IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Private First Class (E-3) **JACOB E. SINGLETARY** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20220506 Tried at Joint Base Elmendorf-Richardson and Fort Wainwright, Alaska, on 3 June, and 4–8 October 2022, before a general court-martial convened by Commander, United States Army Alaska, Colonel Larry Babin and Colonel Matthew Fitzgerald, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error[1]

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING PROSECUTION EXHIBIT 7 PURSUANT TO THE RESIDUAL HEARSAY EXCEPTION UNDER MILITARY RULE OF EVIDENCE 807.

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Panel No. 2

Statement of the Case

On 7 October 2022, an officer panel, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of attempted rape of a child, and three specifications of sexual abuse of a child, in violation of Articles 80 and 120b, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 920b (2019) [UCMJ]. (R. at 845; Statement of Trial Results [STR]). On 8 October 2022, the military judge sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, a dishonorable discharge, and confinement for sixty-six months. (R. at 888; STR). On 8 October 2022, the convening authority waived automatic forfeitures for a period of six months and directed payment to appellant's spouse. (Action). The convening authority also disapproved the adjudged forfeitures and approved the remaining sentence. (Action). On 3 November 2022, the military judge entered judgment. (Judgment).

Statement of Facts

On 14 July 2021, Private First Class [PFC] Jacob Singletary, appellant, entered the bedroom of his six-year-old stepdaughter, Ms. [redacted], and attempted to rape her, and did sexually abuse her. (R. at 221–22, 845). Appellant asked Ms. [redacted] if she wanted to see his privates, and she told him "no." (Pros. Ex. 7).

Appellant showed Ms. [redacted] his penis and pulled off her skirt .[2] (R. at 345, 348). He then tried to pull down her underwear, but she kept pulling them back up. (R. at 226; Pros. Ex. 7). While he was doing this, he told Ms. [redacted] that he "wanted to lick her [] pretty parts," or words to that effect. (R. at 354). Appellant also offered to give Ms. [redacted] "Robux," which is credit towards an online game that Ms. [redacted] was playing, in exchange for showing him her privates. (R. at 224–25).

On 13 July 2021, appellant picked up Ms. [redacted] from work. (R. at 336). Appellant had already started drinking and finished half of a bottle of vodka. (R. at 337). When they arrived at home, they saw their neighbors, Ms. [redacted] and Specialist [SPC] [redacted]. (R. at 337). Appellant asked his neighbors if they could "go over there to hang out." (R. at 337). The neighbors had children the same age as appellant's stepchildren who often played together, but on this occasion, Ms. [redacted] wanted to stay home and play her online games. (R. at 338). The two couples played a trivia game and drank a mixture of liquor and alcoholic seltzers. (R. at 339). Appellant finished drinking the rest of his bottle of vodka. (R. at 339). During that time, appellant would drink half of a bottle of vodka per day. (R. at 339). Despite appellant's heavy alcohol consumption, he was functioning normally throughout the evening. (R. at 336, 341–42).

[2] This article of clothing is referred to interchangeably in the record as a skirt and a skort. Ms. [redacted] explains that [redacted] was wearing a "skort," which is a combination of a skirt and shorts. (R. at 274).

At approximately 2300, Ms. [redacted] went home to charge her vape (electronic cigarette), check on her daughter (Ms. [redacted]), and then returned to her neighbors' house. (R. at 343). Approximately thirty to forty-five minutes later, Ms. [redacted] noticed that appellant was missing from the gathering. (R. at 344). Ms. [redacted] went home to get her vape and check on appellant and her daughter. (R. at 345). When Ms. [redacted] entered her daughter's room, Ms. [redacted] was "on her bed," "she was laying down on her pillow and her legs were bent," she was wearing just her underwear and shirt and her skirt was beside her on the bed. (R. at 345). Appellant was "sitting on the end of [[redacted]'s] bed, "leaning back," and looking toward the ceiling. (R. at 345). Appellant's "pants were unzipped" and two fingers (pointer and middle finger) of his right hand "were like rubbing . . . inside of the zipper," while his left hand was right by the zipper and trying to zip his pants up. (R. at 345). When Ms. [redacted] entered the room she asked, "what's going on?" and "why are your pants unzipped?" to which appellant replied, "they're not." (R. at 347). Appellant then leaned forward, laid on the floor next to the bed, and closed his eyes. (R. at 347). Ms. [redacted] told her mother that appellant had taken her "skirt off," and Ms. [redacted] took [redacted] back to her neighbor's house. (R. at 348).

Once back at the neighbor's house, Ms. [redacted] told her mother, and Ms. [redacted] what occurred, which prompted Ms. [redacted] to call the police. (R. at 349). Ms. [redacted] and SPC [redacted] went back over to appellant's house and told appellant that the police

were coming. (R. at 349). Shortly before the police arrived, appellant came down the stairs, craned his head to look around the corner for police, and said "oh, I'm fucked." (R. at 353). Appellant then, sitting on the edge of the curb, laid back on the grass and started "gasping for air like he couldn't breathe" before the ambulance arrived to take him to the hospital. (R. at 353–54). Approximately one to two days after charges were preferred against appellant, he called Ms. [redacted] and said, "if you don't remember, I'll take care of you," or words to that effect. (R. at 356).

At trial, approximately fifteen-months had passed since the incident was reported to law enforcement, and Ms. [redacted] was now seven-years old. (App. Ex. XXXVIII, p. 1; R. at 219). The first exchange between Ms. [redacted] and trial counsel about the crime went as follows:

> Q: What happened when [appellant] came into your room?
> A: Okay. He comed [sic] in my room and he said—I forgot again—and he said he—I forgot what he said.
> Q: You forgot what he said?
> A: "Yeah."
> Q: Did he ask if you wanted to see any parts of him?
> A: [Unintelligible]
> Q: I'm sorry, [Ms. [redacted]], can you try to talk loud enough so that they can hear you in the back of the room, please?
> A: Okay.
> Q: Did he say that—or ask if you wanted to see any parts of him?
> A: No.
> Q: No, he didn't, or no, you don't remember?
> A: I don't remember.

(R. at 223).

Although Ms. [redacted] went on to testify about the various attempted sexual acts and lewd comments that she did recall, Ms. [redacted] stated she did not recall details that she had previously provided in her recorded forensic interview with Ms. [redacted]. For example, trial counsel asked:

> Q: "Do you [] remember him saying anything else?
> A: No.
> Q: No, you don't remember him saying anything else?
> A: No.

(R. at 225).

On one occasion, trial counsel gave Ms. [redacted] an opportunity to clarify whether something did not occur or whether she simply did not remember:

> Q: Did your mom say anything to [appellant]?
> A: No.
> Q: No, she didn't or no, you don't remember?
> A: Well, her [sic] didn't said anything.

(R. at 225).

On cross examination, Ms. [redacted] also could not recall certain details about who she spoke to in preparation for trial:

> Q: Talked to a lady in an interview?
> A: Don't know.
> Q: And you talked to Major [MAJ] [redacted] before about this?
> A: Don't know.
> Q: You talked to [redacted] is that right?
> A: I forgot, I don't know.

(R. at 233–34).

On cross examination, defense counsel asked Ms. [redacted] leading questions which were contradictory to her previous statements in her recorded interview and contradictory to the observations of the other eyewitnesses:

> Q: And you were wearing pants that night?
> A: Yeah.
> Q: Not a skirt?
> A: No.
> . . .
> Q: He didn't pull down your underwear?
> A: No.

(R. at 235–36).

On redirect, trial counsel sought clarification from Ms. [redacted] regarding what she was wearing:

> Q: You said that you weren't wearing a skirt. Can you describe what you were wearing that night?
> A: I think pants, what are like, white and pink and more colors.
> Q: So when you say "pants," could it have been, like, a skort?
> A: No, I think it's just rainbow pants, but those are my favorite ones.
> Q: You think it was just plain old pants?
> A: No, those are just rainbow pants. I just call them that.
> Q: Are you having a hard time remembering what you were wearing that night?
> A: Yeah.

(R. at 239).

All three specifications involved statements or actions by appellant that Ms. [redacted] relayed to an adult closer in time to the attempted rape but could not recall at the time of trial. (Charge Sheet; R. at 223–25). Ms. [redacted] was the sole witness to these statements and actions by appellant that formed the basis of the charges. (R.

at 320). Ms. [redacted] relayed these statements and actions to Ms. [redacted], Ms. [redacted], and Ms. [redacted]. (R. at 313; Pros. Ex. 7). The statements included appellant asking Ms. [redacted] if she "wanted to see his privates," and if he could "lick her pretty parts."

The military judge ruled that Ms. [redacted]'s statements to Ms. [redacted], her mother, and Ms. [redacted] the neighbor, were present sense impressions. (R. at 313). The military judge found that the forensic interview with Ms. [redacted] was admissible under Mil. R. Evid. 807, residual hearsay. (R. at 315–21; App. Ex. XXXVIII). The military judge issued both an oral and written ruling detailing his findings. (R. at 315–21; App. Ex. XXXVIII). The military judge noted that although portions of the interview may be objectionable under Mil. R. Evid. 401, 402, or 403, the parties were "no longer at an impasse as to the video." (R. at 319–20). The military judge offered defense "the opportunity before that video is introduced into evidence to consider any redactions of non-relevant material." (R. at 320). Defense agreed with the military judge's summarization on the record and did not wish to "add or clarify" any portion of it. (R. at 321). Defense had no objection when Prosecution Exhibit 7 was offered into evidence. (R. at 484).

Assignment of Error

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING PROSECUTION EXHIBIT 7 PURSUANT TO THE RESIDUAL HEARSAY EXCEPTION UNDER MILITARY RULE OF EVIDENCE 807.

Standard of Review

This court reviews admission of evidence under Mil. R. Evid. 807 for an abuse of discretion. *United States v. Czachorowski*, 66 M.J. 432, 434 (C.A.A.F. 2008). "A military judge's decision to admit residual hearsay is entitled to 'considerable discretion' on appellate review." *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003) (quoting *United States v. Pollard*, 38 M.J. 41, 49 (C.M.A. 1993)).

"A military judge abuses his or her discretion when: (1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider important facts. *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022).

Law

Military Rules of Evidence 807 states that "a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Mil. R. Evid. 803 or 804: [if] (1) the statement has equivalent circumstantial guarantees of trustworthiness [reliable]; (2) it is offered as evidence of a material fact [material]; (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 [necessary]; and (4) admitting it will best serve the purposes of these rules and the interests of justice."[3]

"The residual hearsay rule sets out three requirements for admissibility: (1) materiality, (2) necessity, and (3) reliability." *United States v. Kelley*, 45 M.J. 275, 280 (C.A.A.F. 1996). The materiality prong "is merely a restatement of the general requirement that evidence must be relevant." *United States v. McAninch*, 2019 CCA LEXIS 142, *7 (Army Ct. Crim. App. 1 Apr. 2019) (quoting *United States v. Peneaux*, 432 F.3d 882, 892 (8th Cir. 2005). "The residual-hearsay exception is 'intended to apply [only] to highly reliable and necessary evidence.'" *Wellington*, 58 M.J. at 425 (citing *United States v. Giambra*, 33 M.J. 331, 334 (C.M.A. 1991). When "the declarant testifies and the Sixth Amendment's Confrontation Clause is satisfied, reliability of the residual-hearsay evidence may be established by the circumstances that immediately and directly surround the making of the declaration as well as corroboration by other evidence extrinsic to the declaration." *Id.* (citing *United States v. Morgan*, 40 M.J. 405, 409 (C.M.A. 1994); *United States v. McGrath*, 39 M.J. 158, 167 (C.M.A. 1994)).

[3] "The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it." Mil. R. Evid. 807.

Although "'the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances' . . . 'one such exceptional circumstance generally exists when a child abuse victim relates to an adult the details of the abusive events.'" *Kelley*, 45 M.J. at 280 (citing *United States v. Shaw*, 824 F.2d 601, 609 (8th Cir. 1987)). "The more liberal approach in child abuse cases extends to the necessity requirement." *Id.* Even evidence that may be "somewhat cumulative" may be admitted as residual hearsay when it is "important in evaluating other evidence and arriving at the truth." *Id.* Thus, the "'more probative' requirement cannot be interpreted with cast iron rigidity." *Id.* (cleaned up). "The necessity prong 'essentially creates a 'best evidence' requirement.'" *Kelley*, 45 M.J. at 280 (citing *Larez v. City of Los Angeles*, 946 F.2d 630, 644 (9th Cir. 1991)). "This prong may be satisfied where a witness cannot remember or refuses to testify about a material fact and there is no other more probative evidence of that fact." *Id.* (citations omitted).

For the reliability prong, "[i]n determining whether a statement is supported by circumstantial guarantees of trustworthiness, we look to a number of indicia of reliability. These may include, among other things: (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." *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003) (citing *United States v. Grant*, 42

M.J. 340, 343–44 (C.A.A.F. 1995); *Kelley*, 45 M.J. at 281; *United States v. Cox*, 45 M.J. 153, 157 (C.A.A.F. 1996)). "Other indicators of reliability may include the declarant's age or the circumstances under which the statement was made." *Id.* (citing *Kelley*, 45 M.J. at 281; *Cox*, 45 M.J. at 157). Ultimately, "[i]t requires an analysis of numerous factors indicating the time, place, and circumstances of the making of the statement to qualify it." *Giambra*, 33 M.J. at 334 (citations omitted). A court's factual findings on the existence of circumstantial guarantees of trustworthiness are reviewed for clear error. *Id.* (citing *United States v. Workman*, 860 F.2d 140, 144 (4th Cir. 1988)).

Argument

The military judge did not abuse his discretion when he ruled that the government could properly introduce Ms. [redacted]'s statements under the residual hearsay exception. The military judge's findings of fact and conclusions of law were reasonable and supported by the record. Appellant's argument that the evidence failed to meet the necessity prong is unsupported by the record and case law. Appellant's assertion that the admission of the *entire* recorded interview was error was waived at trial. Even assuming the military judge abused his discretion, there was no material prejudice to appellant's substantial rights.

1. The military judge did not abuse his discretion.

The military judge predicated his ruling on findings of fact that were supported by the evidence in the record. (App. Ex. XXXVIII, pp. 1–2). He provided both an oral and written ruling detailing his findings. (R. at 312–21). The military judge relied upon sound legal principles when he determined that the evidence satisfied all four prongs of Mil. R. Evid. 807, or as described in *United States v. Kelly*, the three prongs of materiality, necessity, and reliability. (App. Ex. XXXVIII, pp. 3–4). The military judge's application of these legal principles to the facts was not clearly unreasonable; nor did he fail to consider important facts. (App. Ex. XXXVIII, pp. 1–4). *Rudometkin*, 82 M.J. at 401.

A. Materiality

The military judge properly noted that "[t]he materiality prong 'is merely a restatement of the general requirement that evidence must be relevant.'" *McAninch*, 2019 CCA LEXIS 142 at *7 (Army Ct. Crim. App. 1 Apr. 2019) (quoting *Peneaux*, 432 F.3d at 892). The military judge found "the statements are relevant to the charged offenses" citing "spontaneous and unprompted declarations to Ms. [redacted] several times about the alleged events." (R. at 319; App. Ex. XXXVIII, p. 2). Here, like in *McAninch*, appellant concedes the materiality of the evidence.[4]

[4] Appellant does suggest that portions of the interview may have been irrelevant or otherwise inadmissible which is discussed *infra*.

(Appellant's Br. 13) ("the interview contains statements of the named victim that provide direct and circumstantial evidence of the charged offenses – a clear indication of materiality.").

B. Reliability

The military judge properly concluded the evidence was reliable with independent guarantees of trustworthiness. (App. Ex. XXXVIII, p. 4). Appellant does not contest this finding, nor does the record support any argument that the evidence from the forensic interview was unreliable. (Appellant's Br. 11, 14) (noting that "the quality of this interview was extremely significant," and that the "questions [were asked] in an objectively nonthreatening environment" with a "level of specificity not found in Miss AS's testimony").

C. Necessity

Appellant argues that Ms. [redacted]'s entire recorded interview was not necessary because "her testimony [at trial] did not display an inability or unwillingness to remember." (Appellant's Br. 11). This premise is incorrect for the following reasons. First, the record is clear that Ms. [redacted] could not recall both basic and crucial details which she had recalled fifteen-months prior in her forensic interview. (R. at 223, 225, 233–34, 235–36). The basic details, such as what she was wearing, were verifiable and independently corroborated by both her mother and her forensic interview. (R. at 348; Pros. Ex. 7). The forensic interview, which

occurred twelve-hours after the events, provided the court with the best evidence of what occurred and included crucial details, such as what appellant said to Ms. [redacted] during the commission of the crime. (Pros. Ex. 7; R. at 297, 318, 321).

Even though some of this evidence overlapped with Ms. [redacted]'s present sense impressions to her mother or neighbor, as this court said in *McAninch*, "[t]he necessity prong does not require that the proffered evidence be necessary to prove the proponent's case, [but r]ather, the necessity prong essentially creates a best evidence requirement." *McAninch* 2019 CCA LEXIS 142 at *8–9 (quoting *Kelley*, 45 M.J. at 281 (citations and quotations omitted). As the military judge found, there were "no other percipient witnesses to those matters" and thus the best evidence available was the recorded interview of Ms. [redacted]. (R. at 320).

Just as in *McAninch*, the evidence involved a child victim of sexual abuse and a recorded forensic interview. *Id.* The proffered hearsay of the recorded interview was certainly the most probative version of Ms. [redacted]'s account of events reasonably available to the government. *Id.* Even if this evidence was somewhat cumulative with the present sense impressions, residual hearsay evidence regarding child sexual abuse victims relaying what occurred "may be 'somewhat cumulative.'" *Id*. (quoting *Shaw*, 824 F.2d at 609). Therefore, even if the evidence overlapped with Ms. [redacted]'s present sense impressions, it was still admissible under Mil. R. Evid. 807.

Appellant suggests that because Ms. [redacted] testified to certain discreet facts at trial, her recorded interview was not the best evidence available. (Appellant's Br. 11). However, this court rejected that exact conclusion in *United States v. Cleveland*. 2017 CCA LEXIS 408 *3 (Army Ct. Crim. App. 16 Jun. 2017). In *Cleveland*, a military judge erroneously concluded that the government could not admit hearsay statements of a child victim because the child was available to testify and her testimony was the best evidence. *Id.* In *Cleveland*, the child victim recanted her testimony at trial. *Id.* This court vacated the judge's ruling, stating: "[u]nlike Mil. R, Evid. 804, Mil. R. Evid. 807 has no requirement that the declarant be unavailable as a precondition for admission of residual hearsay." *Id.*

Just as a recanting victim's testimony at trial is not the best evidence available, a seven-year old victim's memory of events fifteen-months after the act is not the most probative evidence on the issue either. *Id.* In *McAninch*, *Cleveland*, and here, the child witness's testimony was not the most probative evidence, and admitting the proffered residual hearsay was in the best interest of arriving at the truth. For those reasons, admitting Ms. [redacted]'s more detailed recollection of events, which occurred closer in time to the crimes, "best serve[d] the purposes of these rules and the interests of justice." Mil. R. Evid. 807(a)(4).

i. Waiver

Second, appellant argues that even if some of the proffered hearsay was admissible, the military judge abused his discretion by admitting the *entire* interview. (Appellant's Br. 11). This is incorrect for two reasons. First, this argument was waived at trial. (R. at 320–21, 484). Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Olano,* 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "The first limitation on appellate authority under Rule 52(b) is that there indeed be an 'error.' Deviation from a legal rule is 'error' unless the rule has been waived." *Id.* at 732. As this court has recognized, "under the current version of Article 66, effective 1 January 2021, [this court] no longer retain[s] the 'should be approved' discretion to reach waived claims." *United States v. Strong*, 83 M.J. 509, 524 n.19 (Army Ct. Crim. App. 2023) (Smawley, C.J., dissenting).

Here, appellant clearly waived any claim to the admission of the complete recorded interview. The military judge provided defense with ample opportunity to object to certain portions of the recorded interview under Mil. R. Evid. 401, 402, or 403. (R. at 319–20). Despite that opportunity, the military judge stated that "the parties have told me they are no longer at an impasse as to the video." (R. at 320). This suggests that defense had a strategic purpose for wanting the video in evidence in its entirety if it was going to be in at all. The military judge gave

defense further opportunity to "add or clarify" the military judge's summary, to which they replied, "No, Your Honor." (R. at 321). This was reaffirmed when the entirety of Prosecution Exhibit 7 was admitted into evidence without further objection. (R. at 484). Therefore, although defense preserved their objection to the admission of the evidence generally, any argument that specific portions of the evidence were inadmissible was expressly waived at trial.[5]

ii. Probative value

Additionally, even if the issue was not waived at trial, the military judge would not have abused his discretion by admitting the entire video. Appellant's case involved an "exceptional circumstance" where "a child abuse victim relates to an adult the details of the abusive events.'" *Kelley*, 45 M.J. at 280 (citations omitted). One of the express reasons "this more liberal approach" in child abuse cases extends to the necessity requirement is that this evidence is "important in evaluating other evidence and arriving at the truth." *Id.* Here, Ms. [redacted]'s account to Ms. [redacted] was highly reliable, independently corroborated by eyewitness testimony, and established much closer in time to her testimony at trial. (R. at 317–18). It was clear that Ms. [redacted] could not recall certain details that she previously remembered. (R. at 223–25). Therefore, allowing the panel to be provided with

[5] Notably, appellant does not assert his counsel were ineffective, nor would such a claim be warranted. As discussed *infra*, and evidenced by closing arguments, the defense saw a clear strategic benefit in admitting the interview in its entirety.

the full context of the interview was the best means of "arriving at the truth." *Kelley*, 45 M.J. at 280.

Clearly, there was even a strategic benefit to the defense. (R. at 320–21, 484, 817–24). Trial defense counsel spent a significant portion of their closing argument focused on the forensic interview of Ms. [redacted]. (R. at 817–24). According to defense counsel, the forensic interview was instrumental to show that Ms. [redacted]'s testimony was not from "personal knowledge," but rather fed to her by an adult, most likely her mother. (R. at 817–18). Without this forensic interview, defense would not have any evidence to support one of their three theories of the case, and the only one that explained Ms. [redacted]'s accusations—Ms. [redacted] influenced her daughter's memory, and her ability to accurately recount what occurred." (R. at 810). In addition to a litany of statements made by Ms. [redacted] that allegedly showed she had been influenced, defense counsel argued that the inconsistencies between her interview and in court testimony constituted reasonable doubt. (R. at 821–22). Because the entire interview had probative value to both parties, this court should find no abuse of discretion and affirm.

D. Appellant's other arguments

Appellant argues that "[Ms. [redacted]'s] comments as to her inability to remember facts were often in response to leading questions." (Appellant's Br. 12). However, as mentioned *supra*, Ms. [redacted] stated she forgot important details in response to the

open-ended questions, such as "[w]hat happened when [appellant] came into your room," and "[d]o you remember him saying anything else?" (R. at 223, 225).

Even when trial counsel asked more specific or clarifying questions he did not lead Ms. [redacted]: "No, she didn't or no, you don't remember?" (R. at 225). The only time trial counsel arguably directed Ms. [redacted] towards an answer was in regard to what she was wearing—"[a]re you having a hard time remembering what you were wearing that night?" (R. at 239). This was on redirect after defense had asked her leading questions suggesting she was wearing pants—a fact that was contradicted by Ms. [redacted] and clearly the result of a seven-year old's faulty memory. (R. at 235, 239). However, even if this court were to accept appellant's characterization of trial counsel's questions, this court should not disturb the military judge's "considerable discretion" based on this argument. *Wellington*, 58 M.J. at 425.

Appellant asserts that an "[i]ntermittent inability to remember discrete facts is not a complete inability that might otherwise support a finding of necessity." (Appellant's Br. 11). Appellant seemingly relies on an excerpt of the facts from *United States v. O'Rourke*, for this proposition. 57 M.J. 636, 640 (Army Ct. Crim. App. 2002). However, to the extent *O'Rourke* addresses that issue at all, it actually states exactly the opposite. "The necessity prong was established by [the victim's] inability or unwillingness to testify about the *details* of the abuse she endured." *Id.*

at 643 (emphasis added). That is what occurred here—Ms. [redacted] was unable to recall *details* that she was able to remember closer in time to the events. The recorded interview provided the factfinder with those details to enable them to arrive at the truth. (Pros. Ex. 7).

Appellant argues that the "memory degradation" was not significant and thus the military judge's finding was not supported by the record. (Appellant's Br. 12). However, several of the details that Ms. [redacted] could not recall at the time of trial were expressly alleged as crimes or highly probative of appellant's intent. (Charge Sheet; R. at 297). Ms. [redacted] clearly stated "I forget" or "I don't remember" multiple times in response to trial counsel's questions about these statements made by appellant. (R. at 223, 225). The military judge's finding that Ms. [redacted] was the only witness who heard the statements firsthand and that she clearly experienced memory degradation was not clearly erroneous. (R. at 320–21). Contrary to appellant's assertions, this finding was not based on a "hypothetical six-year old," but rather the "combination of the testified to memory degradation where the declarant stated on the record, under oath, matters that she could not remember." (*Compare* Appellant's Br. 12, *with* R. at 321).

2. There was no material prejudice to appellant's substantial rights.

Article 59(a), UCMJ, provides that the 'finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error

materially prejudices the substantial rights of the accused." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019). "For nonconstitutional evidentiary errors, the test for prejudice 'is whether the error had a substantial influence on the findings.'" *Id.* (citation omitted). In conducting the prejudice analysis, this court weighs: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id.* (citations omitted).

Assuming arguendo that the military judge abused his discretion, appellant cannot show material prejudice to his substantial rights. Even without the recorded interview, the government's case was strong. Appellant was found by his wife, with his pants undone, his hand on his genitalia, in his six-year-old stepdaughter's bed, who was sitting on the bed without her skirt. (R. at 345, 348, 354). When Ms. [redacted] asked what happened, Ms. [redacted] replied that appellant had removed her skirt, tried to touch her, lick her, and exposed his genitalia to her. (R. at 354). Her statements were corroborated by her mother and her neighbor immediately after the events occurred and admitted as present sense impressions. (R. at 385). Despite forgetting certain details, her testimony remained the same fifteen-months later. (R. at 223–26). Additionally, appellant's actions and statements immediately following the attempted rape were incriminating. (R. at 353). Appellant's sudden lapses of consciousness whenever he was confronted for his

actions, and his exclamations when he realized the police were coming showed a consciousness of guilt. (347, 353).

On the other hand, the defense's case was weak and relied upon appellant's state of intoxication and vague suggestions of a motive to fabricate. (R. at 630, 634–35). Appellant testified that he could not definitively say whether he sexually abused Ms. [redacted] due to his lack of memory, and that he had no reason to believe she was lying. (R. at 644–46). Additionally, as discussed *supra*, defense relied solely upon this evidence for one of their theories of the case. (R. at 810, 817–24). Thus, even if there was error, it was harmless.

Although the materiality and quality of the evidence in question were high, the majority of the evidence was also admitted through the testimony of Ms. [redacted] and as present sense impressions through Ms. [redacted] (R. at 354). Therefore, the materiality and quality prongs do not outweigh the first two prongs of the analysis. For these reasons, any alleged error did not have a substantial influence on the findings.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.

ANTHONY J. SCARPATI
CPT, JA
Appellate Attorney, Government
Appellate Division

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government
Appellate Division

CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government
Appellate Division

APPENDIX

United States v. Cleveland

United States Army Court of Criminal Appeals

June 16, 2017, Decided

ARMY MISC 20170268

Reporter
2017 CCA LEXIS 408 *

UNITED STATES, Appellant v. Staff Sergeant JERRY D. CLEVELAND, United States Army, Appellee

Notice: NOT FOR PUBLICATION

Subsequent History: Decision reached on appeal by *United States v. Cleveland, 2020 CCA LEXIS 483, 2020 WL 7872935 (A.C.C.A., Dec. 28, 2020)*

Prior History: [*1] Headquarters, 7th Infantry Division. Lanny Acosta, Jr., Military Judge, Colonel Russel N. Parson, Staff Judge Advocate.

Counsel: For Appellant: Colonel Mark H. Sydenham, JA; Major Michael E. Korte, JA; Captain Samuel E. Landes, JA; Captain Linda Chavez, JA (on brief); Major Michael E. Korte, JA; Captain Samuel E. Landes, JA (on reply brief).

For Appellee: Lieutenant Colonel Christopher D. Carrier, JA; Captain Cody D. Cheek, JA; Captain Ryan T. Yoder, JA (on brief).

Judges: Before MULLIGAN, FEBBO, and WOLFE, Appellate Military Judges. Senior Judge MULLIGAN and Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO *ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE*

WOLFE, Judge:

We consider the appeal by the United States on a narrow issue of law concerning the residual hearsay exception. *See Article 62*, Uniform Code of Military Justice [hereinafter UCMJ]; Military Rule of Evidence [hereinafter Mil. R. Evid.] 807. At trial, the government sought to admit the prior statements of a child, Miss HC, made during a forensic interview that she had been abused by the accused. The child is available to

testify, but has recanted what she said during the interview. The military judge found, and all parties agree, she is expected to testify at trial there was no abuse by the accused. **[*2]**

The military judge excluded HC's pretrial statements under the residual hearsay exception after determining the statements were not the "best evidence on the issue of whether the alleged abuse occurred." The military judge determined as HC was willing to testify, her testimony would be the best evidence—notwithstanding she would deny the abuse. We find the military judge erred and therefore set aside his ruling and return the case to him for reconsideration in light of this opinion.[1]

Military Rule of Evidence 807(a) provides:

> Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if not specifically covered by a hearsay exception in Mil. R. Evid. 803 or 804:
> (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 interest of justice.

As the military judge excluded the evidence under the third prong (without directly ruling on whether the evidence met the other requirements), we address only the **[*3]** narrow issue before us. For purposes of this interlocutory appeal, it is undisputed HC previously made statements describing abuse. It is also undisputed HC will now testify there was no abuse. That is, this is not a case where the child-witness lacks memory of the abuse and therefore is "unavailable" to testify. Indeed, she is available to testify; she will testify there was no abuse.

The question here is what is meant by the requirement in the rule the statement "is more probative on the point for which it is offered than other evidence that the proponent can obtain through other reasonable efforts"? Is evidence "probative on the point for which it is offered" if it clearly proves the opposite of what the offering party wants? Does the statement need to be *favorable* to the offering party?

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[1] In his brief the accused makes several substantive, if collateral, arguments. First the accused notes the residual hearsay exception is not "firmly rooted," HC's statements are "testimonial" and therefore he has the right to confront his accuser under the *Confrontation Clause*. *See generally* *Crawford v. Washington, 541 U.S. 36, 51-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. That is, appellant argues even if the statements are admissible as residual hearsay, for the court-martial to consider them HC must testify, even if to be asked a single question. We leave it to the accused to determine whether to assert his right to confront HC at trial and for the military judge to ensure enforcement of the right. Second, appellant notes the military judge never ruled on whether the forensic interview statements met the remaining requirements for admissibility under Mil. R. Evid. 807. We do not directly address these concerns as the accused may raise them to the military judge upon remand without prejudice.

The military judge appears to have viewed the rule as being content neutral. That is, since HC was available to testify about *whether* she was abused, her testimony would be the "best evidence" to answer that question. Essentially, the military judge determined as HC was available to testify about the alleged abuse, the residual hearsay exception would never apply because, as he put it, "there is no **[*4]** better evidence on the issue of whether the charged offenses occurred" then HC's own testimony. In essence, the military judge found that the declarant must be "unavailable" to testify. Unlike Mil. R. Evid. 804, Mil. R. Evid. 807 has no requirement the declarant be unavailable as a precondition for admission of residual hearsay. The military judge misapplied the rule and misinterpreted the case law.[2]

We think the confusion likely stems from a series of cases where courts have held it was error to admit residual hearsay "when the evidence is not unreasonably difficult to obtain directly from an available declarant." *United States v. Czachorowski, 66 M.J. 432, 436 (C.A.A.F. 2008)* (citing *United States v. Scrima, 819 F.2d 996, 1001 (11th Cir. 1987)*; *United States v. Giambra, 33 M.J. 331, 334 (C.M.A. 1991)* ("What could be more probative on the point of the assault than the victim's own testimony that she was assaulted. . . . Her live testimony was certainly more probative than her ex parte pretrial statement."); *United States v. Azure, 801 F.2d 336, 342 (8th Cir. 1986)*; *see also United States v. Taylor, 792 F.2d 1019, 1027 (11th Cir. 1986)* (finding error in the trial court's admission of hearsay evidence when the declarant could have been questioned about her own statements).

However in each of these cases, the declarant's trial testimony would have been the same or similar to his or her prior statement. That is, a party likely cannot admit residual hearsay under Mil. R. Evid. 807 when the witness is available to testify **[*5]** and would repeat their prior statement. In such cases the in-court testimony is usually the better evidence than any out of court statement. However, that is not the case here.

Offered to prove the stoplight was green, testimony that the stoplight was red is not more probative than a prior statement that the stoplight was green. The rule requires that the evidence be "more probative *on the point for which it is offered* than other evidence." Mil. R. Evid. 807(a)(3) (emphasis added). The Court of Appeals for the Armed Forces (CAAF) has described this prong as a requirement that the evidence be "necessary." *United States v. Haner, 49 M.J. 72, 77-78 (C.A.A.F. 1998)* (the rule establishes requirements for necessity, materiality, and reliability). Indeed, perhaps the second most important book to military justice practitioners after the *Manual for Courts-Martial* elucidates "[t]he case for admission is stronger when the necessity is absolute, e.g., where there is no other reliable

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[2] Consider if the facts were reversed and HC previously said there was "no abuse" but now claims appellant assaulted her. If the prior statement otherwise met the requirement for residual hearsay, would we ever tell the accused the "best evidence" of the witness's prior statement there *was no* abuse was her in-court testimony that there *was* abuse?

evidence." Edward J. Imwinkelried et al., *Military Evidence Foundations*, § 11-15[1] (4th ed. 2010).

In several cases the CAAF has addressed residual hearsay within the context of witness recantations. In *United States v. Pollard, 38 M.J. 41 (C.A.A.F. 1993)*, the court found no error in admitting statements of residual hearsay because of a recanting witness. The **[*6]** court viewed the "necessity" of the residual statements as being necessary *to the government's case*. Indeed, the CAAF found the necessity so plain it was not worth addressing. *Id. at 49* ("The materiality of the statements is not in issue in this case, and there is no question that they were "necessary" to the Government's case."); *see also United States v. Johnson, 49 M.J. 467 (C.A.A.F. 1998)*; *United States v. Hyder, 47 M.J. 46 (C.A.A.F. 1997)* (prior statement of a recanting witness allowed under residual hearsay); *United States v. Guaglione, 27 M.J. 268, 277 (C.M.A. 1988)* (Cox, J., concurring) (with regards to "the so-called residual hearsay provisions. . . . An especially interesting situation is presented when, as here, the declarant is available for cross-examination at trial (thus eliminating confrontation problems), and he testifies in a manner inconsistent with a pretrial statement"); *United States v. Yeauger, 27 M.J. 199 (C.A.A.F. 1988)*; *United States v. Powell, 22 M.J. 141 (C.A.A.F. 1986)*.

Accordingly, we find the military judge erred when he found HC's potential trial testimony of no abuse was the best evidence for the government that there was abuse.

CONCLUSION

The appeal of the United States pursuant to *Article 62, UCMJ*, is GRANTED. The military judge's 4 April 2017 ruling is VACATED. The record will be returned to the military judge for action consistent with this opinion.

Senior Judge MULLIGAN and Judge FEBBO concur.

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United States v. McAninch

United States Army Court of Criminal Appeals

April 1, 2019, Decided

ARMY 20170091

Reporter
2019 CCA LEXIS 142 *; 2019 WL 1503718

UNITED STATES, Appellee v. Specialist DRAKE S. ***MCANINCH***, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Headquarters, United States Army Alaska. Jeffrey Lippert and Lanny J. Acosta, Jr., Military Judges. Colonel Erik L. Christiansen, Staff Judge Advocate.

*United States v. **McAninch**, 2018 CCA LEXIS 131 (A.C.C.A., Mar. 13, 2018)*

Counsel: For Appellant: Lieutenant Colonel Christopher D. Carrier, JA; Zachary Spilman, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Major Hannah E. Kaufman, JA; Captain Meredith M. Picard, JA; Captain Jessika M. Newsome, JA (on brief).

Judges: Before MULLIGAN, FEBBO, and SCHASBERGER, Appellate Military Judges. Judge FEBBO and Judge SCHASBERGER concur.

Opinion by: MULLIGAN

Opinion

MEMORANDUM OPINION ON FURTHER REVIEW

MULLIGAN, Senior Judge:

Appellant confessed to raping a four-year-old boy and producing child pornography of his victim. Appellant argues the military judge erred by admitting two forensic interviews of appellant's victim over appellant's objection. Appellant also argues that the evidence was insufficient to convict him of producing child pornography. We disagree.

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of rape of a child under twelve years of age, one specification of sexual abuse of a child under twelve years of age, and one specification of producing **[*2]** child pornography, in violation of *Articles 120b* and *134*, Uniform Code of Military Justice, *10 U.S.C. §§ 920b* and *934 (2012)* [UCMJ]. The military judge[1] sentenced appellant to a dishonorable discharge, twenty-four years of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged except that he approved only so much of the sentence to confinement as provided for twenty-three years and eleven months of confinement. Following remand for a new staff judge advocate recommendation and action, appellant's case is now before us for review pursuant to *Article 66*, UCMJ.

Of eight assignments of error raised by appellant, we will discuss two. First, whether the military judge erred by admitting video recordings of two forensic interviews of appellant's child-victim. Second, whether appellant's conviction of producing child pornography was legally and factually insufficient. We answer both questions in the negative and affirm appellant's convictions and sentence.[2]

BACKGROUND

According to appellant's own written confession, appellant attended a party hosted by the parents of KP, a four-year-old boy. KP considered appellant a friend **[*3]** and asked appellant to play video games in his room. After playing video games for some time, appellant told KP that he had a "secret game" to play. Appellant removed KP's clothes and took photographs of KP's buttocks and "a full body picture of the front of him completely naked" for appellant "to keep."[3] He then placed KP's penis in his mouth, placed his penis in KP's mouth, rubbed his genitals on KP's buttocks, and penetrated KP's anus with his penis. Appellant warned KP that "he shouldn't talk about" the "secret game" with anyone else.

KP's mother testified she remembered once, during a party, finding KP and appellant in KP's room with the door closed. She recalled appellant's pants zipper was down. Appellant claimed his zipper was broken and hurried into a nearby bathroom claiming he needed to fix it. When KP's mother asked what appellant and KP were doing, KP stated he and

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[1] Corrected

[2] We have considered the other six assignments of error raised by appellant on brief and the matters personally raised by appellant under *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. We find they merit neither discussion nor relief. We have also considered appellant's claim of dilatory post-trial processing under *United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006)*, which appellant raised in a footnote. We have factored into our consideration appellant's motion for expedited appellate review. We find appellant has suffered no actual prejudice due to delay in the post-trial processing of his case. We further find no other relief for the delay is warranted under *Article 66*, UCMJ.

[3] The photographs were never recovered. Appellant reported that he deleted the photographs later on the day he took them and subsequently destroyed his phone.

appellant "were playing a secret game." Appellant then told KP's mother the "secret game" was a secret level in a video game he had been playing with KP.

Later, KP was discovered placing his penis in the mouth of a four-year-old girl. When asked where he got the idea to place his penis in the girl's mouth, KP responded: **[*4]** "It's a secret. We don't talk about it." The next day, KP admitted that appellant taught him "the game" where he put his penis in someone else's mouth.

After KP reported that appellant had taught him the "secret game," KP was interviewed twice by a trained child forensic interviewer. The forensic interviewer used a nationally recognized protocol for interviewing children. The interviewer ensured KP understood the difference between the truth and falsehood, and emphasized the importance of KP telling the truth.

During the interviews, KP said he was there to talk about the "game" and said it was a "secret" before any such game was mentioned by the interviewer. KP went on to identify various body parts on anatomically correct diagrams. KP told the interviewer that appellant played the "secret game" with him. KP explained the "secret game" involved sucking on "wieners," that "wieners" "get bigger," and that appellant "broke" KP's "butt" with appellant's "wiener." During the interviews, KP demonstrated the "secret game" with anatomically correct dolls.

At trial, KP, who was seven years old at that point, testified that he and appellant had played the "secret game," which involved "the weird **[*5]** stuff" with "the butt and the wiener." KP was unable or unwilling to recall other details at trial and testified that he was "scared to talk about it."

Based on KP's inability or unwillingness to testify, the government moved to admit video recordings of KP's forensic interviews about the "secret game." The government offered the recordings under the residual exception to the rule against hearsay found in Military Rule of Evidence (Mil. R. Evid.) 807.

The military judge made extensive findings of fact relating to the recorded interviews and admitted them over appellant's objection that the recordings were hearsay. The military judge found the residual exception of Mil. R. Evid. 807 applied to the recorded interviews.

Appellant testified in his own defense and claimed that he was innocent and that he had lied to investigators when he confessed to raping KP. Appellant was convicted and sentenced as discussed at the beginning of this opinion.

LAW AND DISCUSSION

Two of appellant's assignments of error merit discussion. We will address them in-turn.

First, appellant argues the military judge abused his discretion by admitting video recordings of two forensic interviews of the child-victim under the residual hearsay **[*6]** exception. We conclude the military judge did not abuse his discretion by admitting the recordings. Further, even if the military judge had erroneously admitted the recordings, appellant was not prejudiced because appellant's confession was otherwise corroborated and the evidence against appellant was overwhelming.

Second, appellant argues his conviction of producing child pornography was legally and factually insufficient. We disagree. The circumstances surrounding appellant's photography of the naked child who appellant raped leave no doubt as to the sexual nature of the images appellant produced.

A. The Residual Exception to the Hearsay Rule

We review a military judge's decision to admit evidence under Mil. R. Evid. 807 for an abuse of discretion. *United States v. Czachorowski, 66 M.J. 432, 434 (C.A.A.F. 2008)* (citations omitted). "Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo." *Id.* A military judge has "considerable discretion" in admitting residual hearsay. *United States v. Kelley, 45 M.J. 275, 280-81 (C.A.A.F. 1996)*[4] (citing *United States v. Pollard, 38 M.J. 41, 49 (C.A.A.F. 1993))*.

A hearsay statement may be admitted under Mil. R. Evid. 807 if the proponent of the statement provides reasonable notice under Mil. R. Evid. 807(b) and:

> (1) The statement has equivalent circumstantial **[*7]** guarantees of trustworthiness [to the hearsay exceptions found in Mil. R. Evid. 803 or 804];
> (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.

Mil. R. Evid. 807(a). "The residual hearsay rule sets out three requirements for admissibility: (1) materiality, (2) necessity, and (3) reliability." *Kelley, 45 M.J. at 280* (discussing a prior version of the rule) (citations omitted). The materiality prong "is merely a restatement of the general requirement that evidence must be relevant." *United States v. Peneaux, 432 F.3d 882, 892 (8th. Cir. 2005)* (citations and internal quotation marks

[4] On brief, appellant argues this quotation from *Kelley* "is a misstatement of the law." Appellant argues our superior court misstated the law because *Kelley* cited to *Pollard*, which itself cited to *United States v. Powell, 22 M.J. 141, 145 (C.M.A. 1986)*, which stated, "a trial judge has considerable discretion *in determining the trustworthiness of a statement* [under the residual exception to the hearsay rule]." *Id.* (emphasis added). In other words, appellant claims our superior court misstated the law by publishing a precedential opinion, in which it relied upon its own prior precedential opinion, which may have expanded upon yet another of its own prior precedential opinions. Far from misstating the law, what our superior court writes in precedential opinions *defines* the law binding upon this court.

omitted). Appellant does not dispute materiality. The necessity prong "requires the proponent of the evidence to show he could not obtain more probative evidence despite reasonable efforts." *Czachorowski, 66 M.J. at 435*. The reliability prong requires that a hearsay statement possesses "circumstantial guarantees of trustworthiness," as stated in the text of the rule. *United States v. Giambra, 33 M.J. 331, 333 (C.M.A. 1991)*.[5]

Appellant contends the military judge erred for two reasons: First appellant argues KP's hearsay statements were not more probative on the point for which they **[*8]** were offered than any other evidence that the government could obtain through reasonable efforts. Put differently, appellant disputes the "necessity" prong of *Kelley*. Second, appellant argues KP's hearsay statements did not possess sufficient circumstantial guarantees of trustworthiness. Put differently, appellant also disputes that "reliability" prong of *Kelley*. We disagree with both arguments. A third matter also bears discussion: even if the military judge had abused his discretion by admitting the forensic interviews, the error would have been harmless.

1. Necessity: The Relative Probative Value of the Forensic Interviews

Appellant contends that the government was required to both attempt and fail to refresh KP's memory at trial prior to offering the forensic interviews under Mil. R. Evid. 807. We find no such requirement, particularly under the circumstances of this case.

The necessity prong does not require that the proffered evidence be "necessary" to prove the proponent's case. Rather, the necessity prong "essentially creates a 'best evidence' requirement." *Kelley, 45 M.J. at 281* (quoting *Larez v. City of Los Angeles, 946 F.2d 630, 644 (9th Cir. 1991)*). In other words, the proffered hearsay must be the most probative version of the declarant's account of events reasonably available **[*9]** to the hearsay proponent. In this case, the necessity prong requires that the forensic interviews of KP be the most probative source of KP's account reasonably available. Even then, the "residual hearsay may be 'somewhat cumulative.'" *Id.* (quoting *United States v. Shaw, 824 F.2d 601, 609 (8th Cir. 1987)*).

Appellant objected to admission of the forensic interviews at trial. Appellant, however, did not claim at trial that the government was required to attempt to refresh KP's recollection prior to asserting the Mil. R. Evid. 807 hearsay exception. This is unsurprising given the fact that successfully refreshing KP's recollection would have potentially yielded more damaging evidence than the forensic interviews themselves.

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[5] While the text of the residual exception has changed slightly since the cases upon which we draw guidance, the analysis in those cases remains sound.

We need not speculate on whether KP's memory could have been refreshed. The military judge found that KP testified he could not remember—or was scared to discuss—many of the factual details of his abuse by appellant. The military judge, who personally witnessed KP's testimony, credited KP's assertion that he could not or would not remember the events in question. Accordingly, the military judge found the forensic interviews were the most probative source of the evidence at issue. The military judge's factual findings were not erroneous and **[*10]** his conclusions of law were sound.

The military judge was within his discretion when he found the recordings of the forensic interviews were more probative on the point for which they were offered than any other evidence that the government could obtain through reasonable efforts. Put differently, the military judge was within his discretion to find the recordings fulfilled the "necessity" prong of *Kelley*.

2. Reliability: Circumstantial Guarantees of Trustworthiness

In evaluating whether a child's hearsay is reliable, the Supreme Court has identified several non-exclusive factors that courts may consider: spontaneity of the statements; consistent repetition of the statements; the mental state of the declarant; the use of terminology unexpected of a child of similar age; and lack of motive to fabricate. *Idaho v. Wright, 497 U.S. 805, 821-822, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)*. The Court went on to explain: "These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test . . . ." *Id. at 822*.

Appellant argues KP's statements in the forensic interview fail all of the Supreme Court's *Wright* factors. The military judge disagreed. So do we.

The military judge found: **[*11]** "The setting of the statements, including the reassurance of the interviewer to the declarant that he was in a safe place to talk, to only tell about real things, and that the declarant on his own revealed that his parents told him [sic] the truth, all favor the trustworthiness of the statements." The military judge also found: "KP appeared comfortable in the setting, and spoke naturally and appeared completely unrehearsed or coached." The military judge concluded: "The interviewer asked open ended questions and the court is satisfied based upon viewing the videos and the testimony of the interviewer that there was no suggesting of the events to [KP]. Additionally, the evidence presented demonstrates that [KP] had no motive to fabricate . . . ." We also find it significant that, while the terminology KP used may not have been unexpected of a child of his age, his descriptions of appellant's conduct with him certainly are. No child of KP's age is expected to describe a "secret game" of oral and anal sodomy.

The military judge was within his discretion to find the interviews carry sufficient circumstantial guarantees of trustworthiness to satisfy the "reliability" prong of *Kelley*. We **[*12]** are equally satisfied the forensic interview recordings satisfy the "materiality" prong of *Kelley*. Accordingly, the military judge did not abuse his discretion by admitting the recordings of the forensic interviews.

3. Harmlessness in Light of Appellant's Independently Corroborated Confession

While we find the forensic interviews of KP were properly admitted, we also find any hypothetical error in admitting the interviews would be harmless. Appellant made a written confession to his crimes. In it, he described the "secret game" he played with KP. Appellant confessed the "secret game" included appellant orally and anally sodomizing KP.

While KP's testimony at trial was limited, he testified that appellant played a "secret game" with him that involved "the butt and the wiener." KP also acted out the oral sodomy appellant inflicted on him with another child and, upon discovery, described it as a "secret" "game." KP's mother also testified about finding appellant in KP's room with the door closed, and appellant's pants zipper down. She testified KP told her he and appellant had been playing a "secret game." We conclude the combined weight of this evidence was sufficient to corroborate appellant's **[*13]** confession for the purposes of Mil. R. Evid. 304(c). In other words, KP's actions leading to his outcry, combined with his and his mother's testimony at trial, establish the trustworthiness of appellant's confession. *See* Mil. R. Evid. 304(c).

Appellant's confession is compelling and renders his subsequent recantation unbelievable. Appellant's detailed, corroborated confession constituted overwhelming evidence of his guilt, independent of the content of KP's forensic interviews. Thus, even if we had found the military judge abused his discretion by admitting the content of the forensic interviews, we would find any such error harmless.

B. Producing Child Pornography

We review questions of factual and legal sufficiency de novo. *United States v. Bright, 66 M.J. 359, 363 (C.A.A.F. 2008)*. The test for legal sufficiency is whether, "considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324 (C.M.A. 1987)*. The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed

the witnesses, [we] are [ourselves] convinced of [appellant's] guilt beyond a reasonable doubt." *Id. at 325*.

Appellant confessed to taking nude photographs **[*14]** of KP. Appellant argues, however, that the government failed to prove any such nude images of KP constituted child pornography. We disagree.

Child pornography is defined as "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." *Manual for Courts-Martial, United States* (*MCM*), pt. IV, para. 68b.c.(1) (2012 ed.). "Sexually explicit conduct" includes "lascivious exhibition of the genitals or pubic area of any person." *MCM*, pt. IV, para 68b.c.(7). To determine whether a depiction constitutes a lascivious exhibition, the *Dost* factors are instructive:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether **[*15]** the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986). Military courts assess whether an image constitutes child pornography "by combining a review of the *Dost* factors with an overall consideration of the totality of the circumstances." *United States v. Roderick, 62 M.J. 425, 429-30 (C.A.A.F. 2006)*.

The evidence demonstrates appellant produced child pornography. Appellant removed KP's clothing and took photographs of KP's naked body, both from the front and from behind. The latter photographs focused on KP's buttocks. Appellant intended "to keep" the images. Appellant immediately orally sodomized KP, both by placing KP's penis in appellant's mouth and by placing appellant's penis in KP's mouth. Appellant then rubbed his genitals on KP's buttocks and anally sodomized him. The photographs appellant took cannot be separated from the circumstances of their taking. *See id.* The circumstances were Specialist Drake ***McAninch*** raping KP.

The circumstances in which appellant took the photographs closely parallel the *Dost* factors: Appellant confessed that some of the photographs were "of [KP's] buttocks," and taken shortly before appellant penetrated KP's anus with appellant's penis. The setting of the photographs was a bedroom, **[*16]** which is commonly associated with sexual activity. KP was completely nude when appellant photographed him. Appellant photographed KP in the context of appellant's "secret game," which involved multiple forms of sexual abuse. The photographs "of [KP's] buttocks" were plainly meant to sexually arouse or gratify appellant, who took them with the intent to then anally sodomize KP. As for the fully-frontally-nude composition, appellant plainly took it also with sexual intent.

Combining our review of the *Dost* factors with an overall consideration of the totality of the circumstances, we have little trouble concluding the images appellant produced constituted child pornography. We have weighed the evidence in the record of trial and made allowances for not having personally observed the witnesses. We are ourselves convinced of appellant's guilt beyond a reasonable doubt.

CONCLUSION

The findings of guilty and sentence are AFFIRMED.

Judge FEBBO and Judge SCHASBERGER concur.

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CERTIFICATE OF SERVICE U.S. v. SINGLETARY (20220506)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted]***@mail.mil*** on this 15th day of April 2024.

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