IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	**BRIEF ON BEHALF OF APPELLEE**
v.	)	USCA Dkt. No. 14-0453/AR
Private First Class (E-3) **JAMES S. PIREN,** United States Army, Appellant	)	Crim. App. Dkt. No. 20110416

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Granted Issues

I.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY OVERRULING THE DEFENSE COUNSEL'S SCOPE OBJECTION DURING THE GOVERNMENT'S CROSS-EXAMINATION OF THE APPELLANT.

II.

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE MOTION TO SUPPRESS RESULTS OF THE DNA ANALYSIS.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, [hereinafter UCMJ].[1] This Court has jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

A panel of officers sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2006) [hereinafter UCMJ].[3] The panel sentenced appellant to reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for twelve months, and a bad-conduct discharge.[4] The convening authority approved the adjudged sentence and credited appellant

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[1] 10 U.S.C. § 866.
[2] 10 U.S.C. § 867(a)(3).
[3] 10 U.S.C. § 920. JA 33, 366.
[4] JA 368.

with fifteen days of confinement against his sentence to confinement.[5] On January 7, 2014, ACCA summarily affirmed the findings and sentence.[6] On May 29, 2014, this Honorable Court granted appellant's petition for review.

Statement of Facts

1. Background

Appellant's conviction for abusive sexual contact arose from a series of events that began at a bar in Nuremberg, Germany on 10 April 2011.[7] The victim, Specialist (SPC) K.W., traveled to the city with her boyfriend, sister, and other friends to attend "Volksfest," a local German festival.[8] At around 2200, she met her friends and her sister at a bar called the "Green Goose" to drink alcohol.[9] At some point during the evening, appellant arrived at the same bar and his roommate began talking with SPC K.W.'s friends.[10] SPC K.W.'s boyfriend, Private First Class (PFC) "Zac"[11] Malphurs, testified that when he introduced appellant to SPC K.W., he introduced her as his "girlfriend."[12] PFC Malphurs further testified that he put his arm around SPC K.W., held her hand, and kissed her in

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[5] JA 369.
[6] JA 1.
[7] JA 53.
[8] JA 42-46.
[9] JA 46-48.
[10] JA 49-50.
[11] PFC Malphurs is referred to in the record as "Zac." JA 60.
[12] JA 312. Appellant testified he only introduced SPC K.W. by her first name and did not mention their relationship. JA 241.

appellant's presence.[13] Appellant and the victim agree that any communication between them was minimal.[14]

As the night progressed, appellant became very intoxicated and was later discovered passed out in the street in front of the bar by SPC K.W. and her group of friends.[15] SPC K.W. and her friends decided to help him back to their hotel.[16] Once they arrived at the hotel, PFC Malphurs made a space for appellant to sleep on the hotel room floor, while SPC K.W. passed out in a bed.[17] SPC K.W. testified that she was intoxicated when she arrived at the hotel.[18] PFC Malphurs stated that SPC K.W. was about "a six" on a scale of one to ten and put a trash can next to her bed in case she needed to vomit.[19]

SPC K.W. then testified that after she had fallen asleep, she later woke to the "appellant in between [her] legs kissing on [her] stomach ... one to two inches above [her] vagina."[20] The bed covers had been pulled off and SPC K.W.'s underwear had been pulled down so that it was only wrapped around one of her ankles.[21] After realizing what was happening, SPC K.W. screamed "get out!" multiple times, kicked appellant, and yelled "you're

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[13] JA 312-13.
[14] JA 50-51, 242.
[15] JA 51, 218-19.
[16] JA 52, 219.
[17] JA 54, 97-99, 220.
[18] JA 53.
[19] JA 57, 97.
[20] JA 58.
[21] JA 72, 86.

not Zac!"[22] Appellant "started saying that he was sorry and that he wanted to wait outside the door for everyone else to get back so he would explain what had happened."[23] SPC K.W. eventually convinced appellant to leave.[24] SPC K.W. testified that after appellant left she got dressed and went down to the lobby of the hotel to tell the receptionist that she had been raped.[25]

Appellant offered a different version of events, arguing that all sexual contact between him and SPC K.W. was consensual and that he never penetrated or attempted to penetrate her vagina with his penis.[26] On direct examination, appellant testified that after passing out on the floor at some point during the night he woke up to go to the bathroom.[27] Appellant testified that he removed his jeans, urinated, and washed his hands.[28] He then testified that he walked outside the bathroom without his jeans, looked over to the bed, and allegedly saw SPC K.W. holding out her hand to him.[29] Appellant stated that after he took SPC K.W.'s hand she pulled him on top of her and began kissing him.[30]

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[22] JA 59-60.
[23] JA 59.
[24] JA 59-62.
[25] JA 62-63.
[26] JA 223-32, 236. Appellant was charged both with aggravated sexual assault and aggravated sexual contact. JA 3.
[27] JA 221.
[28] JA 221-22.
[29] JA 223.
[30] JA 223-24.

Appellant stated he kissed SPC K.W. on the back and she then "nibbled [his] ear and kissed [his] neck."[31] Appellant also testified that SPC K.W. "put her hands in [his] boxers" and rubbed his penis "[v]ery vigorously" for five minutes.[32] Appellant further testified that after kissing SPC K.W. for approximately ten minutes, her rubbing his penis for about another five minutes, and rolling around on the bed knocking the covers off, appellant then pulled off SPC K.W.'s underwear and began to kiss "her inner thighs and the area directly above her vagina."[33] Appellant stated that neither he nor SPC K.W. said anything to each other during this whole time.[34] It was only when appellant began to kiss around SPC K.W.'s vagina that he says she screamed "[y]ou're not Zac," and kicked appellant off of her.[35] From this point on, both the victim and appellant's versions of events were generally consistent.[36]

Appellant testified that after he left the hotel he went to the train station where he encountered Master Sergeant (MSG) Justin Bartels.[37] Referencing MSG Bartels' prior testimony, appellant admitted that he made a statement to MSG Bartels that

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[31] JA 225.
[32] JA 228.
[33] JA 227-29.
[34] JA 226-29. Both the victim and appellant agree that there was no physical contact between the two of them beforehand, nor was there any talk of future sexual activity. JA 60-61, 241-42.
[35] JA 232.
[36] JA 59-60.
[37] JA 235-36.

he was forced out of a girl's room when she realized that appellant was not her boyfriend after they were already kissing each other.[38] While being questioned by German Police, appellant made a similar statement to them stating "I was in the room with a girl, we fooled around a little bit and then she kicked me out."[39] After making these remarks, appellant explained that both MSG Bartels and the German Police cut off appellant's explanation and told him to remain silent.[40]

2. Motion to Suppress

After making these statements, appellant testified that he was placed in handcuffs when he was transferred by the Military Police back to Vilseck, Germany where he was placed "in [a] holding cell for several hours."[41] Appellant was moved to a health clinic where he met with Special Agent (SA) Jeffery Harris who informed him that "an inquiry was being conducted in connection with possible violations of the law including aggravated sexual assault."[42] Appellant agreed that he "knew at

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[38] JA 255. MSG Bartell's testimony (found in the original transcript of the Record of Trial) states that appellant made the spontaneous statement at the train station: "I think I know what this is about. I was in a girl's room and I was kissing her and at one point she realized that I wasn't her boyfriend, I had to leave." Appellant made essentially the same statement again in the car during the ride to the German police station. Record of Trial 335-36.
[39] JA 253.
[40] JA 253-55.
[41] JA 22, 256.
[42] JA 257.

the time" that he was "being investigated for aggravated sexual assault."[43] SA Harris explained that he needed appellant's consent for a medical exam pursuant to this inquiry.[44] Appellant provided his consent and signed a consent form for the medical exam.[45] Despite appellant providing his consent for the medical exam, the individual performing the exam, Lieutenant Colonel (LTC) Alumbaugh, failed to advise appellant of his Article 31(b), UCMJ, rights before asking him questions related to the incident.[46]

Due to this failure, appellant moved to suppress the statements appellant made to LTC Alumbaugh; the Government did not oppose appellant's motion.[47] Appellant also filed a motion to suppress "all evidence and derivative evidence obtained as a result of [appellant's] involuntarily given consent;" the Government *did* oppose this motion.[48]

At the subsequent motion hearing, the Government called SA

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[43] JA 257. "Aggravated Sexual Assault" was noted on the consent form in the space identifying which possible violations of law that the inquiry and search was connected with. JA 407.
[44] JA 257.
[45] JA 257. The consent form contained the following language: "I have been advised of my right to refuse a search of my person, premises, or property ... The written permission is given to the undersigned USACIDC Special Agent freely, voluntarily, and without threats or promises of any kind." JA 407.
[46] JA 372-73. LTC Alumbaugh was a Major (MAJ) at the time.
[47] JA 5, 372-73. However, the government reserved the right to use "derivate evidence from those statements ... for other purposes such as impeachment." JA 20.
[48] JA 397-406.

Harris to the stand to testify.[49] SA Harris testified that appellant was in handcuffs when he met him in a waiting room at the Vilseck Health Clinic and he requested that they be taken off.[50] SA Harris did not notify appellant that he was free to leave at this time.[51] When SA Harris asked for appellant's consent to have the medical personnel conduct a "sexual assault examination" on appellant, he hesitated and asked whether he "should speak with a lawyer."[52] SA Harris then told appellant that "when he came to the CID office later that day, [SA Harris] would advise him of his legal rights."[53] However, SA Harris testified that he did advise appellant twice – before and after appellant asked about whether he should get an attorney - that any consent to search "was of his own free will."[54] During this time, SA Harris was wearing a civilian suit and was armed "for officer safety purposes."[55] Prior to obtaining appellant's consent for the exam, another CID agent had obtained a search authorization from a military magistrate to obtain DNA from appellant at approximately 0600 or 0700 earlier that day.[56] SA Harris, stated that if the appellant did not consent to the

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[49] JA 7-18.
[50] JA 8, 16.
[51] JA 12, 22.
[52] JA 9, 15.
[53] JA 9.
[54] JA 9, 15.
[55] JA 10.
[56] JA 13.

search, he would have proceeded under the authority gained from the military magistrate nine hours earlier.[57]

Next, appellant was called to the witness stand by defense to testify for the limited purposes of the motion.[58] Appellant's testimony only substantively diverged from SA Harris' testimony on the point of what would happen if appellant did not consent.[59] Appellant agreed that the handcuffs were taken off for approximately fifteen minutes before signing the consent form.[60] Appellant admitted to signing the form, but only because he said SA Harris told him he could "sign it and get the form over with" or SA Harris "would attempt to obtain consent from [his] command."[61] Appellant also testified that he asked "should [he] have a lawyer," to which SA Harris replied "we'll get to that later."[62] Appellant testified that he "didn't want to do anything until he had a lawyer" and that he felt SA Harris "understood [him] and was just ignoring [him]."[63] Appellant admitted that he did not mention this to anyone until the charges were brought against him about nine months later.[64]

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[57] JA 13, 16.
[58] JA 21-25.
[59] JA 22.
[60] JA 22.
[61] JA 22.
[62] JA 23.
[63] JA 23.
[64] JA 25.

During the motions hearing, the government noted that since the taking of DNA evidence was authorized by the military magistrate many hours before the medical exam, the defense's argument that the medical exam results subsequently led to the taking of the DNA evidence had no merit.[65] Defense argued that the major difference was that if appellant did not give his consent, the military magistrate had only authorized DNA to be taken via a blood test, thus appellant's clothing, hair and fingernail scrapings would not have been seized at that time.[66] Ultimately, the military judge made the following ruling:

> As pointed out in the written motions and by counsel, and during oral arguments, there are essentially two pieces to this motion. The first is whether or not [appellant] consented to the search, which is the SANE examination was voluntarily given; the second is whether the evidence--physical evidence essentially from that SANE examination was derived from inadmissible statements. With respect to whether or not [appellant]'s consent was voluntarily given, the court finds that it was. [SA] Harris advised [appellant] that this was a voluntary procedure that he did not have to acquiesce despite the fact that [appellant] had been handcuffed and asked whether or not he should have an attorney, and appeared to be hesitant while signing the form. There was no unequivocal request for an attorney, nor is one required with dealing with a search ... [SA] Harris, did not apply undue pressure. The accused certainly could have stated that he did not want to when given the answer by the CID agent, we'll talk about lawyers later. [Appellant] could have at that point responded, well then, I don't want to do anything else until we do. He could have chosen not to sign the consent form at that point, but he did because he thought that he

[65] JA 20.
[66] JA 27, 401.

was going to have to be subjected to this exam at some point in time anyway, so he figured he might as well go ahead and do it now. That reason for signing the consent form doesn't go to show that it was not voluntarily given. In fact, it goes to the opposite to show that it was a conscious decision. [Appellant] thought about it and made a choice, and the choice was to sign the consent form.

So, the court finds that the government has met its burden to show that [appellant]'s consent to the search was voluntarily given. With respect to whether or not the results of the examination were derived from an inadmissible statement, the parties agree that any statements that [appellant] made to the SANE examiner are inadmissible given that there were no rights read to [appellant] prior to the examination.

However, the court believes that the government has met its burden of showing that the results from that SANE examination did not derive from any inadmissible statements. The consent to search form that [appellant] signed specifically consented to a search involving a sexual assault evidence collection kit, to collect evidence that may include hairs, fibers, fluids, blood, DNA, semen, saliva and clothing. That certainly indicates that it was more likely than not that the SANE examiner was going to be collecting those items. It doesn't just say DNA. It talks about a variety of items. So, it is more likely than not that the SANE examiner was going to be collecting those regardless of what statements the accused made during the course of the examination. And, as such, the defense motion to suppress all evidence and derivative evidence obtained as a result of [appellant's] consent is denied.[67]

Subsequent to the military judge denying appellant's motion to suppress, the Government called Mr. Jeffrey Fletcher, "a forensic biologist in the Serology DNA Division" employed at the U.S. Army Criminal Investigation Laboratory (USACIL) as an

[67] JA 30-32.

expert witness.[68] Mr. Fletcher was the individual who conducted the DNA analysis on the items contained in both the appellant's and the victim's sex assault examination kits.[69] Mr. Fletcher said he was unable to rule out appellant as being a contributor to a "minor" or "partial" profile of DNA found on a body swab from SPC K.W.'s "right medial leg."[70] The Government expert testified that seeing that profile in a totally random U.S. Caucasian population would be approximately "1 in 700 individuals."[71] Mr. Fletcher also stated that he could not exclude SPC K.W. as the source of DNA found in appellant's underwear or from a swab taken from his penis.[72] Semen was also found on the swabs taken from each side of SPC K.W.'s labia, but the DNA of that semen only matched that of SPC Malphurs.[73]

The defense cross-examined Mr. Fletcher at length in order to establish possible theories of how the DNA transfer from SPC K.W. to appellant's penis occurred, other than vaginal intercourse.[74] Both parties' closing arguments only related the DNA evidence to the aggravated sexual assault specification.[75]

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[68] JA 145.
[69] JA 145, 159.
[70] JA 161-62.
[71] JA 161-62, 385-90.
[72] JA 163-65, 385-90.
[73] JA 159, 163, 391-92.
[74] JA 171-203.
[75] JA 341, 343, 355-56, 363. The panel ultimately found appellant not guilty of aggravated sexual assault. JA 366.

3. Government's Cross-examination of Appellant

Appellant did not testify about his interaction with the Sexual Assault Nurse Examiner (SANE), LTC Alumbaugh on direct examination.[76] On cross-examination, government counsel asked appellant questions concerning all the events he testified about during direct examination in chronological order.[77] Government counsel also explored what comments appellant made to Master Sergeant (MSG) Bartels at the train station, and then later during a car ride to the Polizei Station.[78] Government also asked about any statements appellant made to the German Police.[79]

Once the government counsel moved into testimony regarding the part where appellant met with the LTC Alumbaugh, defense counsel immediately objected on the basis the inquiry being "[o]utside the scope."[80] Government responded "[i]t's not outside the scope ... [t]his goes directly toward the comments that [appellant] may or may not have made [and it] also goes toward the events ... and the investigation on that day."[81] Defense counsel then clarified that appellant only "testified as to the events that occurred that night in the train station ... [he]

[76] JA 235-36.
[77] JA 237-57.
[78] JA 246-48, 255.
[79] JA 253.
[80] JA 257.
[81] JA 257.

did not go into further events."[82] The military judge overruled appellant's "outside the scope" objection and the government continued to probe his credibility via cross-examination.[83]

The government asked, among other questions, whether appellant told LTC Alumbaugh that: 1) SPC K.W. kissed him, 2) SPC K.W. kissed his ear, 3) SPC K.W. "grabbed [his] penis," and 4) SPC K.W. "masturbated [him] for five minutes."[84] Appellant affirmed that he did, in fact, tell LTC Alumbaugh about all of these four acts at the time he volunteered to participate in the examination.[85] Trial defense counsel did not raise an objection to any of these four questions or their answers.[86] Trial counsel then started a new line of questioning and cross-examined appellant regarding statements he made to his roommate.[87]

During a subsequent Article 39(a) session requested by defense immediately after government recalled LTC Alumbaugh on rebuttal for purposes of impeachment, the military judge put the following on the record:

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[82] JA 258.
[83] JA 258-61.
[84] JA 259-61.
[85] JA 259-61.
[86] JA 259-61. During a subsequent Article 39(a) session, defense counsel objected to a related question of whether appellant told LTC Alumbaugh that SPC K.W. was asleep the whole time, arguing that appellant's response was not an inconsistent statement; government counsel replied that he was "not impeaching [appellant] at this point in time" and that he had a "reasonable basis for the question." JA 265. The military judge overruled this objection as well. JA 266.
[87] JA 267-69.

> MJ: All right. It appears as though what the government is trying to get out is to impeach by contradiction which would not lead to any discussion of omission other than that which directly contradicts what the accused said in court today. If the accused said that he told [LTC] Alumbaugh one thing and [LTC] Alumbaugh testifies that she was never told that thing, then that would be appropriate impeachment by contradiction. With respect to the statements offered by the government, the accused testified in court that he did not tell [LTC] Alumbaugh that [SPC K.W.] lifted her hand to him or pulled him into bed. [Appellant] testified that he never said that. So, for [LTC Alumbaugh] then to testify that [appellant] never said that would be commenting on an omission and not be impeaching by contradiction because it does not contradict what the accused said in court today ... The accused did testify that he told [LTC] Alumbaugh that [SPC K.W.] kissed him on the ear. The accused did testify that he told [LTC] Alumbaugh that [SPC K.W.] grabbed his penis and ... that he told her that she masturbated him for approximately five minutes.[88]

After the military judge found no basis to admit appellant's statement to LTC Alumbaugh that the victim woke up when he kissed her on the stomach, the military judge continued:

> MJ: ... So, it appears as though the statements that you intend to elicit are the statements that the accused told ... [LTC] Alumbaugh that [SPC K.W.] kissed him, that the accused told ... [LTC] Alumbaugh that [SPC K.W.] kissed and nibbled on his ear, - or did not. I'm sorry. For both of these that *he did not say* these things. That he did not tell her that [SPC K.W.] grabbed his penis. Those three statements. Is that-
> ATC: Did not grab his penis and did not masturbate him for five minutes.
>
> MJ: Correct. Defense, do you have any objection to any of those statements?...
> DC: No objection, Your Honor.[89]

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[88] JA 298-99.
[89] JA 302-03. (emphasis added)

Given the lack of objection by defense, the Government then re-called LTC Alumbaugh to ask her the following four questions:

> Q. [LTC] Alumbaugh, did the accused tell you that [SPC K.W.] kissed him?
> A. No.
>
> Q. Did the accused tell you that [SPC K.W.] kissed him on the ear?
> A. No.
>
> Q. Did the accused tell you that [SPC K.W.] grabbed his penis?
> A. No.
>
> Q. Did the accused tell you that [SPC K.W.] masturbated his penis for five minutes?
> A. No.
>
> ATC: No further questions.[90]

Later during the court-martial after a R.C.M. 802 conference, the following exchange took place between the military judge, government and defense counsel:

> MJ: ... Additionally, in the R.C.M. 802 conference, we addressed the proposed closing argument by the government. There had been some issue in a prior 39(a) as to whether or not the government intended to argue omissions that the accused had--just can't make any omissions, but omissions in the story that he had told [LTC] Alumbaugh. The defense had objected. I deferred that issue until a later time. This would be the later time. However, it appears from the R.C.M. 802 conference that the government does not intend to argue any of those omissions. Is that correct?
>
> ATC: The government is not going to argue omissions, the government will argue contradictions. So the four points that were brought up on the rebuttal where the accused said that he told [LTC] Alumbaugh she kissed

[90] JA 306.

> him on the ear, that she kissed him on the--I believe it was the neck, that she--that he told her that she touched his penis and he--she rubbed his penis. Those things will be talked about. But the others will not, unless it's raised in legitimate rebuttal, which I don't anticipate will happen.
>
> MJ: All right. Defense Counsel, any objection with that? ...
> DC: No objection, Your Honor.[91]

During closing argument the Government made the following points in regards to the contradictions between appellant's sworn testimony and that of LTC Alumbaugh:

> Further contradiction is what [appellant] told [LTC] Alumbaugh. On cross-examination, I asked the accused, did you tell [LTC] Alumbaugh she kissed your ear? Yes. Did you tell [LTC] Alumbaugh she kissed your neck? Yes. Did you tell [LTC] Alumbaugh she grabbed your penis? Yes. Did you tell [LTC] Alumbaugh she rubbed it for five minutes? Yes. What did [LTC] Alumbaugh say? *No to all of those*. ... He did not tell you the truth and the story is incredible. You've got to remember that the accused at the time he talked to [LTC] Alumbaugh, knew he was having swabs taken, knew that he was under investigation for aggravated sexual assault, so the only answer that he could give me to those questions were "yes" because to answer anything else makes no sense. Just like his entire story makes no sense.[92]

In response, during defense's closing argument, defense attempted to diminish the significance of appellant's four alleged statements noting that there were "a lot of things that [LTC Alumbaugh] doesn't remember about the exam."[93]

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[91] JA 324.
[92] JA 338 (emphasis added).
[93] JA 355.

Granted Issue I

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY OVERRULING THE DEFENSE COUNSEL'S SCOPE OBJECTION DURING THE GOVERNMENT'S CROSS-EXAMINATION OF THE APPELLANT.

Summary of Argument

The military judge did not abuse her discretion when she properly overruled the defense's beyond the scope objection to the Government's cross-examination of appellant regarding the statements he allegedly made to LTC Alumbaugh. Appellant opened the door when he testified about his version of events before and after the assault. Appellant failed to object to the questioning of appellant about the specific statements he made to LTC Alumbaugh. Defense counsel also stated they had no objection to the Government's proposed four rebuttal questions for LTC Alumbaugh. Thus, any new arguments made on alternative bases by appellant now on appeal are waived absent plain error.

Even if this court finds no waiver, the Government's cross-examination of appellant regarding statements made to LTC Alumbaugh was proper as his questions were intended to test appellant's credibility. The Government's inquiry was permissible and any statements, even those made without a proper rights advisement, were properly used to impeach appellant's in-court testimony. Even assuming error, there was no prejudice as the four contradictory statements were trivial compared with the weight of the rest of the evidence in the case.

Standard of Review

This court reviews a judge's ruling on the admissibility of evidence under an abuse of discretion standard.[94] However, failure to make a timely objection or failure to cite the proper basis for the objection will waive any issue on appeal with respect thereto in the absence of plain error.[95]

Law

Generally speaking, "[c]ross-examination should be limited to the subject matter of the direct examination and *matters affecting the credibility of the witness.*"[96] Moreover, "[t]he military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."[97] "The same general rule applies when it is the accused who testifies, [and] '*greater latitude* may be allowed in [the accused's] cross-examination than in that of other witnesses.'"[98]

The Supreme Court has noted that "unless prosecutors are allowed wide leeway in the scope of impeachment cross-

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[94] *United States v. Dewrell*, 55 M.J. 131, 137 (C.A.A.F. 2001).
[95] The only basis on which defense properly preserved an objection for this assignment of error is "outside the scope." JA 257. Any other basis would be subject to plain error analysis. *See United States v. Ruiz*, 54 M.J. 138, 143 (C.A.A.F. 2000).
[96] Military Rule of Evidence [hereinafter M.R.E.] 611(b) (emphasis added).
[97] *Id.*
[98] *United States v. Taylor*, 2 C.M.R. 438, 440 (A.B.R. 1952) (emphasis added). *See also United States v. Gibson*, 18 C.M.R. 323, 326 (C.M.A. 1955).

examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge."[99] "Unquestionably, an accused who exercises his right to testify takes his credibility with him to the stand, and it may be assailed by every proper means."[100] As such, "a trial counsel should not hesitate to present the Government's competent evidence in its most effective light."[101]

In addition to these guidelines, Military Rule of Evidence 304(b)(1) states:

> Where the [accused's] statement is involuntary only in terms of noncompliance with the requirements of [M.R.E.] 305(c) or 305(f) ... this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused....[102]

Similarly, even when an "appellant's statement [is] inadmissible during the prosecution's case-in-chief, it could properly be used for impeachment during cross-examination of the appellant."[103] This rule originally applied the Supreme Court's

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[99] *Doyle v. Ohio*, 426 U.S. 610, 617, n.7 (1976).
[100] *Gibson*, 18 C.M.R. at 326 (citation omitted).
[101] *Id.*
[102] M.R.E. 304(b)(1). *See also MCM*, App. 22, M.R.E. 304(b) ("Analysis of the Military Rules of Evidence" stating the 1990 Amendment language "expands the scope of the exception and thereby permits statements obtained in violation of Article 31(b), UCMJ ... to be used for impeachment purposes ....").
[103] *United States v. Sykes*, 38 M.J. 669, 670-71 (A.C.M.R. 1993).

holding in *Harris v. New York*.[104] *Harris* permitted the use of statements, even taken without a proper rights warning, during cross-examination of the accused to impeach the accused's trial testimony.[105] "The rationale behind these exceptions is that an accused should not be allowed to pervert procedural safeguards into a license to commit perjury" or to otherwise impermissibly rely "on the Government's disability to challenge credibility utilizing the traditional truth-testing devices of the adversary process."[106]

In 1990, the rule "was amended further to permit limited use of a statement obtained in violation of the warning requirements of Article 31(b)."[107] This court noted that the analysis section of the *Manual* states "that when there is a violation of the rules requiring cessation of questioning, 'the deterrent effect of excluding the unlawfully obtained evidence is fully vindicated by preventing its use in the Government's case-in-chief, but permitting its collateral use to impeach an accused who testifies inconsistently ....'"[108]

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[104] *See id.* (citing *Manual for Courts-Martial*, United States (1984 ed.) [hereinafter *MCM*] 1984 app. 22, A22-10. *See also Harris v. New York*, 401 U.S. 222, 225-26 (1971).
[105] *Id. See also Jenkins v. Anderson*, 447 U.S. 231, 237 (1980).
[106] *Sykes*, 38 M.J. at 670-71 (citing *Oregon v. Hass*, 420 U.S. 714, 721 (1975)); *United States v. Swift*, 53 M.J. 439, 450 (C.A.A.F. 2000). *See also United States v. Trimper*, 28 M.J. 460, 467 (C.M.A. 1989) (citation omitted).
[107] *Swift*, 53 M.J. at 450.
[108] *Id.* (quoting *MCM*, App. 22, M.R.E. 304(b)).

"Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."[109] Federal courts have never considered "impeachment by contradiction" and "impeachment by omission" as separate legal categories; in fact, at least one Federal Circuit Court has found that impeachment by omission to be a *subcategory* of impeachment by contradiction.[110] Legal treatises also fail to draw any significant legal distinction between the two terms.[111]

Argument

1. Appellant's Cross-Examination

Appellant's argument is based on a series of erroneous legal and factual premises. The first of these is the flawed legal premise that military jurisprudence allows an accused to take the stand under oath to give his or her version of events,

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[109] *United States v. Catalan-Roman,* 585 F.3d 453, 464 (1st Cir. 2009) (quoting *Jenkins,* 477 U.S. at 239).

[110] *See generally Moylan v. Meadow Club, Inc.,* 979 F.2d 1246, 1249 (7th Cir. 1992) (noting the "impeachment by omission, [is] a well-established, if slightly uncommon, subcategory of impeachment by contradiction").

[111] *See also* 33A FED. PROC., L. ED. § 80:117 (citing *Moylan,* 979 F.2d at 1249) (noting impeachment by omission's "subcategory" status to impeachment by contradiction); 4 HANDBOOK OF FED. EVID. § 613:2, n.5 (7th ed.); 1 MCCORMICK ON EVID. § 34 (7th ed.) (noting that to be sufficiently inconsistent the "statement need only bend in a different direction than the trial testimony ... [f]or instance, if the prior statement omits a material fact presently testified to and it would have been natural to mention that fact in the prior statement, the statement is sufficiently inconsistent"). (internal quotations and citations omitted).

but at the same time *purposefully*[112] "limit the scope of the testimony to avoid opening the door" to cross-examination of this same version of events by government counsel.[113]

The Supreme Court has long been wary of such efforts "to frustrate the truth-seeking function of a trial by presenting [such] tailored defenses insulated from effective challenge."[114] "If [an accused] takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness ... '[h]e has no right to set forth to the jury all the facts which tend [to be] in his favor without laying himself open to a cross-examination upon those facts.'"[115] As this court has "unquestionably" asserted that "an accused who exercises his right to testify takes his credibility with him to the stand," it is well within the discretion of a military judge to permit the government "wide leeway" or "greater latitude" in cross-examining the credibility of the accused's version of events.[116] Moreover, as the abuse of discretion standard applies to appellant's "beyond the scope" objection, the general possibility that the judge's ruling in

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[112] The word "purposefully" was used in appellant's original brief to ACCA, but was omitted in their current brief. AB 9.
[113] AB 9.
[114] *See Doyle*, 426 U.S. at 617, n.7. *See also Walder v. United States*, 347 U.S. 62, 65 (1954).
[115] *Brown v. United States*, 356 U.S. 148, 155-56 (1958) (quoting *Fitzpatrick v. United States*, 178, U.S. 304, 315 (1900).
[116] *See Doyle*, 426 U.S. at 617, n.7; *Gibson*, 18 C.M.R. at 326; *Taylor*, 2 C.M.R. at 440.

light of such "wide leeway" would still be "arbitrary, fanciful, clearly unreasonable, or clearly erroneous" is rather remote.[117]

Given the facts of this case, it is clear the military judge did not abuse her discretion as to the objection. When appellant took the witness stand on direct examination he stated (contrary to the testimony of the victim) that SPC K.W. was awake during the entire encounter and that she was the one who initiated sexual contact.[118] Among other detailed, very specific testimony, appellant stated that SPC K.W. kissed him, kissed his ear, put her hands down his boxers, and grabbed his penis and rubbed it "[v]ery vigorously" for about five minutes.[119] When appellant testified to his version of events he simultaneously also "opened the door" to relevant questions designed to probe appellant's credibility as to his version of events.[120]

Some of these probing questions were specific to what appellant said to the various individuals he encountered after the sexual assault such as PFC Malphurs, SPC K.W., MSG Bartels, the German Police Officers, SA Harris, LTC Alumbaugh, and SPC Garthwait.[121] When government trial counsel got to the chronological point of the medical exam that appellant had

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[117] *See Doyle*, 426 U.S. at 617, n.7; *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).
[118] JA 223-32.
[119] JA 225, 228.
[120] JA 240-69. *See United States v. Lovig*, 35 C.M.R. 41, 44 (C.M.A. 1964); *Ruiz*, 54 M.J. at 143-44.
[121] JA 240-69.

volunteered for, defense counsel immediately objected.[122] Yet, the only basis for an objection that the defense made was "outside the scope."[123] In doing so, trial defense counsel appeared to imply that because appellant "did not go into further events" beyond what "occurred that night in the train station" on direct examination, that this would somehow limit the scope of government's cross-examination to the exact segment in time discussed by appellant during direct.[124]

Appellant's argument also mistakenly relies on a faulty factual inference that the Government had "previously agree[d] that [appellant's] statements [to LTC Alumbaugh] were inadmissible" – apparently for *any* purpose – when, in fact, the government trial counsel specifically noted at the beginning of trial that while he agreed such statements should be suppressed "for merits purposes," the Government still "reserve[d] the right[] to use them for other purposes *such as impeachment*."[125] This court has long held that when an accused testifies, he or she necessarily takes the risk of putting his or her credibility on the line.[126] In this case, the purpose of government counsel's questions was to probe appellant's version of events by testing both his credibility and ability to remember what actually took

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[122] JA 257.
[123] JA 257.
[124] JA 258.
[125] AB 10. JA 20.
[126] *See Gibson,* 18 C.M.R. at 326.

place by comparing what he said at the time of the assault to what he was now saying at trial.[127] One of the best ways to test the credibility of appellant's in-court testimony is to ask what specific statements he made (or did not make) to those individuals right after the incident took place.[128] All of government's questions about what appellant said to the various witnesses right after the events in the hotel room, to include LTC Alumbaugh, went to this proper purpose.[129] This is even so despite defense's attempts to insulate appellant's version of events from effective challenge by use of strategic, chronologically-tailored testimony.[130]

Moreover, appellant's argument relies on another erroneous legal premise when he claims that "[i]mpeachment by omission is not one of the permissible uses of unwarned statements recognized in [M.R.E.] 304(b)(1)."[131] Appellant provides no citation to legal authority except for the rule itself, apparently relying on the fact that the *Manual* only uses the term "impeachment by contradiction" and does not include the

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[127] JA 296-98, 302. *See generally Ruiz*, 54 M.J. at 143 (noting that "[t]rial counsel had a duty to ... point out the inconsistencies and unbelievable nature of appellant's story"). (internal quotations omitted).
[128] *See id. See also United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (noting that in such situations it is proper to "challenge the defendant's testimony as to his behavior following arrest").
[129] *See id.* JA 246-261, 267-69.
[130] *See Doyle*, 426 U.S. at 617, n.7.
[131] AB 10.

term "omission."[132] However, both federal case law and legal treatises have noted that impeachment by omission is a "subcategory" of impeachment by contradiction.[133] As such, there is no reason to believe that the Government's reliance on exploring what was *not said* by appellant to the various witnesses (including LTC Alumbaugh) after the sexual assault was anything but proper.

It is also important to note, that aside from appellant's "beyond the scope" objection, any of appellant's new arguments now made on appeal regarding improper impeachment or improper use of statements made without a rights warning, are now all subject to plain error review.[134] Regarding the portion of the cross-examination that was not objected to, the majority of these statements made to LTC Alumbaugh were either screened out for rebuttal purposes or given a curative instruction by the military judge.[135] In the end, given the narrow requirements M.R.E. 403(b)(1), the military judge only permitted the government to rebut four statements: the two answers appellant gave to the LTC Alumbaugh related to SPC K.W. allegedly kissing appellant and the two answers he gave related to SPC K.W.

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[132] AB 10. M.R.E. 304(b)(1).
[133] *See Moylan*, 979 F.2d at 1249; 33A FED. PROC., L. ED. § 80:117; 4 HANDBOOK OF FED. EVID. § 613:2, n.5 (7th ed.); 1 MCCORMICK ON EVID. § 34 (7th ed.).
[134] *Ruiz*, 54 M.J. at 143-44.
[135] JA 287, 301-02.

grabbing/touching his penis for about five minutes.[136] Most importantly, appellant specifically denied having any objection to these four rebuttal questions during the trial.[137]

In sum, this court has previously recognized "the Supreme Court's holding that the Government is permitted to make 'a fair response' to claims made by the defense, even when a Fifth Amendment right is at stake."[138] As such, the military judge acted well within her discretion by allowing government to probe appellant's version of events.

2. No Prejudice

Even assuming *arguendo* that either the military judge abused her discretion overruling the scope objection or that she committed plain error regarding appellant's alternative arguments now on appeal, the four statements allegedly made by appellant that were later impeached by LTC Alumbaugh on rebuttal were trivial in comparison with the weight the other evidence in the case.

First, trial defense counsel characterized the four impeached statements as "unimportant" in comparison to the "big

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[136] JA 302-33.
[137] JA 302.
[138] *Gilley*, 56 M.J. at 120-21 (citing *United States v. Robinson*, 485 U.S. 25, 32 (1988)). *See also Walder*, 347 U.S. at 65 (the availability of an objection to the affirmative use of improper evidence does not provide the defendant "with a shield against contradiction of his untruths"); *Ruiz*, 54 M.J. at 144 (holding that the Government "had a duty to ... point out the inconsistencies and unbelievable nature of appellant's story").

overarching" issue.[139] Particularly, defense emphasized that "there [were] a lot of things that [LTC Alumbaugh did not] remember about the exam" given that "[s]he didn't write down every question that she asked on the exam."[140]

Second, nothing in these four impeached statements about what appellant allegedly did or did not tell LTC Alumbaugh hurt appellant as much as his own unbelievable story.[141] Appellant went to great lengths to create a scenario that provided him with a defense of mistake of fact as to consent. Appellant testified that after he walked out of the bathroom (after conveniently leaving his pants in the bathroom) SPC K.W. was the one who initiated the encounter by holding her hand out to him and leading him to her bed.[142] In contrast, SPC K.W. testified that she never held appellant's hand or initiated any kind of sexual contact with him whatsoever.[143]

What is truly incredible about appellant's version of events is the notion that SPC K.W. kissed and groped appellant for around ten minutes and then rubbed his penis for another five minutes without realizing the whole time that appellant was not actually her boyfriend.[144] This version of the initial sexual

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[139] JA 355.
[140] JA 355.
[141] JA 355.
[142] JA 223.
[143] JA 60-61.
[144] JA 227-29.

contact, however unbelievable it may have been, was necessary to bolster appellant's mistake of fact defense. This was alleged by appellant despite the fact both parties agreed that SPC K.W. never kissed or touched appellant at the bar, and that their mutual interactions were minimal at best.[145]

What appellant could not provide was a rational explanation for why his kissing above SPC K.W.'s vagina instantly clued her into his true identity, while the prior fifteen minutes of kissing his face and stroking his penis did not. SPC K.W. testified that she never kissed appellant or rubbed his penis.[146] It was only after appellant was between her legs and began kissing above her vagina when she recognized that appellant was not her boyfriend.[147]

In short, the only credible version of events was the version as told by the victim. Appellant's story defied common sense and his fanciful testimony in comparison to SPC K.W.'s credible testimony was more than sufficient convince the panel to convict him of the Abusive Sexual Contact specification. Consequently, even assuming error, appellant has suffered no prejudice in this case.

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[145] JA 50-51, 60, 242.
[146] JA 41-92.
[147] JA 58.

Granted Issue II

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE MOTION TO SUPPRESS RESULTS OF THE DNA ANALYSIS.

Summary of Argument

Appellant's consent to the sexual assault examination was entirely voluntary and any evidence relating to appellant's DNA evidence was properly admitted. More importantly, even assuming the DNA evidence should have been excluded, appellant suffered no prejudice. The DNA evidence was only important to the Government's case as to the aggravated sexual assault specification to prove that appellant's penis came in contact with the victim's vagina. Given that appellant was acquitted of that specification, any argument about whether the DNA evidence should have been admitted is entirely moot. The DNA evidence did not add anything to the abusive sexual contact specification as appellant's presence in the hotel room was uncontested at trial.

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress evidence for an abuse of discretion.[147] Findings of fact are reviewed for clear error (clearly erroneous) and conclusions of law are reviewed de novo.[148]

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[147] *United States v. Gallagher*, 66 M.J. 250, 253 (C.A.A.F. 2008) (citing *United States v. Khamsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002)).

[148] *Id.* (citing *United States v. Flores*, 64 M.J. 451, 454 (C.A.A.F. 2007)).

Law

The voluntariness of consent is determined by looking at the totality of the circumstances.[149] In determining whether a defendant's will was overborne, the Supreme Court has advocated assessing the characteristics of both the accused and the interrogation.[150] Some of these factors include: 1) the youth of the accused, 2) his lack of education, or his low intelligence, 3) the lack of any advice to the accused of his constitutional rights, 4) the length of detention, 5) the repeated and prolonged nature of the questioning, and 6) the use of physical punishment such as the deprivation of food or sleep.[151]

Similarly, this court has evaluated voluntariness on the basis of related factors including: 1) degree to which liberty was restricted, 2) the presence of coercion or intimidation, 3) awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors, (4) mental state at the time, (5) consultation, or lack thereof, with counsel; and (6) the coercive effects of any prior violations of the suspect's rights.[152]

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[149] Mil. R. Evid. 314(e)(4). *See also Schneckloth v. Bustamante*, 412 U.S. 218, 225-26 (1973).
[150] *See id.*
[151] *Id.* at 266.
[152] *United States v. Wallace*, 66 M.J. 6, 9 (C.A.A.F. 2008) (citing *United States v. Murphy*, 36 M.J. 732, 734 (A.F.C.M.R. 1992).

Argument

1. Voluntary Consent

The military judge did not abuse her discretion in finding that appellant's consent to participate in the medical exam was voluntary. Her findings were not based on any misstated or otherwise clearly erroneous facts.[154] She weighed on the one hand, that appellant "had been handcuffed and asked whether or not he should have an attorney, and appeared to be hesitant while signing the [consent] form."[155] On the other hand, she considered that SA Harris twice "advised [appellant] that this was a voluntary procedure," that he applied no "undue pressure"[156] to appellant, and appellant had made "no unequivocal request for an attorney."[157]

The military judge found that the "reason for signing the consent form" and even appellant's hesitation went "to show that it was a conscious decision [that appellant] thought about it and made a choice, and the choice was to sign the consent form."[158] Moreover, the consent form itself contained the

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[154] JA 30-32. *See Gallagher*, 66 M.J. at 253 (citing *Flores*, 64 M.J. at 454).
[155] JA 30.
[156] SA Harris used no improper tactics or tricks against appellant, SA Harris had appellant's handcuffs removed as soon as he met with him, and the fact that SA Harris was wearing his duty uniform of a civilian suit and a sidearm cannot be said to exert "undue pressure" on appellant. JA 8, 10, 16, 22.
[157] JA 30.
[158] JA 31.

following language: "I have been advised of my right to refuse a search of my person, premises, or property ... The written permission is given to the undersigned USACIDC Special Agent freely, voluntarily, and without threats or promises of any kind" that appellant would have read before signing the form.[159] Additionally, even after appellant had signed the form, SA Harris reminded him that his participation in the medical exam was still his choice and that his consent to the exam "was [still] of his own free will."[160]

The military judge also properly found that "the government has met its burden of showing that the results from that SANE examination did not derive from any inadmissible statements."[161] She also noted that by signing the form, appellant "specifically consented to a search involving a sexual assault evidence collection kit, to collect evidence that may include hairs, fibers, fluids, blood, DNA, semen, saliva and clothing."[162] As such, she found that this "certainly indicate[d] that it was more likely than not that [LTC Alumbaugh] was going to be collecting those items ... regardless of what statements the accused made during the course of the examination."[163]

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[159] JA 407
[160] JA 9, 15.
[161] JA 32.
[162] JA 32.
[163] JA 32.

Considering the factors as announced by the Supreme Court and this court in *Schneckloth* and *Wallace,* the factors are largely in the Government's favor.[164] On one hand, appellant's "youth and inexperience," his "lack of counsel," well as the "length of his detention," all weigh in favor of finding his consent to be of an involuntary nature.[165] While appellant did ask SA Harris whether or not he needed an attorney, appellant vacillated and never made an actual request.[166]

On the other hand, appellant was notified through both SA Harris and the form itself, of his constitutional right to decline participation in the exam.[167] Similarly, there is no evidence of "repeated [or] prolonged nature of [] questioning," "coercion or intimidation," a diminished "mental state" nor any evidence of "physical punishment such the deprivation of food or sleep."[168] All these other factors favor a view that appellant's consent was voluntary.

While there may be credible arguments that some factors favor appellant's argument, given all of the other factors, it cannot be said that the military judge abused her discretion by finding that appellant's consent was voluntary and denying appellant's motion to suppress the DNA evidence.

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[164] *See Schneckloth,* 412 U.S. at 225-26; *Wallace,* 66 M.J. at 9.
[165] *See id.* JA 9, 22-23, 237
[166] *See id.* JA 9, 23, 271-72.
[167] *See id.* JA 9, 407.
[168] *See id.* JA 21-25, 236, 253-73.

2. No Prejudice

Even more important to this second granted issue is the question of prejudice. Debating whether or not the military judge abused her discretion in denying the motion to suppress the DNA evidence is ultimately a purely academic exercise given that the DNA evidence was only important to the aggravated sexual assault specification of the Government's case. Appellant was found not guilty of that specification.[169]

Regarding the only specification at issue on appeal (abusive sexual contact), neither party contested that appellant and the victim had intimate contact stopping short of penis/vagina penetration in the hotel room.[170] The real question was whether or not SPC K.W. was substantially incapacitated at the time.[171] Consequently, appellant based his whole theory of the case around a theory of consensual acts and mistaken identity.[172] Appellant testified, in explicit detail, to an apparently intimate encounter involving various kissing and touching that would easily satisfy all the elements of abusive sexual contact except for SPC K.W. being substantially

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[169] JA 336.
[170] JA 3, 58-60, 224-32, 253, 255. Record of Trial 335-36. Appellant was charged with "touching the buttocks with his hands, touching her inner thighs with his hands, arms and body, and touching the groin with his hands and lips, of [SPC K.W.]." JA 3, 325-26.
[171] JA 3, 58-60, 223-32, 326.
[172] JA 223-32, 325-26, 344-60.

incapacitated at the time.[173] Additionally, even if this court were to speculate whether or not appellant would have then testified at trial, the evidence of appellant's spontaneous statements made in front of MSG Bartels as well as the statement in front of SPC Garthwait and the German Police that he was "kiss[ed]" and "fooled around" with a girl in a hotel room before she kicked him out when she realized he was not her boyfriend would have still been considered by the panel.[174] More importantly, SPC K.W. testified she *awoke to* appellant in between her legs kissing the area above her vagina, with her underwear pulled off, meaning she was incapacitated during the time leading up to that moment.[175]

This evidence stood in contrast to the DNA evidence. The main purpose of the DNA evidence was to prove the element of appellant's penis penetrating SPC K.W.'s vulva.[176] The primary DNA evidence included SPC K.W.'s DNA found both on appellant's penis and underwear.[177] This DNA evidence was critical to the Government's case as it was the only evidence cited to during the R.C.M. 917 motion that qualified as "some evidence" to the aggravated sexual assault specification.[178] However, this DNA

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[173] JA 325-26.
[174] JA 253, 255. Record of Trial 335-36.
[175] JA 58-60, 71-72.
[176] JA 3, 129, 325, 341, 388-89.
[177] JA 161-62, 385-90.
[178] JA 161-62, 321-22, 341, 385-90.

evidence was only critical to that specification.

The only other DNA evidence found was a "partial profile" of DNA on SPC K.W.'s right medial leg where appellant could not be ruled out as a contributor.[179] This secondary DNA evidence likely put appellant in contact with SPC K.W.'s bare leg at some time that early morning as her jeans were removed as she went to bed wearing only "panties, [a] tank top, sweatshirt and bra."[180] This DNA evidence was probative to both specifications and, most importantly, this particular DNA evidence would have come in whether or not the other DNA evidence was suppressed. Not only did SPC K.W. consent to having the DNA swabs taken from her body, the military magistrate had already found probable cause to take a DNA blood sample from appellant.[181] Thus, neither of those samples would have been suppressed and that additional evidence would have made its way before the panel.

Finally, both parties' closing arguments *only* related the DNA evidence to the specification for which appellant was found *not guilty*.[182] Given all of the following, it is telling that appellant cannot offer any real prejudice argument beyond a meager claim of cumulative error.[183] In sum, this court should find no error, but if error, then certainly no prejudice.

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[179] JA 160, 385-90.
[180] JA 71.
[181] JA 12, 16, 65, 401.
[182] JA 341, 343, 355-56, 363, 366.
[183] AB 22 (citing *Flores*, 69 M.J. at 373).

Conclusion

The military judge did not abuse her discretion when she properly overruled the defense's beyond the scope objection as appellant opened the door when he testified. Appellant failed to object to the cross-examination over the specific statements he made to LTC Alumbaugh and defense counsel stated they had no objection to her four questions on rebuttal. Thus, any new arguments made now on appeal are waived absent plain error.

Even if this court finds no waiver, the Government's cross-examination of appellant regarding statements made to LTC Alumbaugh was proper as his questions were intended to test appellant's credibility. The Government's inquiry was allowable and any statements, even those made without a proper rights advisement, were properly used to impeach appellant's in-court testimony. Even assuming error, there was no prejudice as the four contradictory statements were trivial compared with the weight of the rest of the evidence.

Finally, the military judge did not abuse her discretion as appellant's consent to the medical examination was voluntary and any evidence relating to appellant's DNA evidence was properly admitted. Even assuming error, appellant suffered no prejudice as the primary DNA evidence was only important to the aggravated sexual assault specification that appellant was ultimately acquitted of.

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the findings and sentence of the Army Court of Criminal Appeals.

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August 12, 2014

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing BRIEF ON BEHALF OF APPELLEE, *United States v. Piren,* Crim. App. Dkt. No. 20110416, Dkt. No. 14-0453/AR was filed electronically with the Court on the 12th day of August, 2014 and contemporaneously served electronically on military appellate defense counsel, Captain Robert H. Meek, III.

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