

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee

v.

Specialist (E-4)
SEAN R. ERIKSON,
United States Army,
Appellant

) FINAL BRIEF ON BEHALF OF
) APPELLANT
)
)
) Army App. Dkt. No. 20150130
)
) USCA Dkt. No. 16-0705/AR
)
)
)

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issue

WHETHER THE MILITARY JUDGE ERRED IN
EXCLUDING EVIDENCE THAT THE VICTIM
PREVIOUSLY MADE A FALSE ACCUSATION OF
SEXUAL CONTACT AGAINST ANOTHER SOLDIER.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On December 4, 2014, and January 23, and 26-27, 2015, an enlisted panel sitting as a general court-martial convicted Specialist (SPC) Sean R. Erikson,

contrary to his pleas, of sexual assault (two specifications) and adultery, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934 (2012). The panel sentenced SPC Erikson to reduction to E-1, confinement for three years, and a bad-conduct discharge. On July 9, 2015, the convening authority disapproved and dismissed Specification 1 of Charge I and approved the sentence as adjudged.

On June 27, 2016, the Army Court summarily affirmed the findings of guilty and the sentence. On October 19, 2016, this Honorable Court granted the appellant's petition for review and ordered briefs on the above stated issue.

Statement of Facts

A. The first allegation by the complaining witness, against another Soldier

Prior to SPC Erikson's trial, in May 2013, SPC Robert Mergen was at a friend's house with SPC BG, the named victim in SPC Erikson's court-martial. Specialist Mergen and a friend were in the living room playing video games and SPC BG and her then-boyfriend were sleeping on the couch next to them. (JA at 165)(sealed). While SPC Mergen was learning how to play the game, SPC BG "sat up and said, 'I got you.'" (JA at 166)(sealed). She then woke her boyfriend and stated SPC Mergen tried to touch her breast. (JA at 166)(sealed).

Approximately a day or two prior to this incident, SPC BG had received an Article 15, UCMJ, for violation of a lawful general order and failure to report. (JA at 170-71)(sealed).

Specialist Mergen testified that earlier in the night he heard SPC BG argue with her boyfriend, SPC Devon Hunter, about their relationship getting more serious and getting married. (JA at 166-67)(sealed). However, SPC Hunter did not want to get more serious. (JA at 158, 167)(sealed). After this argument, SPC BG accused SPC Mergen of touching her. At some point later, SPC Mergen was tried at a summary court-martial for touching SPC BG's breast and was found not guilty. (JA at 167, 180)(sealed).

B. The second allegation by the complaining witness, against SPC Erikson

On June 20, 2014, SPC Erikson and SPC BG were members of a group of Dining Facility (DFAC) workers during a field exercise who had gathered to drink alcohol, against policy, in the DFAC. (JA at 80). Specialist BG testified that while drinking with her companions, she used a small field cup and filled it "about two-thirds or maybe just under with vodka and PowerAde." (JA at 16-17). She remembered talking with SPC Devon Hunter on the telephone and the nature of their conversation. (JA at 50). She also remembered talking to Staff Sergeant (SSG) Paul Gallo, her then-boyfriend and current husband, that night on the phone. (JA29 and 51).

Specialist BG testified the last thing she remembered after she went to bed was waking up with SPC Erikson penetrating her and then she "rolled back out of awareness." (JA at 26). Specialist BG's barracks roommate testified that she heard

moaning from SPC BG's side of the room, and heard SPC BG saying, "Fuck me" and "Fuck me harder." (JA at 115). Specialist BG testified that when she "woke up and gained consciousness again," she found herself pulling on SPC Erikson's hair while he performed cunnilingus on her. (JA at 26). She alleged after gaining awareness, she kicked SPC Erikson away and ran out of the room. (JA at 26). Upon returning, SPC BG told SPC Erikson to leave. (JA at 29-30). Though SPC Erikson was at first confused, he did leave after SPC BG repeated herself. (JA at 30).

Prior to the night of drinking, SPC BG discussed marriage with her then-boyfriend, now husband. (JA at 171). However, earlier in the night of the incident with SPC Erikson, SPC BG called her ex-boyfriend and cried about the breakup of their relationship and that she loved and cared about him a lot. (JA at 159). It was after that conversation and the incident with SPC Erikson that she called her now-husband and alleged that SPC Erikson did something to her.

Staff Sergeant Gallo told SPC BG that if she did not report the incident with SPC Erikson, he would. (JA at 97). The next morning, PFC Freeman told SPC BG that SPC Erikson told him that they had sex. (JA at 78). Within five minutes, SPC BG reported the incident. (JA at 79).

C. Motions and Article 39(a) Hearing

Specialist Erikson's defense counsel filed a motion to admit evidence of the incident with SPC Mergen and his finding of not guilty at the summary court-martial. The theory was that the seriousness of the relationship discussion with SPC BG and argument led to the false accusation against SPC Mergen. Defense argued SPC BG used the false accusation against SPC Mergen to "draw negative attention away from herself and onto SPC Mergen and encourage sympathy by alleging some kind of victimization directly to her partner." (JA at 218)(sealed). Here, SPC BG made a phone call to her ex-boyfriend on how much she loved and cared about him, was sorry they ended their relationship and wanted to get back together. (JA at 159-60)(sealed). After which, there was sexual intercourse with SPC Erikson. After the sexual intercourse, she called her then-boyfriend, now husband and made her false allegation against SPC Erikson. Just as with her allegation against SPC Mergen, SPC BG wanted to draw negative attention away from her phone call with her ex-boyfriend and the sexual intercourse with SPC Erikson and encourage sympathy from her current boyfriend by alleging victimization to her partner. This theory was based on how SPC BG "attempts to avoid or resolve conflicts by making false accusations." (JA at 218)(sealed).

The defense argued their theory on why SPC BG had a motive to fabricate:

[B]ased on Specialist Hunter's testimony, the evidence that will be presented at trial is that what she said to him was she wanted to get back together. She still cared about him. She still loved him. And the response she got from him was, at best, lukewarm and possibly actually a denial. That would have made her feel pretty strongly she needed to go back to {SSG} Gallo to make sure that the relationship was preserved. Instead, as our theory goes, she had consensual sex with [SPC Erikson]. And so the fact that she had earlier been unfaithful . . . in an emotional way, greatly increases her pressure to lie.

(JA at 189-90)(sealed).

The military judge denied the defense motion regarding the incident with SPC Mergen and his finding of not guilty under Military Rule of Evidence (Mil. R. Evid.) 403 and unnecessarily referenced Mil. R. Evid. 412. (JA at 209, 211)(sealed). He found that the "defense failed to establish any similarity of the assault involved with Specialist Mergen in May 2013 to the facts of this case which allegedly occurred in 2014" and that it would lead to a trial within a trial and the probative value would be substantially outweighed. (JA at 211)(sealed). In addition, the military judge denied the defense's motion to elicit testimony regarding SPC BG's previous dating relationship with SPC Hunter. (JA at 208-09)(sealed).

Summary of Argument

The military judge abused his discretion when he excluded evidence that SPC BG previously made an accusation of sexual contact against another Soldier who was found not guilty at a summary court-martial.

WHETHER THE MILITARY JUDGE ERRED IN EXCLUDING EVIDENCE THAT THE VICTIM PREVIOUSLY MADE A FALSE ACCUSATION OF SEXUAL CONTACT AGAINST ANOTHER SOLDIER.¹

Law and Argument

“A military judge’s decision to admit or exclude evidence is reviewed for an abuse of discretion.” *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015); *see also United States v. McElhaney*, 54 M.J. 120, 129-30 (C.A.A.F. 2000)(discussing exclusion under Mil. R. Evid. 403). “A military judge abuses his discretion if ‘his findings of fact are clearly erroneous or his conclusions of law are incorrect.’” *Id.* (citing *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014)). The challenged action must be “arbitrary, fanciful, clearly unreasonable” or clearly erroneous. *McElhaney*, 54 M.J. at 129.

The Sixth Amendment protects an accused’s right to confrontation and cross-examination. However, the scope of cross-examination is limited to “the subject matter of the direct examination *and matters affecting the credibility of the*

¹ Appellant recognizes there is a difference between a false accusation where a witness recants an allegation and a finding of not guilty at a court-martial.

witness.” *McElhaney*, 54 M.J. at 129 (emphasis added). “A limitation on an accused’s presentation of evidence related to issues such as bias or motive to fabricate may violate an accused’s right of cross-examination.” *United States v. Gaddis*, 70 M.J. 248, 256 (2011). Reversal is required unless the government can show such error was harmless beyond a reasonable doubt. See generally *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). This Court has recognized that “[t]rial judges have broad discretion to impose *reasonable limitations* on cross-examination” based on concerns about harassment, prejudice, confusion of the issues, or interrogation that is only marginally relevant. *McElhaney*, 54 M.J. at 129 (emphasis added). This Court stated in *Gaddis*:

We must thus ask whether the exclusion of evidence deprived Appellant of a fair trial or an opportunity for cross-examination. The question, then, is whether “[a] reasonable jury might have received a significantly different impression of [the witness]’s credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.

Gaddis, 70 M.J. at 256 (citing *Van Arsdall*, 475 U.S. at 680). Although *Gaddis* involved Mil. R. Evid. 412, the same principle applies. This Court held the military judge’s limitation of cross-examination was properly excluded because the military judge “simply imposed ‘reasonable limits’ on the cross-examination and left open an ‘opportunity for effective cross-examination.’” *Gaddis*, 70 M.J. at 256. Here, the military judge failed to allow any cross-examination relating to SPC BG’s

allegation against SPC Mergen and imposed significant limits on cross-examination, unlike the military judge in *Gaddis*.

In *Bahr*, the defense proposed questions “for the purpose of showing the prosecutrix had a second motive for testifying falsely in this case against appellant, i.e., to call attention to herself. The defense’s proffer, especially the false rape claim in Spain, rationally supported the defense’s theory of impeachment and clearly did not violate the reasonableness standard of *Delaware v. Van Arsdall*.” *United States v. Bahr*, 33 M.J. 228, 233-34 (C.A.A.F. 1991). The military judge barred questions about key topics that could have impeached the prosecutrix and supported the defense’s theory. *Id.* at 231. This Court held Bahr’s constitutional right was violated when the military judge limited his ability to cross-examine the government’s key witness and rendered his trial unfair. *Id.* at 234. The same must be true here. Specialist Erikson was denied his constitutional right to effectively cross-examine the complaining witness, SPC BG.

The following chart illustrates SPC BG’s motive to fabricate:

<u>SPC Mergen Allegation (May 2013)</u>	<u>SPC Erikson Allegation (June 2014)</u>
Misconduct: SPC BG pending Article 15.	Misconduct: SPC BG consumed alcohol in violation of policy during a field exercise.
Relationship Issue: Had argument with then-boyfriend about relationship becoming more serious.	Relationship Issue: Called ex-boyfriend and confessed regret and feelings for him. Hours later, after having sexual intercourse with SPC Erikson, called current boyfriend (soon to be husband) and made sexual assault allegation.
First Report: Then-boyfriend	First Report: Then-boyfriend

The military judge’s ruling was wrong on multiple fronts. First, his discussion regarding the Mil. R. Evid. 412 balancing test was clearly erroneous and based on an incorrect interpretation of the law. He stated that Mil. R. Evid. 412 “is designed to protect sexual assaults victims from ‘degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional right of the accused to present a defense.’” (JA at 72)(sealed) citing *Manual for Court-Martial* (2008), Mil. R. Evid. 412(a) analysis. His understanding of this issue is at odds with this Court’s ruling in *Gaddis*. In *Gaddis*, this Court clarified its explanation in *Banker* that “suggesting that balancing constitutionally required evidence against the privacy interests of the victim before admitting it . . . is simply wrong.” *Gaddis*, 70 M.J. at 256.

Second, the military judge's reliance on *United States v. Velez*, 48 M.J. 220, 227 (C.A.A.F. 1998), and *United States v. Pagel*, 45 M.J. 64, 70 (C.A.A.F. 1995), was misplaced. (JA at 210)(sealed). Both cases are substantially different than here. The military judge's pinpoint cite to *Velez* states there was no cogent argument on relevance of the evidence the defense sought to admit and the evidence was "logically and legally unsupported," and that the defense counsel at trial "conceded there was no evidence that the prior complaint of rape was false." *Velez*, 48 M.J. at 227. Here, defense counsel had a cogent and logically relevant argument as to why the finding of not guilty against SPC Mergen was relevant to show a motive to fabricate. Also, defense counsel did not concede that there was no evidence the complaint was false. The opposite is true. The defense put forth evidence that SPC BG's allegation was false, that it was impossible for her allegation to have occurred, and that an independent factfinder at a summary court-martial found the allegation did not occur by finding SPC Mergen not guilty.

The military judge's pinpoint cite to *Pagel* discusses when specific instances of prior sexual behavior would be constitutionally required under Mil. R. Evid. 412. (R. at 73). Although the military judge touched upon Mil. R. Evid. 412 in his ruling, he concluded that the allegation here did not fall within Mil. R. Evid. 412. (JA at 208, 210-11)(sealed).

Third, the military judge's reliance on *McElhane*y and the five factor test to determine the "admissibility of evidence that a victim witness has made prior false criminal accusations" was clearly erroneous. Of the five factors he cited, he relies only upon two: similarity of the prior false criminal accusation to the crime charged and the Mil. R. Evid. 403 balancing test. (JA at 211)(sealed). However, his Mil. R. Evid. 403 balancing determination was clearly erroneous. He found "[t]he defense failed to establish *any* similarity of the assault involved with Specialist Mergen in May 2013 to the facts of this case which allegedly occurred in 2014." (JA at 211)(sealed) (emphasis added). As shown above, the defense sufficiently established similarities between both incidents and SPC BG's motive to fabricate both allegations. He further stated that "[a]dmission of evidence surrounding this allegation will result in a trial within a trial and the minimal probative value would be substantially outweighed by Mil. R. Evid. 403 concerns, including danger of unfair prejudice, confusion of the issues, considerations of undue delay, and a waste of time." (JA at 210-11)(sealed). Yet it would not turn it into a trial within a trial. The defense should have been able to cross-exam SPC BG on her allegation against SPC Mergen and his finding of not guilty. These are both facts SPC BG had personal knowledge of and had testified about in the Article 39(a) hearing. (JA at 180)(sealed). The motive to fabricate both allegations would have required only one additional witness, SPC Mergen. All other witnesses who were required were

already merits witnesses. It would not have caused undue delay, waste of time, confusion of the issues, or unfair prejudice. It would have allowed SPC Erikson to put on his defense that SPC BG had a motive to fabricate the sexual assault allegation against him and had made a similar allegation with a similar motive to fabricate a year prior.

Fourth, the military judge denied the defense's motion based on the above. However, prior to his specific ruling on this issue, he delved into a general discussion about Mil. R. Evid. 608². (JA at 208)(sealed). He was correct by saying "M.R.E. 608(b) does allow inquiry during cross-examination . . . concerning the character for truthfulness" (JA at 208)(sealed). The defense theory was SPC BG was untruthful not only in both allegations, but as a whole and SPC Hunter testified as a defense witness that she was not a truthful person. (JA at 143). Specialist BG's credibility became an issue as soon as she testified and her prior accusation arguably shed some light on her credibility.

Cross-examination is the "greatest legal engine ever invented for the discovery of the truth." *Cal. v. Green*, 399 U.S. 149, 158 (1970). The military judge deprived SPC Erikson of the ability to use that great legal engine. This was a

² Although raised by the defense in their motion, the military judge never addresses their valid Mil. R. Evid. 404(b) argument that her prior accusation against SPC Mergen would be used to show her motive and intent to fabricate. (JA at 219)(sealed).

case of he said/she said and SPC BG's credibility was crucial to the factfinder. A reasonable jury might have received a significantly different impression of SPC BG's credibility had the defense been permitted to pursue their line of cross-examination. The military judge's exclusion of evidence cannot be held to be harmless beyond a reasonable doubt because SPC BG's testimony was key to the government's case, her testimony was not cumulative, there was no corroborating evidence of her allegation, and there was contradicting testimony of her story on material points. Overall the strength of the government's case was weak. *See United States v. Ellerbrock*, 70 M.J. 314, 320 (2011).

Conclusion

Wherefore, Specialist Erikson requests that this Honorable Court set aside the findings and sentence in this case.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States
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