IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20190221
Specialist (SPC) **MICHAEL P. WHITEEYES** , United States Army Appellant	Tried at Vilseck, Germany, on 2 January, 21 February, and 2–5 April 2019, before a general court-martial appointed by the Commander, Headquarters, Seventh Army Training Command, Colonel Joseph A. Keeler, Military Judge, presiding.

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

Assignments of Error

I. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S PREVIOUS STATEMENTS UNDER MILTIARY RULE OF EVIDENCE 404(B).

II. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S STATEMENTS TO LAW ENFORCEMENT IN VIOLATION OF MILITARY RULE OF EVIDENCE 304(C).

III. THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO EXCUSE A PANEL MEMBER THAT WAS IMPLIEDLY BIASED.

PANEL 3

IV. APPELLANT IS ENTITLED TO RELIEF FOR EXCESSIVE AND UNNECESSARY POST-TRIAL DELAY BY THE GOVERNMENT.

Argument

A. Appellant did not waive Assignment of Error II.

With regard to assignment of error II, the government posits that "the record supports a finding that appellant waived this issue as a matter of law." (Appellee's Br. at 21 n.8). In support of this assertion, the government cites Military Rule of Evidence (Mil. R. Evid.) 304(f)(1) for the proposition that, in the context of this issue, "[f]ailure to so move or object constitutes a waiver of the objection." (Appellee's Br. at 21 n.8). The government's citation of that rule is curious, considering the sentence prior to the government's cited portion states: "In the absence of such motion or objection, the defense may not raise the issue at a later time *except as permitted by the military judge for good cause shown*." Mil. R. Evid. 304(f)(1) (emphasis added)

Here, the military judge clearly permitted defense to raise the issue in question by written motion and then allowed trial defense counsel to litigate the same motion for twenty-five pages. (R. at 464–86). Therefore, in order for this court to determine the issue is waived, it would have to determine the military

judge—who is presumed to know and follow the law[1]—permitted both parties to file written motions, oversaw the litigation of the motion for twenty-five pages, and issued a detailed ruling, but did not think there was good cause for the motion. Such a finding would strain the limits of logic.

B. Appellant's text message cannot be used as corroboration.

In an attempt to justify the military judge's erroneous ruling, the government argues "appellant's confessions to [Special Agent (SA) [redacted]] were corroborated by his text message to [Sergeant [redacted]]." (Appellee's Br. at 23). This argument sets up a false dichotomy. If this text message was, as the military judge found[2], not an admission, then it is of no value to corroborate appellant's later admission to SA [redacted].

On the other hand, if the text message was an admission, it would have corroborative value, but the rule would exclude it. Military Rule of Evidence 304(c)(2) states"[o]ther uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply . . . independent evidence." Accordingly, if the court determines this text message was an admission, it is impermissible for this court to then use it as independent evidence for corroboration purposes.

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[1] *See United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007); *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F. 2004).
[2] (R. at 485).

C. Uncontroverted evidence supports that there was no evidence between [redacted]'s behaviors and appellant's alleged conduct.

The government's next attempt to justify the military judge's erroneous ruling focuses on evidence that "[redacted]'s behavior changed where she would get naked, take off her diapers, and poke objects and toys into her vagina." (Appellee's Br. at 23). Again, the government misses the boat entirely. The record contains uncontroverted expert testimony from Dr. [redacted] establishing that even if appellant's alleged conduct did occur, there was no nexus between [redacted]'s behavior and the alleged conduct. (R. at 786, 794). Specifically, Dr. [redacted] testified "it would be inappropriate, just from that behavior itself, to determine that [[redacted].] had been sexually abused." (R. at 794). The government never rebutted this testimony.

As such, there was only one piece of evidence before the military judge: [redacted].'s behavior, while curious, was *not* related to the alleged misconduct. (R. at 786, 794). As such, the military judge could not have found [redacted]'s alleged behavior to be independent evidence to corroborate appellant's admissions. This evidence simply did not create an inference of truth in appellant's statements because defense counsel effectively severed the relevance link between the behavior and the alleged misconduct, and the government never re-connected that link.

Conclusion

Based on the foregoing, the appellant respectfully requests this court set aside the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on 23 November 2020.

[redacted]
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