

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
BURTON, RODRIGUEZ, and FLEMING  
Appellate Military Judges

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

ARMY 20170496

Headquarters, 7th Infantry Division  
Lanny J. Acosta, Jr., Military Judge  
Colonel Rebecca K. Connally, Staff Judge Advocate

For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Kyle C. Sprague, JA; Captain Alexander N. Hess, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Kyle C. Sprague, JA; Captain Alexander N. Hess, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Marc J. Emond, JA (on brief).

28 December 2020

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MEMORANDUM OPINION ON FURTHER REVIEW  
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*This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.*

BURTON, Senior Judge:

Appellant claims the military judge erred in allowing the child victim's statement into evidence as residual hearsay. For the reasons set forth below, we find appellant's case is one of the rare and exceptional cases where admission of the statement as residual hearsay was appropriate.<sup>1</sup>

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<sup>1</sup> We gave full and fair consideration to appellant's other three assigned errors, as well as the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they merit neither discussion nor relief. We note appellant raised as an assigned error that the military judge erred in

(continued . . .)

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of rape of a child, two specifications of sexual abuse of a child, and one specification of communicating a threat, in violation of Articles 120b and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920b and 934. The panel sentenced appellant to a dishonorable discharge and confinement for eight years. The convening authority approved the adjudged sentence and credited appellant with four hundred thirty days of pretrial confinement credit.

On 27 June 2019, this court issued an order staying the appellate proceedings in appellant’s case, returned the record to the convening authority, and ordered a new action due to the omission of the transcript of an Article 39(a), UCMJ, session from the record. *United States v. Cleveland*, ARMY 20170628 (Army Ct. Crim. App. 27 Jun. 2019) (order).

On 16 September 2019, the convening authority withdrew the initial action in appellant’s case and took new action on the record including the previously omitted transcript from the Article 39(a) session. The convening authority approved the adjudged sentence and credited appellant with four hundred thirty days of pretrial confinement credit.

On 20 December 2019, this court issued another order staying the appellate proceedings in appellant’s case and returned the record to the convening authority for a new action due to the government’s failure to comply with Rule for Courts-Martial [R.C.M.] 1105, 1106, and 1107. *United States v. Cleveland*, ARMY 20170628 (Army Ct. Crim. App. 20 Dec. 2019) (order).

After receiving appellant’s post-trial matters, the convening authority withdrew the prior action and substituted a new action on 20 February 2020. The convening authority approved the findings of guilty for Specifications 1 and 4 of

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(. . . continued)

his Military Rule of Evidence [Mil. R. Evid.] 404(b) ruling allowing the government to use appellant’s jail calls as probative of appellant’s plan. Assuming without deciding this was error, we find the military judge also allowed the calls to show appellant’s consciousness of guilt. *See United States v. Cook*, 48 M.J., 64, 66 (C.A.A.F. 1998 (concluding that one of the “other purposes” for which uncharged misconduct may be admissible is evidence of consciousness of guilt). We find appellant’s statements to his wife in his jail calls reflect his consciousness of guilt. The military judge conducted a Mil. R. Evid. 403 prejudice analysis and concluded the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Thus, we find the military judge did not abuse his discretion.

Charge II (rape and sexual abuse of a child in violation of Article 120b, UCMJ) and The Specification of Charge III (communicating a threat in violation of Article 134, UCMJ). The convening authority disapproved the finding of guilty for Specification 2 of Charge II. After reassessing the sentence, the convening authority approved only so much of the sentence to confinement as provides for five years and two hundred eighty-five days of confinement.<sup>2</sup> The convening authority credited appellant with four hundred-thirty days of pretrial confinement credit, as well as any portion of the punishment served between the date of trial and the date of action.

Appellant's case is now pending review before this court pursuant to Article 66, UCMJ.

### **BACKGROUND**

Appellant raped and sexually assaulted his biological daughter, HC, when she was between the ages of seven and ten. Appellant was convicted of penetrating HC's vulva with his finger on divers occasions, and touching HC's genitals with his hand on divers occasions. HC reported the sexual abuse to her mother, JC, in a handwritten note that read:

Mom I love you but ive been keeping this from you dadey  
has suexule abuse me I don't now if I should run away or  
what but read this when im asleep plese dount talk to me  
about this plese!!!

At the time HC wrote the note, she was ten years old. A few days later, HC was interviewed by PS, a child forensic interview specialist. During the interview, HC detailed several instances when appellant sexually abused her.

Within a week of HC's note and interview, appellant was interviewed by a local civilian law enforcement agent. During appellant's law enforcement interview, appellant made several admissions indicating he had been sexually abusing HC for the past three years. Appellant admitted to penetrating HC's vagina with his finger, and touching HC's vagina with his hand.

Within a couple of months of HC's outcry, she recanted her allegations that appellant sexually abused her. At trial, HC testified that appellant did not sexually abuse her.

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<sup>2</sup> In recognition of the significant post-trial delay in appellant's case, the convening authority credited appellant with ninety days of confinement credit.

Pretrial, the government moved to admit the video of HC’s forensic interview [hereinafter statement] into evidence as residual hearsay under Mil. R. Evid. 807. The military judge denied the government’s motion because HC’s statement was not the “best evidence on the issue of whether the alleged abuse occurred.” The military judge determined that HC was willing to testify and her testimony would be the best evidence, even if she would deny the abuse.

The government appealed the military judge’s ruling pursuant to Article 62, UCMJ. This court issued an opinion finding the military judge erred and we set aside the military judge’s ruling. *United States v. Cleveland*, ARMY MISC 20170628, 2017 CCA LEXIS 408 (Army Ct. Crim. App. 16 Jun. 2017) (mem. op.). This court held that under circumstances such as these, where the declarant’s testimony is different than her prior statement, there is no other reliable evidence. *Id.* at \*4-6. This court’s opinion only addressed the narrow issue of whether HC’s statement was more probative than any other evidence; it did not address whether HC’s statement met the remaining requirements for admission under the residual hearsay exception. *Id.*

In light of this court’s decision, the government renewed its motion to admit HC’s statement under the residual hearsay exception. The military judge granted the motion finding the statement had circumstantial guarantees of trustworthiness because “[i]t is a structured child forensic interview,” and “[t]he [g]overnment provided expert testimony regarding the trustworthiness of the statement based upon the techniques used to take that statement.” The military judge noted the parties did not dispute that the statement was offered as evidence of material facts. Next, the military judge recognized this court’s opinion holding that the statement was more probative than any other evidence available to the government. Finally, the military judge held the statement would best serve the purposes of the rule of evidence and justice as it would provide the factfinder with “[m]ore information on which to make its determinations.”

## LAW AND DISCUSSION

On appeal, appellant claims the military judge abused his discretion by admitting HC’s statement as residual hearsay. Appellant argues the military judge erred in finding HC’s prior statement possessed a sufficient guarantee of trustworthiness to warrant admission. We disagree.

We review a military judge’s decision to admit evidence for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). Under Mil. R. Evid. 807, a party may introduce evidence that does not otherwise fall under the exceptions contained in Mil. R. Evid. 803 and 804, where certain requirements are met. 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 appellant only disputes the trustworthiness of HC’s statement, we limit our discussion to that requirement.<sup>3</sup> “[T]he Supreme Court has held that the ‘particularized guarantees of trustworthiness’ required by the residual hearsay rule ‘must be shown from the totality of the circumstances,’ but that ‘the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.’” *United States v. Pollard*, 38 M.J. 41, 49 (C.A.A.F. 1993) (quoting *Idaho v. Wright*, 497 U.S. 805 (1990)). The circumstances surrounding the statement include “factors such as spontaneity, consistent repetition, mental state of the declarant, motive to fabricate, [and] use of terminology beyond the declarant’s years.” *United States v. Kelley*, 45 M.J. 275, 281 (C.A.A.F. 1996) (quoting *Doe v. United States*, 976 F.2d 1071 (7th Cir. 1992)).

The military judge has discretion to consider corroborating evidence beyond the circumstances surrounding the making of the statement “once confrontation is satisfied.” *Id.* A court’s factual findings on the existence of circumstantial guarantees of trustworthiness are reviewed for clear error. *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003). We accord a military judge “considerable discretion” in admitting evidence as residual hearsay. *Kelley*, 45 M.J. at 281-82.

We recognize Congress intended the residual hearsay exception to be used “very rarely, and only in exceptional circumstances.” *Rivers v. United States*, 777

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<sup>3</sup> Even if appellant’s brief disputed the other three requirements, we find those requirements satisfied.

F.3d 1306, 1312 (11th Cir. 2015); *United States v. Tome*, 61 F.3d 1446, 1452 (10th Cir. 1995). “Exceptional circumstances generally exist when a child sexual abuse victim relates the details of the abusive events to an adult.” *United States v. Peneaux*, 432 F.3d 882, 893 (8th Cir. 2005).

We find exceptional circumstances in appellant’s case. Specifically, we find the combination of the following four circumstances, unique to this case, permitted the military judge to admit HC’s statement as residual hearsay: (1) the declarant is a child sex abuse victim which allows for a deferential standard of review; (2) HC testified at trial and was subject to cross-examination; (3) HC’s statement is detailed and was conducted in a non-suggestive manner; and (4) appellant’s statement corroborated HC’s statement.

As a starting point in our analysis, we note HC testified at trial and was subject to cross-examination. *See Pollard*, 38 M.J. 41, 50 (citing *United States v. Lyons*, 36 M.J. 183, 188 (C.M.A. 1992) (no confrontation clause violation where witness is available for cross-examination)). As such the military judge was permitted to look beyond the circumstances of HC’s statement and consider corroborating evidence to determine whether HC’s statement was sufficiently trustworthy. *See United States v. Johnson*, 45 M.J. 666, at 667-68 (C.A.A.F. 1997) (citing *United States v. McGrath*, 39 M.J. 158, 164-67 (1994)). As we consider all circumstances surrounding HC’s statement, we “balance the positive and negative indicia or reliability.” *Johnson*, 49 M.J. at 472.

Turning first to the negative indicia, HC recanted her allegation. She first recanted to her mother approximately two months after her initial outcry. Subsequently, HC denied the abuse on several occasions to her aunt and mental health provider. At trial, HC testified the abuse did not occur. She stated she lied. She explained that she made up the allegation because her mom and dad were not paying enough attention to her. HC stated she got the idea from a girl at school who said her stepdad had touched her. On cross-examination, defense fully explored HC’s explanation for why she said she lied. HC stated she was afraid that if she told PS that the abuse did not happen then her parents would not love her anymore. Appellant argues HC’s repeated denial of abuse is evidence that her statement is untrustworthy. *See, e.g., United States v. Bradley*, 145 F.3d 889, 895 (7th Cir. 1998). Although HC’s continued denials of abuse detract from the statement’s reliability, the below circumstances overwhelm her recantation. *See Johnson*, 49 M.J. at 473.

The military judge made several specific findings supporting his conclusion that HC’s prior statement was trustworthy. First, the military judge noted that HC met with PS for a forensic interview within days of her outcry. Thus, HC’s allegations were fresh in her memory. *See, e.g., Donaldson*, 58 M.J. 477, 488 (considering the amount of time that transpired between the incident and the

interview as an indication the incident was still fresh in the victim’s memory). Second, the military judge recognized that HC’s statement was “[m]ade under circumstances that would tend to indicate to the declarant that the statements would be used later against [appellant].” Specifically, HC met with PS, a stranger, alone in an unfamiliar environment. At the beginning of the interview PS pointed to the cameras and told HC the interview would be recorded.

Third, HC’s statement contained a considerable degree of detail normally associated with reliable statements. We find particularly helpful that HC’s statement was video-recorded. A video enabled the factfinder to observe and listen to HC’s allegations as opposed to merely reading a written statement. During the interview, HC was able to identify who touched her, where she was touched, the manner in which the touching occurred, how often it happened, and the location of the incidents. *See, e.g., Donaldson*, 58 M.J. at 489 (finding statement reliable when victim clearly identifies who touched her, where she was touched, and the manner in which the touching occurred). In this court’s experience of reviewing statements from child victims, we find HC’s statement to be one of the most compelling and detailed. We provide some of these details below.

After some rapport building, PS asked HC “[d]o you know why you’re here today?” HC responded “[t]he reason I know why I’m here is it’s hard to say like I don’t know how to say it.” PS asked, “[t]ell me what it has to do with.” HC replied, “[m]y dad and me.” HC stated, “[Appellant will] pull my pants down and um can’t say it . . . [m]y mom would usually be in a different room.” HC explained that she and appellant would “[u]sually be playing around like rough housing and he’ll bring me to a room,” and “[h]e’ll do things that he’s not supposed to be doing.” HC stated the abuse took place in her bedroom, her sister’s bedroom, her parents’ bedroom, and in the living room. HC stated “[appellant] put his hands down my pants . . . [and] slide it up and down . . . my private parts.” HC described another incident where appellant “[p]ut his fingers through there again.” HC described how her father would make her lay down on a bed with her pants off and appellant would rub his fingers up and down her private parts. HC described a specific incident where she was wearing a “onesie” and appellant unzipped it and slid his fingers back and forth over her private parts. HC made clear that appellant would touch the “outside and inside” of her vagina. She said, “[i]t’s like he’ll take his finger and he’ll put it in there and move around.”

Thus, HC’s statement provided specific facts alleging sexual abuse at the hands of appellant. In other words, HC’s statement was not a vague bare-bones allegation. It provided sufficient detail to support its reliability.

Fourth, the military judge found the reliability of HC’s statement was further enforced by expert testimony from LS, an expert in child forensic interviews. LS reviewed HC’s statement and noted PS followed the Washington State protocol, a

structured interview format for conducting child forensic interviews. In LS's opinion the Washington State protocol comports with best practices for child forensic interviews. LS identified some of the best practices PS used in HC's interview. For example, PS instructed HC to correct PS if anything PS stated was incorrect. PS practiced this instruction with HC with a sample narrative about HC's recent shopping trip. HC demonstrated she was able to follow PS's instructions and offer corrections when necessary. During questioning about the abuse, HC did not hesitate to correct PS. For example, HC denied certain things happened. HC stated appellant inserted his fingers in her vagina in every room, but not in the living room. PS asked HC if appellant's mouth ever gave her "touches." HC said it did not. PS also asked whether appellant ever took any photos or videos of HC that she thought was inappropriate. HC said he did not. LS opined that it was significant that HC was willing to identify for the interviewer what happened and what did not happen.

Additionally, LS observed that HC was "cooperative," and she appeared to listen to PS's questions carefully. LS testified that HC's use of terminology and descriptions was developmentally appropriate for her age. HC was able to provide sensory details such as, appellant rubbing his fingers on her. HC described it feeling weird. LS opined that it was significant that HC was able to provide gestures to help describe her words because "[i]t speaks to a kind of consistency that words and behaviors are lining up together." LS described this as "internal consistency."

In regards to spontaneity, LS identified times during the interview when HC initiated a disclosure. For example, HC clarified that during the first instance of abuse the family was living in Washington and not Germany. HC also offered information about a time appellant abused her while she was wearing a pajama "onesie." *See, e.g., Kelley*, 45 M.J. at 281 (considering the "spontaneous, voluntary, unprompted" nature of the statement). PS asked HC why she decided to tell her mom. HC replied succinctly, "I was tired of it." HC expressed her frustration with appellant's abuse by stating "[I'll try not to remember it. So I'll focus my mind on something else then a few hours later I'll forget it sometimes but if it's really bad I won't."

Lastly, the military judge found appellant's statement to law enforcement "[t]end[s] to corroborate [HC's] statement." We agree and find appellant's law enforcement interview corroborated many of HC's statements to PS.

Detective CB, a local civilian law enforcement agent, confronted appellant with HC's allegation that appellant rubbed his hands on her vagina, sometimes outside of her clothes, sometimes inside of her clothes. Appellant replied, "I've put lotion on her." Appellant spoke for some time about how HC gets rashes near her vagina and she got a yeast infection. Appellant stated they took HC to the doctor, and got a medicated lotion to treat it. Appellant further elaborated that he would rub

Vaseline and “Neosporin-type stuff” two to three times a month on HC’s vagina and buttocks.<sup>4</sup>

Eventually, appellant’s narrative evolved and he admitted to penetrating HC’s vagina with his fingers. Appellant initially described the penetration as an accidental slip. Appellant explained, “[w]ell the doctor told us to make sure it is everywhere . . . . [I] cover it, and am always really thorough to make sure that I get every inch covered so she gets better.” Appellant then stated it’s possible his finger slipped inside HC’s vagina. Appellant admitted to getting “aroused” and a “slight erection” while play wrestling with HC. Interestingly, appellant confirmed HC’s timeline and stated to Detective CB that he “[s]tart[ed] with the lotion three years ago.” Appellant claimed he began inserting his finger into HC’s vagina “about a month ago, maybe.” Later in the interview, appellant stated he touched HC’s genitalia with his hand on five separate occasions without applying lotion. Appellant also admitted that he inserted his fingers into HC’s vagina for sexual stimulation.

Juxtaposing appellant’s statement with HC’s statement, the sexual abuse is very clear—for several years, appellant had been placing his hand on HC’s genitals and inserting his fingers inside her vagina.

In conclusion, we reiterate Congress’s intent that the residual hearsay exception be used rarely and only in exceptional circumstances. As we discussed above, we find such exceptional circumstances in appellant’s case. The totality of contemporaneous and non-contemporaneous circumstances surrounding HC’s statement overwhelmingly support the statement’s reliability. *See, e.g., Johnson*, 45 M.J. at 669 (balancing the totality of contemporaneous and non-contemporaneous evidence to determine the trustworthiness of statement). Accordingly, the military judge did not abuse his discretion in admitting HC’s statement as residual hearsay.

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<sup>4</sup> HC’s pediatric nurse practitioner, AB, testified that she treated HC for a rash in April 2015, a couple of months prior to HC’s outcry. AB stated that she would have instructed a ten-year-old to apply the ointment herself and would not have instructed to apply the ointment inside the vagina.

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**CONCLUSION**

The findings of guilty and the sentence are AFFIRMED.

Judge RODRIGUEZ and Judge FLEMING concur.

FOR THE COURT:

**(b) (6)**

MALCOLM H. SQUIRES, JR.  
Clerk of Court

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
BURTON, RODRIGUEZ, and FLEMING  
Appellate Military Judges

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

ARMY 20170496

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NOTICE OF COURT-MARTIAL ORDER CORRECTION  
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IT IS ORDERED THAT, to reflect the true proceedings at the trial of the above-captioned case,

GENERAL COURT-MARTIAL ORDER NUMBER 2, HEADQUARTERS,  
7TH INFANTRY DIVISION, BOX 339500 MAIL STOP 59, JOINT BASE LEWIS-  
MCCHORD, WASHINGTON 98433-9500,

IS CORRECTED AS FOLLOWS:

BY reflecting the date of the General Court-Martial Order  
Number 2 as "20 February 2020."

DATE: 28 December 2020

FOR THE COURT:

**(b) (6)**

MALCOLM H. SQUIRES, JR.  
Clerk of Court