

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MERCK, JOHNSON, and MOORE
Appellate Military Judges

UNITED STATES, Appellee

v.

Sergeant First Class RAFAEL A. PEREZ
United States Army, Appellant

ARMY 9900680

1st Cavalry Division

John P. Galligan (arraignment) and Stephen R. Henley (trial), Military Judges
Major Mark D. Dupont, Acting Staff Judge Advocate (trial)
Lieutenant Colonel Michele M. Miller, Staff Judge Advocate (post-trial)
Lieutenant Colonel Christopher J. O'Brien, Staff Judge Advocate
(new post-trial recommendation)

For Appellant: Frank J. Spinner, Esquire (argued); Captain Eric D. Noble, JA (on brief); Captain Brian S. Heslin, JA (on original brief).

For Appellee: Captain Magdalena A. Przytulaska, JA (argued); Colonel Steven T. Salata, JA; Lieutenant Colonel Mark L. Johnson, JA; Lieutenant Colonel Theresa A. Gallagher, JA (on brief); Lieutenant Colonel Lauren B. Leeker, JA; Lieutenant Colonel Margaret B. Baines, JA; Major Jennifer H. McGee, JA; Captain Matthew J. MacLean, JA (on original brief).

25 April 2005

MEMORANDUM OPINION ON FURTHER REVIEW

MOORE, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of rape (two specifications), forcible sodomy (two specifications), indecent acts with a child under the age of fourteen, and indecent acts with a child under the age of ten, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934 [hereinafter UCMJ]. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for twenty-seven years, and reduction to Private E1.

We initially reviewed this case pursuant to Article 66, UCMJ. We set aside the action and returned the record of trial to The Judge Advocate General for a new recommendation and action by the same of different convening authority due to numerous errors in the staff judge advocate's post-trial recommendation. *United States v. Perez*, ARMY 9900680 (Army Ct. Crim. App. 14 Oct. 2003) (unpub.). The new recommendation and action have been completed and the record has been returned to this court for further review.

We have considered the record of trial, appellant's assignments of error, the matters appellant raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the government's reply thereto, and the oral argument of counsel. We find no basis for relief, but appellant's original assignment of error III¹ warrants further discussion.

FACTS

Appellant was charged with three specifications of indecent acts with a child, three specifications of forcible sodomy on a child on divers occasions, and two specifications of rape on divers occasions. The alleged victim of these offenses was appellant's stepdaughter, BC. The government called BC as a witness during its case-in-chief. BC was largely unable to provide any details about the alleged offenses, claiming that she could not recall most of the particulars. In response to her asserted lack of memory, the government moved to admit her prior written statement under the residual hearsay exception to the prohibition against hearsay. The military judge admitted the statement, over defense objection.

The defense then recalled BC during its case-in-chief. She was somewhat more forthcoming during this testimony. She said that inappropriate touching took place between her and appellant while they lived at Fort Leonard Wood, Fort Wainwright, and Fort Hood. She testified that appellant had had sex with her more than once at Fort Wainwright and once at Fort Hood. She also said that she engaged in oral sodomy with appellant at Fort Leonard Wood and Fort Wainwright.

¹ In assignment of error III, appellant avers:

THE MILITARY JUDGE ERRED BY ADMITTING INTO EVIDENCE UNDER MILITARY RULE OF EVIDENCE 807, OVER DEFENSE OBJECTION, THE HEARSAY STATEMENT OF [BC], WHO HAD BEEN FOUND UNAVAILABLE TO TESTIFY BASED ON A CLAIMED LACK OF MEMORY, YET SUBSEQUENTLY APPEARED AS A DEFENSE WITNESS.

After her testimony, the defense did not ask the military judge to reconsider his decision to admit BC's prior statement as residual hearsay, nor did the military judge do so *sua sponte*. The military judge convicted appellant of two specifications of indecent acts with a child, after excepting out certain acts alleged in the specifications, two specifications of forcible sodomy with a child, and two specifications of rape, only one of which was on divers occasions.

DISCUSSION

The admission of BC's pretrial statement under the residual hearsay exception did not conflict with the Confrontation Clause of the Constitution because she testified at trial. *See Crawford v. Washington*, 541 U.S. 36, 59 (2004) (stating that "when the declarant appears for cross-examination at trial, the *Confrontation Clause* places no constraints at all on the use of his prior testimonial statements"). Thus, the only issue is whether the military judge abused his discretion in admitting the statement as residual hearsay under Military Rule of Evidence [hereinafter Mil. R. Evid.] 807. We hold that he did not.

"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). "A military judge has 'considerable discretion' in determining whether to admit residual hearsay." *Id.* at 280-81 (quoting *United States v. Pollard*, 38 M.J. 41, 49 (C.M.A. 1993)). The military judge correctly ruled that all of these requirements were met in this case.² *See United States v. Wellington*, 58 M.J. 420, 425-27 (C.A.A.F. 2003).

The correctness of the ruling was not changed when the defense called BC as a witness during its case-in-chief. She was still largely reluctant to discuss the offenses, so her ability to provide details did not greatly improve. Thus, the prior statement was still necessary to the government's case. It remained the most probative evidence on the point for which it was offered, namely the type and extent of the abuse appellant inflicted on BC. Moreover, the rule requires that the statement be "more probative . . . than any other evidence which the *proponent* can procure." Mil. R. Evid. 807. Nothing in the rule requires that the government be bound by the testimony as elicited by defense counsel.

Additionally, our superior court has recognized that when a child abuse victim tells an adult about an abusive event, courts should take a liberal approach to the necessity requirement of the residual hearsay rule. *Kelley*, 45 M.J. at 280. Therefore, even if evidence admitted under the residual hearsay exception is

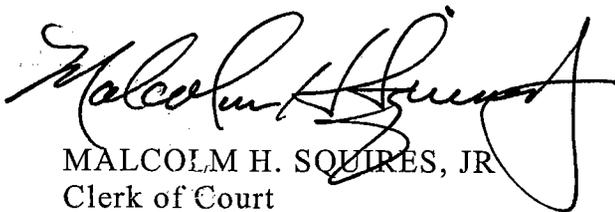
² A copy of the military judge's detailed findings of fact and conclusions of law are attached in the appendix to this opinion.

somewhat cumulative, “it may be important in evaluating other evidence and arriving at the truth so that the ‘more probative’ requirement cannot be interpreted with cast iron rigidity.” *Id.* (internal quotations omitted). In this case, the statement was necessary to put BC’s testimony at trial in context and to evaluate it in conjunction with appellant’s confession. As a result, the military judge correctly considered BC’s pretrial statement as residual hearsay.

We have considered the remaining assignments of error and find them to be without merit.³ Accordingly, the findings of guilty and the sentence are affirmed.

Senior Judge MERCK and Judge JOHNSON concur.

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

³ Appellant correctly alleges that the staff judge advocate’s post-trial recommendation (SJAR) again failed to completely inform the convening authority as to the nature and duration of the pretrial restraint placed on appellant. In our original opinion in this case, we held that this error, in the context of multiple other errors in the SJAR, necessitated a new SJAR and convening authority’s action. *United States v. Perez*, ARMY 9900680 (Army Ct. Crim. App. 14 Oct. 2003) (unpub.) However, under the current facts, appellant has not presented a “colorable showing of possible prejudice” arising from this error. See *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

A P P E N D I X

FINDINGS REGARDING ADMISSIBILITY OF [BC's] STATEMENT AS RESIDUAL HEARSAY

Pursuant to MRE 807, I find [BC's] statement to Agent Wooley on 15 December 1998 (1) is relevant; (2) more probative than any other evidence reasonably obtainable under the circumstances, considering that [BC] is apparently unable or unwilling to recall the events detailed in the statement and no one else has direct, personal knowledge; (3) serves the interests of justice by its admission, considering the inherent difficulty in obtaining evidence in cases involving alleged intra-family abuse; and (4) its probative value is not substantially outweighed by the danger of unfair prejudice to the accused. In determining the statement's reliability and trustworthiness, I gave special importance to the following positive and negative factors surrounding the statement:

The statement occurred within hours after the multiple allegations against the accused first came to light. Here, [BC] told her mother at the first available opportunity of her step-father's attempted sexual abuse occurring earlier that evening. This was unsolicited and spontaneous. It was Mrs Perez who decided to immediately bring [BC] to CID. She did not discuss the allegations with her daughter on the way.

At the CID office, Agents Nelson and Wooley identified themselves to [BC] as CID agents and [BC] recognized them as police officers. Wooley, who was eventually detailed to take [BC's] statement, impressed upon her several times the importance of telling the truth, which [BC] understood. Wooley did not pressure [BC] to implicate the accused and there is no evidence Wooley had any motive to get [BC] to implicate the accused.

The statement was given voluntarily, [BC] was not forced to say anything. [BC] talked to Wooley alone, her mother remained outside of the interview room. [BC] reviewed the written statement for accuracy before signing, initialing each page. Mrs. Perez also reviewed the written statement before allowing [BC] to sign it. No changes were made. The statement was typed by Agent Wooley, not [BC]. Although the large majority of the written statement came directly from [BC] it contains several words not used by her during the interview, words instead that are Wooley's suggestions to [BC] offered to describe things in adult terminology. [BC] did swear to the statement and understood what that meant. The interview lasted between 3 and 4 hours, ending at 0245 in the morning.

[BC] began with her own narrative description of the alleged events, which constitutes the majority of her statement. Towards the end of the statement, Wooley employs the Q&A method of interviewing, which leads to some suggestive questioning. [BC] appeared to be speaking from memory, remembering specific events, times, places, dates and details of abuse without prompting. The statement did not appear rehearsed and it concerns only matters within [BC's] personal knowledge, to include a description of the accused's penis. She did not express anger towards her father or say anything bad about him during the interview or in the final statement. The statement is non-accusatory. [BC] does not blame her father. Her motivation was to get him to stop the abuse, not to get him in trouble.

[BC] is a bright, articulate, 13 year old girl with sufficient mental ability to understand the gravity and seriousness of the accusations. [BC] had recanted an allegation of abuse previously when she saw how it had traumatized her parents, evidence again she understood the seriousness of the allegations and her perception that the situation will likely be worse for her and her family by telling the police what had happened, something she wanted to avoid. Though characterized as a leader and needing to be the center of attention, there is no evidence [BC] is a

manipulator or rebellious child. She remained calm and collected throughout the interview. She did not cry.

There is no evidence [BC] is unreliable, a liar or can't be trusted

There is no apparent motive to lie and no evidence of coaching. The details in the statement suggest a lack of fabrication. No conclusions are drawn by [BC], just facts. There is no repetition, suggesting some degree of rehearsing. [BC] has not recanted her statement, in fact, her testimony at trial was that she was unable to remember. Her inability to testify affirms the accuracy of her statement since she now recognizes that her father may go to jail based on what she has said.

In my opinion these guarantees of trustworthiness are sufficient in and of themselves to provide the adequate indicia of reliability required under the residual hearsay rules. Additionally, however, as [BC] was available, did testify, and is still subject to recall, I also considered the following corroborating and impeaching evidence: the testimony of Dr. Domelsmith, [BC's] treating psychologist, in which he relates [BC's] recollection of the history of the abuse, evidencing a pattern of consistent repetition, the psychological evidence provided by Dr. Puglise, the testimony of Dr. Curier, [BC's] treating physician the night of 15 Dec, that there was no definitive physical evidence of sexual abuse, the housing records, the testimony regarding [BC's] advanced sexual maturity as related by her grade school teachers, the accused's statement to CID confessing to a portion of the sexual activity which allegedly occurred and the times and places reflected in [BC's] statement, Dr. Willoughby's testimony relating to the inadequacy of Dr Puglise and Dr Domelsmith's testing methods and challenging the conclusions drawn by them, and the lack of any physical evidence to the alleged offenses or eye witnesses to the events.

In my opinion, [BC's] statement is material, necessary to the government's case, reliable and trustworthy. As such, PE 9 for identification is admitted.

Additionally, I find that trial counsel did not anticipate [BC's] inability or unwillingness to testify when she took the witness stand on Tuesday. Trial counsel fully expected her to testify consistent with her prior statement to CID, her prior interviews with her therapist and trial counsel, and representations made by Mrs Perez that [BC] would be testifying at court. Given this, they did not believe [BC's] written statement was needed. Therefore, given these circumstances, they had not intended to offer the statement as residual hearsay evidence.

It was only on the day of trial, upon learning that [BC] was unable or unwilling to testify about the abuse, that the government realized the statement may be necessary and indicated it would be offered in an 802 conference held in chambers at the end of the first day of trial, attended by both defense counsel. Further, the defense has been in possession of [BC's] statement well in advance of trial. Therefore, I will not rigidly enforce the advanced notice requirement.

However, if a continuance is necessary in order for the defense to adequately prepare, I will grant it.

Sheila R. Healey 12/17/99
LT, JA
MILITARY DOJ R