

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
PENLAND, MORRIS, and ARGUELLES¹
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class JOHN K. JARLEGO
United States Army, Appellant

ARMY 20210389

Headquarters, Fort Bliss
Robert L. Shuck and Jeffrey W. Hart, Military Judges
Colonel Andrew M. McKee, Staff Judge Advocate

For Appellant: Captain Tumentugs D. Armstrong, JA (argued); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (on brief); Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (on reply brief).

For Appellee: Major Joseph H. Lam, JA (argued); Colonel Christopher B. Burgess, JA; Captain Cynthia A. Hunter, JA; Major Joseph H. Lam, JA (on brief).

11 September 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent

PENLAND, Senior Judge:

A military judge, sitting as a general court-martial, convicted appellant, contrary to his pleas, of two specifications of rape of a child and one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b [UCMJ]. He sentenced appellant to a dishonorable discharge, reduction to E1, total forfeitures, and 48 total months of confinement. We review the case under Article 66, UCMJ.

¹ Judge ARGUELLES decided this case while on active duty.

Over defense objection, the military judge admitted Prosecution Exhibit 1, a “birth verification” document offered to prove the age of the victim, who did not testify. We hold the military judge erred under the Confrontation Clause of the Sixth Amendment of the United States Constitution, resulting in prejudice to appellant.² We will set aside the findings of guilty and sentence and authorize a rehearing.

DISCUSSION

Trial counsel opened the case with Prosecution Exhibit 1, a “Birth Verification” document from the office of the El Paso County Clerk in El Paso, Texas. The defense objected, citing hearsay, hearsay within hearsay, best evidence, and relevance. The defense also argued the document was prepared “with an eye towards litigation.”

Accompanied by a purportedly self-authenticating affidavit, the document asserted “a birth record search was conducted in the El Paso County Clerk’s Vital Statistics Division[,]” which disclosed a birth record for [REDACTED], born in El Paso on “08/11/2007[.]” The military judge overruled the defense objection and summarily admitted the document under Military Rule of Evidence [Mil. R. Evid.] 803(9), which provides for a hearsay exception for “[a] record of birth, death, or marriage, if reported to a public office in accordance with a legal duty.”

“In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” U.S. Const. amend. VI. *Crawford v. Washington*, 541 U.S. 36, 38 (2004). We review alleged violations of *Crawford* and the Confrontation Clause *de novo*. *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007). Without addressing whether the document was hearsay, we find its admission violated this constitutional protection.

Appellee invites us to find waiver, for the defense at trial did not specifically use the phrase, “confrontation clause,” in their list of objections to the birth verification. We decline and find appellant preserved the error for our review. First, we are generally reluctant to find waiver of constitutional protections. *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). Second, we are unaware of any requirement for opposing counsel to use a certain phrase to preserve an objection. Rather, the essential question is whether the objecting party sufficiently makes the grounds for objection known, so the trial judge can evaluate them. *United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016). Opposing the exhibit’s admission, the defense said, among other things, it was prepared “with an eye towards litigation.” This is a central consideration for deciding whether a document is “testimonial” and

² Considering the basis for our decision, we need not address the remaining assigned and specified errors or the matters appellant personally asserts under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982); they are moot.

qualifies for protection under the confrontation clause. *Sweeney*, 70 M.J. at 302. We are confident the trial judge recognized – or at least should have recognized – that appellant grounded a substantial part of his complaint in the Sixth Amendment. Therefore, we conclude appellant neither waived nor forfeited this constitutional objection.

The Sixth Amendment prohibits the admission of testimonial statements of a witness who did not appear at trial, unless the witness is unavailable to testify and the defendant had had a prior opportunity for cross examination. *United States v. Katso*, 74 M.J. 273, 278 (C.A.A.F. 2015). (citing *Crawford*, 541 U.S. at 53-54). We also recently addressed the topic: “[i]n determining whether a statement is testimonial hearsay, we assess whether it is ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” *United States v. McGee*, ARMY 20190844, 2022 CCA LEXIS 160, at *10 (Army Ct. Crim. App. 17 March 2022) (mem. op.) (citing *Sweeney*, 70 M.J. at 302).

“Various formulations of testimonial statements exist, including affidavits and custodial examinations.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009). Here, appellee must withstand scrutiny on two pieces of *ex parte* information: the birth verification—a purported examination of a custodial record; and, the accompanying affidavit, which attempts to self-authenticate the former as a hearsay exception. Even a cursory review of the birth verification reveals it was created by government request on 13 April 2021.³ These are precisely the “circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *McGee*, 2022 CCA LEXIS 160, at *10 (citation omitted). *See also Rankin*, 64 M.J. at 351 (holding that the “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse”) (citing *Crawford*, 541 U.S. at 56 n.7).

Appellee argued before us the birth verification was filed in 2007 near the time of [REDACTED] birth, and the document at trial was simply a copy of it. This was plainly incorrect and, not surprisingly, no witness so testified. Fundamentally, the government now asks us to find that a certifying affidavit proved a birth verification admissible under Mil. R. Evid. 803(9), where the underlying record it purportedly verified was inexplicably absent from trial. The Constitution and Mil. R. Evid. 803(9) require otherwise, though, lest a trial devolve into an exercise in multi-layered *ex parte* document gathering.

³ We interpret government appellate counsel’s comments at oral argument to include a limited concession that the prosecution obtained the document for the purposes of this criminal case.

Where a Confrontation Clause objection is preserved, as is the case here, we grant relief for such errors only where they are not harmless beyond a reasonable doubt, considering such factors as [1] the importance of the uncontroverted testimony in the prosecution's case, [2] whether that testimony was cumulative, [3] the existence of corroborating evidence, [4] the extent of confrontation permitted, and [5] the strength of the prosecution's case. *United States v. Tearman*, 72 M.J. 54, 62 (C.A.A.F. 2013) (citations omitted). "To conclude that a Confrontation Clause error was harmless beyond a reasonable doubt, we must be convinced that the testimonial hearsay was unimportant in light of everything else the court members considered on the issue in question. *Id.* (citing *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009)). The "Birth Verification" document had only one purpose - to prove [REDACTED] age in this criminal trial - a fundamentally necessary fact that was nothing but prejudicial to appellant. A document such as this birth verification is exactly the type of information that prompted today's confrontation clause jurisprudence. *See Crawford*, 541 U.S. 36. The verification was the linchpin in the government's effort to prove the age of the non-testifying victim, inarguably contributing to the findings of guilty. As such, its admission was not harmless.

Even if we found appellant forfeited the objection by failing to raise a specific confrontation clause objection, we would still decline to find waiver and instead review for plain error. Unlike the waivers recently recognized by the Court of Appeals for the Armed Forces in *United States v. Davis*, 79 M.J. 329, 331-32 (C.A.A.F. 2020) and *United States v. Cunningham*, _ MJ _, 2023 CAAF LEXIS 520 at *13-14 (C.A.A.F. 21 Jul. 2023), defense counsel below did not "affirmatively declin[e] to object" or otherwise definitively state on the record that he had no additional objections. "Under a plain error analysis, the accused has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused *United States v. Davis*, 76 M.J. 224, 11 (C.A.A.F. 2017). However, "[w]here the error is constitutional, *Chapman* directs that the government must show that the error was harmless beyond a reasonable doubt to obviate a finding of prejudice." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). (citing *Chapman v. California*, 386 U.S. 18, 87 (1967)). "Certainly...constitutional error...casts on someone other than the person prejudiced by it a burden to show that it was harmless" *Chapman*, 386 U.S. at 24. For all of the reasons set forth above, all three conditions are met where, as here, the alleged error is constitutional, obvious, and the government cannot show harmlessness beyond a reasonable doubt. *Id.* Try as appellee might, on the facts of this case it is virtually impossible to show the erroneous admission was harmless.

CONCLUSION

The findings of guilty and the sentence are SET ASIDE. A rehearing is authorized. All rights; privileges; and property, of which appellant has been

JARLEGO — ARMY 20210389

deprived by virtue of the findings and sentence set aside by this decision are ordered restored. See UCMJ arts. 58b(c) and 75(a).

Judge MORRIS and Judge ARGUELLES concur.

FOR THE COURT:

A large black rectangular redaction box covering the signature of James W. Herring, Jr.

✓ JAMES W. HERRING, JR. ✓
Clerk of Court