UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, **Appellant** **v.** **Airman First Class (E-3)** **JACOB R. BURGHARDT,** **USAF,** **Appellee**	)))))))))	**Misc. Dkt. No. 2009-13** **ORDER** **Special Panel**

On 2 December 2009, counsel for the United States Air Force filed an appeal under Article 62, UCMJ, 10 U.S.C. § 862. This case is before this Court after the military judge granted the trial defense counsel's motion to suppress the appellee's 5 August 2009 written and oral statements to agents with the Air Force Office of Special Investigations (AFOSI).

Two issues are raised on appeal. The first issue is whether the military judge abused his discretion by suppressing portions of the appellee's statements that pertained to oral sex for lack of corroboration. The second issue is whether the military judge abused his discretion by suppressing the appellee's statements on the basis of destruction of evidence.

Background

On 5 August 2009, AFOSI agents interviewed the appellee on the suspicion of sexual assault. During his interview, the appellee admitted, both verbally and in writing, to: (1) removing Airman First Class (A1C) NH's pants and underwear while she was "passed out;" (2) performing oral sex on A1C NH while she was "passed out;" and (3) engaging in sexual intercourse with A1C NH. On 21 August 2009, the appellee's commander charged the appellee with one specification of aggravated sexual assault upon a person substantially incapacitated and one specification of abusive sexual contact upon a person substantially incapacitated, in violation of Article 120, UCMJ, 10 U.S.C. § 920.

At an Article 32, UCMJ, 10 U.S.C. § 832, investigation hearing on 2 September 2009, A1C NH testified that she returned to her room with the appellee on the evening of 27 July 2009, after a night of drinking. She fell asleep or passed out on her bed and awoke to find the appellee having sexual intercourse with her. Although she fell asleep or passed out fully clothed, when she awoke her pants and underwear were off. On 15

September 2009, the general court-martial convening authority referred the aforementioned specifications to a general court-martial.

On 18 October 2009, the trial defense counsel filed two motions to suppress the appellee's 5 August 2009 AFOSI statement. In the first motion, the defense moved to suppress the entire statement, averring that the appellee's statement was involuntary and that its admission, in light of the destruction of his videotaped interview, would violate his due process rights and rights under Rule for Courts-Martial (R.C.M.) 703. In the second motion, the defense moved to suppress the appellee's admissions regarding oral sex with A1C NH for lack of corroboration.

On 22 October 2009 and 9 November 2009, the military judge granted the appellee's motions to suppress. The military judge found that the appellee's admission that he performed oral sex on A1C NH was not corroborated and that the admission of the appellee's written statement, in light of the destruction of the appellee's videotape AFOSI interview, "would place the [appellee] at an unfair and untenable disadvantage." In so ruling the military found and concluded that: (1) the appellee's AFOSI statement was voluntary; (2) there was a lack of "independent evidence" that oral sex took place and "to find [the appellee's] statement nonetheless corroborated would subject [the appellee] to a conviction upon which he is the only witness;" (3) the AFOSI agents recorded A1C NH's and the appellee's interviews using a Honeywell HRXD series digital recording system; (4) the AFOSI agents destroyed the recorded interviews not in bad faith or in an attempt to obtain an unfair advantage for the government but as a result of a misunderstanding or ignorance of the retention requirement; (5) the appellee's recorded interview was potentially exculpatory in that the appellee's denials would be admissible under the rule of completeness, it would depict the entirety of the appellee's interview, and it "would allow the members to judge for themselves the credibility of his denials as opposed to his incriminating statements;" (6) "[a]pplying the rationale of *Manuel*[1] and that of *Green*[2] and *Brady*,[3] . . . the information lost [through the destruction of the videotaped interview] was potentially exculpatory, warranting suppression of the [appellee's] statement in its entirety;" and (7) the need to suppress the appellee's AFOSI statement based on destruction of evidence "is amplified by the lack of corroboration of the statement."

Law

"An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." Mil. R. Evid. 304(g). "The independent evidence necessary to establish corroboration need not be sufficient of itself

[1] *United States v. Manuel*, 39 M.J. 1107 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 282 (1995).
[2] *United States v. Green*, 37 M.J. 88 (C.M.A. 1993).
[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

to establish beyond a reasonable doubt the truth of the facts stated in the admission or confession . . . . [it] need *raise only an inference of the truth* of the essential facts admitted." Mil. R. Evid. 304(g)(1) (emphasis added). The most important function of the corroboration requirement is to "'establish the trustworthiness of the' confession." *United States v. Rounds*, 30 M.J. 76, 80 (C.M.A. 1990) (quoting *Opper v. United States*, 348 U.S. 84, 93 (1954)). Alternatively stated, the quantum of evidence needed to fulfill the corroboration requirement is very slight and the corroboration is sufficient if it "merely fortifies the truth of the confession, without independently establishing the crime charge." *Smith v. United States*, 348 U.S. 147, 156 (1954); *see United States v. Grant*, 56 M.J. 410, 416 (C.A.A.F. 2002) (quoting *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988)).

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004) (quoting *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004)).

This Court reviews claims of improper loss or destruction of evidence de novo. *United States v. Blaney*, 50 M.J. 533, 543 (A.F. Ct. Crim. App. 1999). To prevail on a claim of improper loss or destruction of evidence the appellee must show that: "(1) the evidence possesses an exculpatory value that was apparent before it was [lost or] destroyed; (2) [the evidence] is of such a nature that he would be unable to obtain comparable evidence by other reasonably available means; and[] (3) the government destroyed [or lost] the evidence in bad faith." *Id*. To be entitled to relief for an Article 46, UCMJ, 10 U.S.C. § 846, discovery violation the appellee must make the same showing. *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986) (holding that the rule announced in *California v. Trombetta*, 467 U.S. 479 (1984),[4] satisfies both constitutional and military standards of due process and should therefore be applicable to courts-martial).

To be entitled to relief for a R.C.M. 703(f) violation, the appellee must show that the evidence: (1) is "relevant and necessary;" (2) "is destroyed, lost, or otherwise not subject to compulsory process;" (3) "is of such central importance to an issue that it is essential to a fair trial;" (4) "there is no adequate substitute for such evidence;" and (5) he is not at fault for or could not have prevented the unavailability of the evidence. R.C.M. 703(f)(1), (2).

[4] The holding in *Arizona v. Youngblood*, 488 U.S. 51 (1988), added to this analysis the requirement of showing governmental bad faith. For simplicity purposes we will refer to the tests enunciated in *California v. Trombetta*, 467 U.S. 479 (1984), *Youngblood*, and Article 46, UCMJ, 10 U.S.C. § 846, as the *Trombetta* test.

Lastly, to be entitled to relief for a violation under *Brady v. Maryland*, 373 U.S. 83 (1963), the appellee must show that the government suppressed evidence favorable to the appellee which was material either to guilt or to punishment. *Brady*, 373 U.S. at 87.

Discussion

As a threshold matter, we have authority to hear this appeal under Article 62, UCMJ, because the military judge's ruling excluded the appellee's written confession, evidence that is substantial proof of a fact material to the court-martial. In contrast with our powers of review under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we "may only act with respect to matters of law" in this appeal submitted pursuant to Article 62, UCMJ. Article 62(b), UCMJ. We cannot make findings of fact in addition to those adduced by the military judge, and may only disturb the military judge's findings of fact if they are unsupported by the record or are clearly erroneous. *United States v. Fling*, 40 M.J. 847, 849 (A.F.C.M.R. 1994) (citing *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985); *United States v. Pacheco*, 36 M.J. 530, 533 (A.F.C.M.R. 1992)).

With respect to the ruling regarding the corroboration issue, the military judge sought independent evidence that oral sex took place. However, the law required that he determine whether independent evidence existed to raise an inference of the truth or to establish the trustworthiness of the appellee's admission to engaging in oral sex. Ample evidence exists in the record to establish the trustworthiness of the appellee's admission to engaging in oral sex with A1C NH.[5] Thus, the military judge abused his discretion by applying the incorrect law on corroboration of confessions.

Concerning the military judge's ruling on destruction of evidence, we first note that there is no evidence in the record to support a finding that the AFOSI agents recorded the appellee's interview. The fact that evidence exists that the agents recorded A1C NH's interview does not necessarily support a finding that they recorded the appellee's interview. Thus, the military judge's finding of fact that the AFOSI agents recorded the appellee's interview was clearly erroneous, as the appellee fell strikingly short of establishing the existence of the evidence, the destruction or suppression of which would have entitled him to relief under *Trombetta*, *Brady*, or R.C.M. 703(f).

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[5] Without making findings of fact, we note a few facts for illustrative purposes which raise an inference of the truth of the appellee's oral sex admission: (1) Airman First Class (A1C) NH's Article 32, UCMJ, 10 U.S.C. § 832, hearing testimony that she and the appellee were alone in her room after a night of drinking raises an inference of truth to the appellee's admission in that it supports a finding that the appellee had an opportunity to commit the offense; (2) A1C NH's Article 32, UCMJ, testimony that she fell asleep or passed out on the bed while fully clothed and awoke to find that her pants and underwear were off raises an inference of truth to the appellee's admission of removing A1C NH's pants and underwear while she was asleep; and (3) A1C NH's Article 32, UCMJ, testimony that she was asleep or passed out and awoke to the appellee engaging in sexual intercourse with her raises an inference of truth to the appellee's admission of the timing of the events, namely, that he first performed oral sex on A1C NH while she was sleeping and later engaged in sexual intercourse with her after she awoke. Additionally, the fact that the appellee mentioned oral sex without any prompting from the Air Force Office of Special Investigation agents likewise gives credence to his oral sex admissions.

Further, in applying the *Trombetta* test to the record, we note that the record is devoid of any evidence that: (1) exculpatory evidence was lost or destroyed; (2) the exculpatory nature of the evidence was apparent before it was lost or destroyed; (3) the evidence was of such a nature that the appellee would be unable to obtain comparable evidence by other reasonable means; and (4) the government destroyed or lost the evidence in bad faith. Moreover, the military judge's finding of no bad faith on the part of the government would forestall a finding that the *Trombetta* test has been met. Nor does the record support a finding that the R.C.M. 703(f) test has been met. On this point, there is no evidence that: (1) relevant and necessary evidence was destroyed; (2) the evidence is of such central importance to an issue that it is essential to a fair trial; and (3) there is no adequate substitute for such evidence. Finally, concerning the *Brady* test, the record lacks any evidence that the government suppressed evidence favorable to the appellee which was material either to guilt or to punishment. In short, the record lacks evidence which would support a finding that the *Trombetta* test, R.C.M. 703(f) test, or the *Brady* test has been met.

After a careful review of the entire record, we hold that the military judge abused his discretion in suppressing the appellee's AFOSI statement.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 5th day of March, 2010,

ORDERED:

That the United States Appeal Under Article 62, UCMJ is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings consistent with this opinion.

(BRAND, Chief Judge; JACKSON, Senior Judge; and HELGET, Senior Judge participating).

FOR THE COURT

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court