-26.

[17] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 315 (2009) ("The right to confrontation was not invented in response to the use of the *ex parte* examinations in *Raleigh's Case*. That use provoked such an outcry precisely because it flouted the deeply rooted common-law tradition of live testimony in court subject to adversarial testing.") (citation and internal quotations omitted).

practice. During the ratifying debates, the Constitution's lack of a guarantee that the proposed federal government could not prosecute using the civil law method—like the lack of many other fundamental protections—was one of the impetuses for the Bill of Rights.

In 1895, the Supreme Court heard *Mattox v. United States*,[18] its first major case concerning the Confrontation Clause. It stated that the "primary object of [the Clause] was to prevent depositions or ex parte affidavits, such as were sometime admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness."[19] The Court added that a criminal defendant had the right not only of "testing the recollection and sifting the conscience of the witness" but also of "compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor on the stand and the manner in which he gives his testimony whether he is worthy of belief."[20]

2. Crawford v. Washington *and its progeny*

Over time, the Supreme Court came to interpret the Confrontation Clause in a way that favored the reliability of testimony over the straight-forward procedural nature of the right. *Ohio v. Roberts*,[21] decided by the Court in 1980, allowed the Government to use hearsay statements of an unavailable witness if the statements bore an "indicia of reliability," which could be inferred where the evidence fell within a "firmly rooted hearsay exception" or, failing that, if it showed some "particularized guarantees of trustworthiness."[22]

In 2004, the Court issued its landmark opinion in *Crawford v. Washington*.[23] In reversing *Roberts*, the Court held that "testimonial hearsay" could not be admitted without the declarant being unavailable and the accused having had a prior opportunity to confront the declarant. Justice Scalia, writing for the Court, outlined the above background history of the Confron-

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[18] 156 U.S. 237 (1895).

[19] *Id*. at 242

[20] *Id*. at 242-43.

[21] 448 U.S. 56 (1980).

[22] *Id*. at 66.

[23] 541 U.S 36 (2004).

tation Clause, its origin, and original public meaning.[24] Of "testimonial" evidence, the Court declined to "spell out a comprehensive definition" but stated, "[W]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[25]

Just two years later, in *Davis v. Washington,*[26] the Court consolidated and heard two cases, an appeal from Washington's *State v. Davis*[27] [*Davis*] and one from Indiana's *Hammon v. State*[28] [*Hammon*]. Both cases involved statements to police by unavailable witnesses. The statements were admitted as evidence at trial. In *Davis*, the ex-girlfriend of the defendant made statements to a 911 emergency operator, describing her real-time victimization in a domestic disturbance. She refused to testify at trial and was deemed unavailable. The state played her 911 call instead. In *Hammon*, the state admitted the sworn affidavit of a wife who had recently been assaulted. When police arrived at the home, it was clear an altercation had just occurred, but the situation had calmed. The officer had the wife complete a "battery affidavit." When the wife refused to appear for Hammon's bench trial, the police officer authenticated the affidavit, over the defendant's objection. The trial judge admitted it as a "present sense impression" and an "excited utterance."[29]

Justice Scalia, once again writing for the Court, held that the affidavit from *Hammon* was clearly testimonial hearsay. The ex parte affidavit given

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[24] Criticism of *Crawford*, and its use of "law office history" are legion. *See*, *e.g.*, Kenneth Grahame, *Commentary: Confrontation Stories: Raleigh on the Mayflower*, 3 Ohio St. J. Crim. L. 209 (2005); Ben Trachtenberg, *Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause*, 64 Fla. L. Rev. 1669 (2012). The issue was not with the certainty of the historical record of Raleigh's trial, but what the public, in 1791, understood the Confrontation Clause to mean. That meaning undoubtedly stemmed from the commonly understood criticisms of Raleigh's trial, the later reforms, and the shock of the removal of the common-law right for the colonists as a result of the Stamp Act.

[25] *Crawford*, 541 U.S. at 68.

[26] 547 U.S. 813 (2006).

[27] 111 P.3d 844 (Wash. 2005), *aff'd*. 547 U.S. 813 (2006).

[28] 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom. Davis v. Washington*, 547 U.S. 813 (2006).

[29] *Id*. at 820.

to a police officer in lieu of live testimony without an opportunity for cross-examination was precisely the sort of Government action the Confrontation Clause was designed to prevent. The *Hammon* affidavit described past events and was memorialized in a formal setting. By contrast, the audio recording in *Davis* to the 911 emergency operator was the live recitation of an ongoing and present emergency and not an after-the-fact formalized statement. The Court described the difference in formality between the two statements as "striking":[30]

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[31]

Crawford and its progeny had a significant impact on criminal prosecutions, perhaps especially so for courts-martial. Courts-martial for Article 112(a) offenses based on a urinalysis alone would eventually require the appearance and live testimony of an expert from the lab who tested an accused's urine sample and prepared the urinalysis report indicating the presence of a prohibited drug metabolite in the urine sample. This new requirement stemmed from the 2009 *Melendez-Diaz v. Massachusetts* decision, where Justice Scalia, once again writing for the Court, held there was "little doubt" that certificates from laboratory technicians attesting that a substance seized from a defendant was "cocaine" fell within the "core class of testimonial statements."[32] The Court rejected arguments that these statements were not made by "accusatory" or "conventional" witnesses, but by objective scientists, responding that "[c]onfrontation is one means of ensuring accurate forensic analysis."[33]

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[30] *Id*. at 827.

[31] *Id*. at 822.

[32] 557 U.S. at 310.

[33] *Id*. at 318.

The U.S. Court of Appeals for the Armed Forces [CAAF] followed this precedent in *United States v. Blazier* [*Blazier* I];[34] *United States v. Blazier* [*Blazier* II];[35] and *United States v. Sweeney*.[36] The common thread of these cases was that the Government was involved in preparing materials and the recording or making of out-of-court statements for the primary purpose of a possible future criminal trial. CAAF held that an accused had the right to confront the declarants of these statements.

Soon after *Crawford*, CAAF decided *United States v. Scheurer*,[37] where it held that statements by the appellant's wife (an Airman) to a co-worker (a Senior Airman) who secretly recorded their conversation were non-testimonial. The Senior Airman had reported previous conversations to the Air Force Office of Special Investigations [AFOSI]. AFOSI persuaded her to wear a wire to secretly record any future conversations.

In the subsequent recorded conversations, the appellant's wife implicated herself and her husband in drug use and other misconduct. Borrowing from two Federal Circuit Courts of Appeal cases interpreting *Crawford*, CAAF held this was not testimonial hearsay because the appellant's wife made the statements to a private individual with no overt association with law enforcement and with no expectation of it being conveyed to police, the prosecution, or other officials. The court further found that "statements made to family, friends, and acquaintances without an intention for use at trial have consistently been held not to be testimonial, even if highly incriminating to another,"[38] and that a "declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony

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[34] 68 M.J. 439 (C.A.A.F. 2010) (finding that statements in cover memorandum of drug laboratory report declaring the presence of an illegal drug and the quantity present were testimonial because the Government requested such information for a court-martial).

[35] 69 M.J. 218 (C.A.A.F. 2010) (finding statements of testifying drug laboratory official that repeated testimonial hearsay contained in laboratory reports to be inadmissible).

[36] 70 M.J. 296 (C.A.A.F. 2011) (finding declarants of statements included in drug laboratory report not appearing at trial constitute denial of appellant's confrontation rights).

[37] 62 M.J. 100 (C.A.A.F. 2005).

[38] *Id*. at 105 (citing Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 540 (2005)).

within the meaning of *Crawford*."[39] CAAF left unanswered the hypothetical question of whether a declarant's unknowing statements to an informant would be testimonial if the questions were "structured" by the Government. In *Scheurer*, "the Government's role in obtaining the statements amounted only to facilitation, not direction or suggestion."[40]

After *Davis*, CAAF decided two cases in 2007, *United States v. Rankin*[41] and *United States v. Gardinier*,[42] concerning whether statements were testimonial or not. In *Rankin*, CAAF distinguished between testimonial and non-testimonial hearsay in an unauthorized absence case, finding several documents were non-testimonial hearsay, but that one other may have been testimonial hearsay. The documents that were non-testimonial hearsay were: (1) a letter generated by the command to the appellant's mother informing her that her son was in an unauthorized absence status and imploring her to urge him to surrender to military authorities; (2) a computer-generated entry in the appellant's personnel record indicating his first day of unauthorized absence; and (3) a naval message from the Naval Absentee Collection Information Center informing other naval units involved with personnel collection that the appellant had been apprehended by civilian authorities. These documents were all more "routine and objective cataloging of unambiguous, factual matters" and not generated to "bring appellant to trial."[43]

But the final document was a copy of a form DD-553, entitled "DESERTER / ABSENTEE WANTED BY THE ARMED FORCES," that physically described the appellant and stated that because he had been absent for more than 30 days beyond the date he initially absented himself, that civilian law enforcement was authorized to detain him. For CAAF, this resembled an arrest warrant, which has a "significant prosecutorial purpose,"[44] though it was designed more to produce the appellant himself for trial than to provide evidence against him for the trial. Even if this document was testimonial hearsay, CAAF considered it harmless beyond a reasonable doubt because the evidence contained in it was cumulative with other admitted evidence.

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[39] *Id*. (citing *United States v. Saget*, 377 F.3d 223, 229 (2d. Cir. 2004)).

[40] *Id*. at 106.

[41] 64 M.J. 348 (2007).

[42] 65 M.J. 60 (2007).

[43] *Rankin*, 64 M.J. at 352.

[44] *Id*. at 353.

In expounding on testimonial hearsay, CAAF identified some questions that "emerge as relevant in distinguishing between testimonial and nontestimonial hearsay."[45] They were, (1) "was the statement . . . made in response to law enforcement or prosecutorial inquiry?"; (2) "did the 'statement' involve more than a routine and objective cataloging of unambiguous factual matters?"; and (3) "was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?"[46] The third question was, in light of the primary purpose test from *Davis*, "contextual, rather than subject to mathematical application of bright line thresholds."[47]

In *Gardinier*, CAAF applied the questions from *Rankin* in a child sexual assault case. When a clinical forensic specialist examined a child after an allegation had been reported to law enforcement, she documented some of the child victim's statements on a "Forensic Medical Evaluation Form." The form, and the statements, were admitted at trial. CAAF held that these statements were testimonial hearsay because the nature of the examination indicated the examiner was acting on behalf of law enforcement. The sheriff's office arranged for the examination, the medical form indicated that it would be provided to the sheriff's office, and the sheriff's office was billed for it. The examiner was not just providing medical treatment or evaluation of the child. Her primary purpose was eliciting statements with an eye toward trial. CAAF added, "Under the totality of the circumstances presented here," the child victim's statements were testimonial in nature and "admitted in error."[48]

3. Michigan v. Bryant *and its aftermath*

The Supreme Court continued expounding on testimonial hearsay in a 2011 case, *Michigan v. Bryant*.[49] When police responded to a radio dispatch that a man had been shot and was injured at a local gas station, they found the victim in his car. He told them that, about half-an-hour before, he had been shot by a man named "Rick" [Richard Bryant] as he exited his back porch. The victim was able to get in his car and drive away to a gas station. He spoke to police for about 5 to 10 minutes before emergency medical ser-

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[45] *Id.* at 352.

[46] *Id.*

[47] *Id.*

[48] *Gardinier*, 65 M.J. at 66.

[49] 562 U.S. 344 (2011).

vices arrived. The victim later died in the hospital from the wound. Police called for additional backup, went to the home described, and found the victim's wallet, some blood, a bullet, and a bullet hole in the back door. But they did not find Bryant at the home [he was only found and arrested a year later in California]. Bryant was eventually convicted of second-degree murder with the use of the police officers' testimony that included the victim's statements at the gas station.

The Court held that the victim's statements were nontestimonial hearsay. The Court considered that the situation was an ongoing emergency based on the informality of the officers' exchange with the victim and the lack of any circumstances that would have led the victim to believe his statements were for later use at trial.

This drew a sharp dissent from Justice Scalia [joined by Justice Ginsburg] over whether the intention of the interrogator mattered at all. The dissent argued that the "declarant's intent is what counts," adding, "That is what distinguishes a narrative told to a friend over dinner from a statement to the police."[50] The dissent argued that this scenario was misread by the Court and was actually someone who was giving information to the police, not because he had an ongoing physical emergency due to an immediate threat from the suspect, but precisely because he wanted police to have information to find and punish Bryant. The dissent accused the Court of muddying the waters to insert into the analysis a "totality of the circumstances"[51] test by adding in the purpose of the interrogator along with the purpose of the declarant. This could result in judges deciding the result they want rather than adhering to the guarantee found in the Confrontation Clause.

The majority acknowledged the criticism, stating that it is a "misreading" to believe the Court intends to give "controlling weight to the intentions of the police."[52] *Bryant* held that because "the declarant's statements, not the interrogator's questions, will be introduced to 'establis[h] the truth of the matter asserted,' and must therefore pass the Sixth Amendment test," the "identity of the interrogator, and the content and tenor of his questions, can illuminate the primary purpose of the interrogation."[53]

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[50] *Id*. at 381 (Scalia, J., dissenting).

[51] *Id*. at 383.

[52] *Id*. at 369 (internal quotation marks omitted).

[53] *Id*. (alteration in original) (citations and internal quotation marks omitted).

Four years later, the Court decided *Ohio v. Clark*[54] and again sparred over the way to analyze testimonial hearsay, this time with a child as the declarant. Clark sent his girlfriend hundreds of miles away to engage in prostitution while he agreed to watch her three-year-old son and 18-month-old daughter. When Clark dropped off the boy at his preschool, the teachers discovered Clark had been physically abusing him. As mandatory reporters, the teachers told law enforcement what the boy had told them about how he and his sister were both being abused. Clark was convicted of felony assaults, domestic violence, and endangering children, largely on the boy's statements and without being able to confront the two children at trial.

The Court unanimously held that the boy's statements were nontestimonial. The majority found that the primary purpose of the teachers' questioning was to "protect" the boy, that the conversation was "informal and spontaneous," and that it was "extremely unlikely" the boy did, or even could, intend or understand that his statements to his teachers could be used for a prosecution.[55]

Prominent in *Clark* was whether a mandatory reporting law essentially deputized such mandatory reporters as agents of law enforcement when they questioned a declarant. The majority "decline[d] to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment" but cautioned that statements must be evaluated in context, "and part of that context is the questioner's identity."[56] "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."[57]

Justice Scalia [again joined by Justice Ginsburg] concurred but complained the majority was departing further from the holding of *Crawford* and clearing a path for a return to the "flabby test" of *Ohio v. Roberts*, "love[d] by [p]rosecutors, past and present."[58] He believed the age of the child alone would make it impossible to form any such prosecutorial purpose in declaring anything to his teachers. But he argued that the majority characterized *Crawford* as merely "adopt[ing] a different approach" and also wrongly

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[54] 576 U.S. 237 (2015).

[55] *Id*. at 247-48.

[56] *Id*. at 249.

[57] *Id*.

[58] *Id*. at 252 (Scalia, J., concurring).

claimed that the "primary purpose test" was "necessary, but not always sufficient," in analyzing testimonial hearsay. [59]

Justice Thomas also concurred, stating he would apply the same test for statements made to private persons as he would to statements made to law enforcement agents. He recognized that the categories of statements made in "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" and statements in "formalized dialogue" such as those made in custody after *Miranda* warnings "bear sufficient indicia of solemnity to fall within the original meaning of testimony."[60] He added that "statements made to private persons rarely resemble the historical abuses that the common-law right to confrontation developed to address, and it is those practices that the test is designed to identify."[61]

Finally, one 2013 CAAF case, cited by both parties before us, *United States v. Squire*,[62] provides a necessary caution against misuse or misunderstanding of the various factors in evaluating whether statements are testimonial. In *Squire*, CAAF—anticipating *Ohio v. Clark*—held that an eight-year-old child victim's statements to two doctors were not testimonial, despite a statute requiring the doctors to be mandatory reporters of child abuse. CAAF evaluated the statements using the factors it announced in *Rankin* and *Gardinier*.

In evaluating the third *Rankin*/*Gardinier* factor [the "primary purpose" test] CAAF cited *Bryant*, stating there may be "*other* circumstances, aside from ongoing emergencies," that would place a statement outside the primary purpose of production of evidence with an eye toward trial.[63] But in citing *Bryant*'s maxim that in "evaluating the primary purpose, the law 'requires a combined inquiry that accounts for both the declarant and the interrogator,' "[64] CAAF also cited *Bryant*'s cautionary language that the "inquiry is still

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[59] *Id*. at 252-53 (Scalia, J., concurring) (alteration in original).

[60] *Id*. at 255 (Thomas, J., concurring) (citations omitted).

[61] *Id*. at 256.

[62] 72 M.J. 285 (C.A.A.F. 2013).

[63] *Id*. at 289 (citing *Bryant v. Michigan*, 562 U.S. 344, 358 (2011)) (emphasis in original).

[64] *Id*. at 289 (citing *Bryant*, 562 U.S. at 367).

objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim."[65]

CAAF also cautioned that it "did not intend for the *Rankin*/*Gardinier* factors to create a rigid set of criteria for determining whether a statement was testimonial, but rather provided them as examples of what an appellate court could consider in conducting an 'objective look at the totality of the circumstances surrounding the statement[s]."[66]

With the historical background and the relevant case law and its permutations in mind, we turn to the analysis of this case.

B. SZ's Statements are Not Testimonial Hearsay Because She Cannot Objectively Be Considered to Be Providing "Testimony"

Whether a statement is testimonial hearsay under *Crawford* is a question of law this Court reviews de novo.[67]

1. The military judge's findings of fact and conclusions of law

In a written ruling, the military judge found that:

> MG had a small party at her house on Sunday, 8 October 2017, while her Marine husband was out-of-town;
>
> Appellant and his wife, SZ, who were MG's next-door neighbors, both attended the party;
>
> MG became intoxicated to the point of not being able to remember events of the party, particularly how she got upstairs to her bedroom to go to sleep at the end of the evening;
>
> MG woke up at approximately 0830 on Monday, 9 October 2017, and noticed she was naked, had vomit on her stomach and vaginal area, and there was vomit on the floor by her feet;
>
> MG discovered Appellant's pants, underwear, and cell phone by the stairs, and discovered the shirt he wore the previous night at the party on her bed;

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[65] *Id*. at 290 n.10 (quoting *Bryant*, 562 U.S. at 369).

[66] *Id*. at 289.

[67] Id. at 288.

> MG contacted SZ on Tuesday, 10 October 2017, to discuss the events of the party, and SZ responded by coming to MG's house to discuss things in person;
>
> MG surreptitiously recorded her conversation with SZ, during which SZ told MG that she helped her up to her bedroom, that SZ left the house with no one other than MG inside, and that SZ did not lock the door when she left;
>
> MG was not directed to make this recording by law enforcement and was not herself a law enforcement officer;
>
> MG was interviewed by NCIS on Tuesday, 10 October 2017, and stated that she remembered Appellant vaginally penetrating her with his penis the night of the party after she had been taken upstairs to her bedroom; MG recalled feeling the carpet on her back as she lay on the floor when Appellant was penetrating her; she recalled feeling Appellant's facial mole pressed against her face, the smell of chewing tobacco, and hearing Appellant's moans as he penetrated her; and
>
> On Monday, 9 October 2017, MG received a text from SZ that included a picture of the clothes Appellant wore home from the party asking, "are these your hubbies?"[68]

Appellant faults the military judge's conclusion that "[t]here is no reason to believe that [MG] was doing anything other than trying to understand what happened the night prior to inform her opinion about whether she may have been victimized by anyone or the Accused in particular."[69] Appellant argues that this is incorrect because what MG really had in mind, as *her*

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[68] App. Ex. XXI. This last Finding of Fact is incorrect as regards to the date of the text. The text message was clearly sent on Tuesday, October 10, 2017, and it was sent *after* MG and SZ's recorded face-to-face conversation. As there was no ambiguity of the evidence presented to the military judge of the actual date of the text message, this appears to be a typo. *See* App. Ex. XI at 6-8. The NCIS Report of Investigation also makes clear the text message happened after the recorded conversation. *Id*. at 25. In any event, even if the military judge erroneously believed this text message was sent before the recorded conversation, it is irrelevant to whether SZ's statements were testimonial or not. Her suspicions, prior to the conversation, that her husband may have committed adultery, or even a sexual assault, would not mean SZ intended to, or even could, "bear testimony" against her husband by having a private conversation with a neighbor.

[69] App. Ex. XXI at 5.

primary purpose, was a prosecutorial inquiry. Appellant argues that because MG, prior to the conversation, wanted to obtain SZ's statements for prosecution, MG was involved in a prosecutorial inquiry, thus making the statements testimonial. The Government responds that MG's primary purpose was merely to "fill gaps in her memory."[70] The Government argues SZ's primary purpose behind her questioning, like the emergency room physicians in *Squire* or the preschool teachers in *Clark*, was not prosecutorial.

But this particular conclusion of law, under these facts, is largely irrelevant to the question of whether SZ can objectively be said to be providing testimonial statements to MG. The central focus is not on whatever possible subjective—and unexpressed—motives a questioner has, but on the objective viewpoint of a reasonable person in the position of the declarant.

2. The Rankin/Gardinier *factors*

We focus on the first and third of the *Rankin*/*Gardinier* factors, as the second factor—the routine and objective cataloging of unambiguous factual matters—often involves machine-generated tests, laboratory reports, and the like and does not apply to the facts of this case.

a. Was the statement elicited by or made in response to law enforcement or prosecutorial inquiry?

SZ made statements to MG. Despite MG's obvious desire to collect information for a potential criminal investigation, she was not part of an actual law enforcement entity or engaging in a prosecutorial inquiry. Her plans, motive, and intent do not deputize her. As we discuss below, *her* "primary purpose" is—per the Supreme Court in *Bryant*—some small part of the analysis, but it does not affect this particular factor.

More importantly, SZ had no concrete belief she was providing any sort of statement, and certainly not a formalized statement akin to an affidavit, that could be used against her husband. Appellant argues, as he did at trial,[71] that SZ was upset with him over his possible adultery, or worse, with MG. This speculation is not supported by the record. Even if it were true, it still does not imbue her declarations with the formality and knowledge of an official inquiry.

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[70] Appellee's Answer of 22 Jan 2020 at 18.

[71] "Hell has no fury like a woman scorned." App. Ex. V at 3, Trial Defense Counsel's Reply to the Government's Motion for Admissibility of Conversation Between [Alleged] Victim and The Accused's Wife.

In *Crawford* and in *Hammon*, Sylvia Crawford and Amy Hammon were questioned by police officers at the police station about "what happened." It was apparent to both of them, as it would be to any reasonable observer or reasonable victim in their positions, that they were providing testimonial statements in response to a law enforcement inquiry. It could not have been so apparent to SZ when she was being secretly recorded by her neighbor—who was in no way herself involved in or with law enforcement—about how drunk that neighbor was at a party.

b. Was the primary purpose for making, or eliciting, the statement the production of evidence with an eye toward trial?

This factor is where *Bryant* can be misread to undermine the original meaning of the Confrontation Clause and its proper analysis under *Crawford*.[72] While *Bryant* allowed for the consideration of the purpose of the questioner, it still maintained that the focus in determining testimonial hearsay is on the declarant's intent in making the statements and that the purpose of the interrogator is not "controlling" but merely considered to provide "context."[73] Recall that *Bryant*, on its face, looked to the point-of-view of the police officers merely to provide context to the questioning and how to evaluate the declarant's statements.

MG's purpose was to gather information and collect evidence of a past incident she believed was a crime. However, unlike the questioners in *Bryant*, she was not a uniformed law enforcement agent responding to a situation that could even remotely be considered an emergency, nor was she responding to a bona-fide emergency situation such as in *Davis*. The identity and

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[72] One observation (or criticism) of *Bryant* is that it allowed the definition of an emergency to be expanded to capture testimonial statements, especially in domestic violence cases. *See, e.g.*, I. Bennett Capers, *Reading* Michigan v. Bryant, *"Reading" Justice Sotomayor*, 123 Yale L.J.F. 427 (2014) (approvingly calling *Bryant* "subversive" of *Crawford* in service of domestic violence prosecutions). For example, after a dispute when there is no longer any active, known emergency, such as the emergency in *Davis*, an abused spouse, though still upset or frantic or fearful of some hypothetical future incident, might call 911 to report the *past* incident. Analysis that expands the "emergency" to the generalized future danger to the public, or a spouse, of an intoxicated and angry person with a firearm takes us far afield from properly evaluating testimonial hearsay and the declarant's primary purpose. This was the result from our Court in *United States v. Perkins*, NMCCA 201600166, 2016 CCA LEXIS 441 (N-M. Ct. Crim App. 2016) (unpub. op.), an Article 62, UCMJ, appeal. As an unpublished opinion, *Perkins* has no precedential value.

[73] *Bryant*, 562 U.S. at 369-70.

subjective purpose of the interrogator is perhaps most useful in evaluating whether the questioning would apply to an ongoing emergency situation.

But an emergency situation is not an "exception" to testimonial hearsay per se; it is simply not testimonial hearsay. *Davis* was *not* a scenario where law enforcement agents were questioning a declarant who provided formalized testimony about a past event. The declarant certainly did not think so. Davis's girlfriend called 911 for immediate help. "He's here jumpin' on me again. . . . He's usin' his fists."[74] The police arrived in four minutes and found her with "fresh injuries on her forearm and her face"[75] and acting frantically. Her words described contemporaneous actions, not past events. She called for immediate help, not to provide testimony.

Sylvia Crawford and Amy Hammon were questioned by police officers at the police station. Not that there could be any confusion from either declarant about the primary purpose of their statements, but if there was any confusion, even a cursory glance at the intent and purpose of the officers would provide the needed context to objectively evaluate the primary purpose of the declarants.

However, the proper focus is still on the declarant's primary purpose. SZ's primary purpose in making statements to MG was not to assist law enforcement, but rather to have a casual neighborly conversation. She was totally unaware the conversation had a potential or actual law enforcement purpose. The record is devoid of any evidence SZ had some reasonable belief she was making declarations of the solemn type to be memorialized to assist law enforcement in prosecuting a crime. The recording itself evidenced a "casual discussion."[76] Because SZ did not believe, nor could any reasonable person in her place objectively believe, she was providing evidence with an eye toward trial, her statements are not testimonial. The Confrontation Clause protects us from the Government, not from surreptitious recordings between neighbors.

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[74] *Davis*, 547 U.S. at 817.

[75] *Id*. at 818 (quoting *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005)).

[76] App. Ex. XXI at 5.

C. The Nontestimonial Statements Are Admissible Under the *Ohio v. Roberts* Test and Under Military Rule of Evidence 807

1. Standard of review and the law

We review a military judge's decision to admit evidence for an abuse of discretion, which occurs when he erroneously applies the law or clearly errs in his findings of fact.[77] "A court's factual findings on the existence of circumstantial guarantees of trustworthiness are reviewed for clear error."[78] This Court gives "considerable discretion" to a military judge admitting evidence as "residual hearsay."[79]

"When the *Crawford* framework does not apply, 'the *Ohio v. Roberts* requirement for particularized guarantees of trustworthiness continues to govern confrontation analysis for nontestimonial statements.' "[80] "Under the *Roberts* framework, nontestimonial hearsay is admissible if: 1) 'the statement falls within a firmly rooted hearsay exception, or 2) it bears other particularized guarantees of trustworthiness.' "[81]

Under Mil. R. Evid. 807, hearsay statements may be admitted as residual hearsay if:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

We consider the second prong of the *Roberts* test to be satisfied if the evidence meets the requirements of Mil. R. Evid. 807.

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[77] *United States v. Czachorowski*, 66 M.J. 432, 434 (C.A.A.F. 2008).

[78] *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003) (citing *United States v. Workman*, F.2d 140, 144 (4th Cir. 1988)).

[79] *United States v. Pollard*, 38 M.J. 41, 49 (C.A.A.F. 1993) (quoting *United States v. Powell*, 22 M.J. 141, 145 (C.M.A. 1986)).

[80] *Rankin*, 64 M.J. at 353.

[81] *Id*. (quoting *Scheurer*, 62 M.J. at 107).

In *Idaho v. Wright*,[82] the Supreme Court discussed guidelines for admitting residual hearsay. The theory of residual hearsay is that the statements bear such guarantees of trustworthiness, akin to the other exceptions under the hearsay rules found in Mil. R. Evid. 803 and 804, that "cross-examination would be of marginal utility."[83] Although *Wright* involved statements of a child—as many, if not nearly all, residual hearsay cases do—the factors the Court outlined were not "exclusive" and it noted that "courts have considerable leeway in their consideration of appropriate factors."[84] A court should consider the "totality of the circumstances . . . surround[ing] the making of the statement . . . that render the declarant particularly worthy of belief"[85] and not use a "mechanical test for determining 'particularized guarantees of trustworthiness.' "[86] The factors were: (1) spontaneity and constant repetition; (2) mental state of the declarant; (3) use of terminology unexpected of a child of similar age; and (4) lack of motive to fabricate.

In *United States v. Donaldson*, another child sexual assault case, CAAF listed several "indicia of reliability" in determining circumstantial guarantees of trustworthiness: "(1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; and (4) whether the statement can be corroborated."[87]

2. The military judge's ruling

Appellant asserts that the statements lack circumstantial guarantees of trustworthiness, pointing to two main factors. First, SZ was drinking the night of the party, and her memory of the night's events could be questionable. Second, she may have already harbored a motive to fabricate because by Tuesday afternoon—the time of the recorded conversation—she already knew her husband might have cheated on her with MG, or worse.

The Government responds that SZ had no reason to be apprehensive about the conversation or to believe anything was amiss. The Government also argues that SZ, at the time of the conversation, did not yet understand

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[82] 497 U.S. 805, 814 (1990).

[83] *Id*. at 820.

[84] *Id*. at 822.

[85] *Id*. at 819.

[86] *Id*. at 822.

[87] 58 M.J. at 488.

the possible ramifications of her husband arriving home in clothes that were not his. In addition, the Government argues it was SZ who prompted MG to want to learn more about "what happened" that night when SZ brought her husband over the next day to apologize for pouring water on her during the party. MG did not remember this incident. Finally, the Government points to corroboration of SZ's statements by MG's testimony concerning MG's level of intoxication at the party.

The military judge found the conversation was not "confrontational or tense, but rather a casual discussion."[88] He found the two women "were neighbors and friendly enough"[89] that MG invited SZ to her party. SZ had no reason to believe she was providing any sort of formal statements, but rather was having a casual conversation with no reason to do anything other than provide details to her neighbor about parts of the party that she did not remember. The military judge, in holding that the statements bore "particularized guarantees of trustworthiness," stated that Appellant was still "free to argue . . . to the members for them to weigh accordingly"[90] that SZ lied to MG about the events of the evening. But he ultimately held that a "reasonable declarant in her position would not have made the statements unless she believed them to be true."[91]

3. Analysis

In considering the *Wright* and *Donaldson* factors, the totality of the circumstances, and bearing in mind that there is no "mechanical test for deter-

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[88] App. Ex. XXI at 5.

[89] *Id*.

[90] Appellant argues the military judge misapplied or misunderstood the law when he dismissed SZ's motive to fabricate, yet still found the statements were admissible because they had such guarantees of trustworthiness to be admissible under the Rule. Statements admitted as residual hearsay can be considered to have such circumstantial guarantees of trustworthiness as to render cross-examination futile, yet still have avenues of attack available to the non-moving party. In *United States v. Sparks*, NMCCA 201000275, 2011 CCA LEXIS 21 (N-M. Ct. Crim. App. Feb. 15, 2011) (unpub. op.), a child's statements were admitted under the Rule, yet it was acknowledged that the defense still could attack the credibility of the hearsay witness and the circumstances surrounding the declarant's out-of-court statements. We believe the military judge was merely referring to the reality that admitting evidence, even under the Rule, never removes the opportunity for the non-moving party to attack its weight before the factfinder.

[91] App. Ex. XXI at 5.

mining 'particularized guarantees of trustworthiness,' "[92] we find the military judge did not abuse his discretion.

The conversation appears to be between two friends, or at least neighbors who are friendly. While MG is asking about the events of the party with an eye toward gathering information that she could potentially provide to law enforcement, there is nothing in her questioning or tone that indicates this. The only thing that comes even close to the proverbial "$64,000 Question" was the following exchange:

> MG: So then, when you put me to bed, what state was I in? Like, up there?
>
> SZ: You were gone, dude.
>
> MG: Like, did I have my clothes on?
>
> SZ: Oh, yeah. You were fully dressed and everything.
>
> MG: Okay, just making sure [laughter].
>
> SZ: No, no, you were fully dressed and everything.
>
> MG: Okay, cool.
>
> SZ: You didn't even change out of your—
>
> MG: Out of what I was wearing.
>
> SZ: You just—crashed.[93]

SZ spontaneously offered details and a narrative of events in response to MG's open-ended questions. Nothing in the conversation makes it appear SZ is mad with her husband and is lying to MG to harm him in some way. There is also nothing in SZ's answers to indicate she was so intoxicated at the party that she herself could not accurately recall events.[94]

Portions of SZ's statements can be corroborated. It was clear from the conversation that MG was heavily intoxicated that evening. SZ believed that the very purpose of the conversation itself was due to MG's inability to recall

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[92] *Wright,* 497 U.S. at 814.

[93] Pros. Ex. 8 (03:15-03:38).

[94] By her own recollection, SZ assisted MG into her bed and left the house through the garage, correctly realizing the front door had a problem locking. She went back to her house and proceeded to send text messages to neighbors looking for her husband.

events from the party due to her heavy intoxication. Both SZ and MG discuss how Appellant and SZ spontaneously came to her house the day after the party to apologize for Appellant pouring water on MG—an event MG does not remember. SZ never challenges that MG was heavily intoxicated. It is an understood fact between the two. It is also corroborated by the conversation that the front door was not working properly. When SZ tells MG that she was not able to lock the front door and had to leave through the garage, MG replied, "Yeah, that's not do-able,"[95] implying that the problem with the front door was a known condition to MG and that SZ's statement is accurate on that matter. Just as in *Donaldson*, where CAAF found that a child's statements to police were corroborated by her similar statements to others, we find SZ's statements are corroborated with respect to MG's significant level of intoxication, the circumstances of how the party ended, that SZ left MG alone in her home and was unable to lock the front door, and Appellant's presence[96] in MG's home after SZ left.

Evidence admitted under Mil. R. Evid. 807 is not required to be completely free from all questions. CAAF has reminded military judges that in considering "noncontemporaneous circumstances," they should "consider both those indicia that add to and detract from a statement's reliability when determining its admissibility under the residual hearsay rules."[97] While Appellant's arguments of SZ's motive to fabricate and her intoxication are "points to consider against admission of the statements as residual hearsay" Appellant "has failed to demonstrate that the military judge abused his 'considerable discretion' when he determined that the statements were accompanied by circumstantial guarantees of trustworthiness."[98]

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[95] Pros. Ex. 8 (02:55-03:02).

[96] We do not consider the fact that forensic testing showed the presence of Appellant's DNA on the front and crotch of MG's underwear. Pros. Ex. 14. This cuts too close to the Supreme Court's warning in *Idaho v. Wright* of when to consider after-the-fact corroboration and when not to. We consider contemporaneous corroboration of the statements themselves, *not* by referencing "other evidence at trial." *Wright*, 497 U.S. at 822. The *Wright* Court warned that corroborating a "child's allegations of sexual abuse by medical evidence of abuse" would "shed[ ] no light on the reliability of the child's allegations regarding the identity of the abuser." This could lead to a "very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement." *Id*. at 824.

[97] *United States v. Johnson*, 49 M.J. 471, 472 (C.A.A.F. 1998).

[98] *Donaldson*, 58 M.J. at 489 (quoting *United States v. Kelley*, 45 M.J. 275, 281-82 (C.A.A.F. 1996)).

III. CONCLUSION

After careful consideration of the entire record of trial, and the excellent briefs from both parties, we have determined the approved findings and sentence are correct in law and fact and find no error materially prejudicial to Appellant's substantial rights occurred.[99] Accordingly, the findings and sentence as approved by the convening authority are **AFFIRMED.**

Chief Judge Emeritus CRISFIELD and Judge LAWRENCE concur.

FOR THE COURT:

RODGER A. DREW, JR.
Clerk of Court

[99] UCMJ arts. 59, 66.