IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States Army, *Appellee* v. Specialist (E-4) **SEAN R. ERIKSON** United States Army, *Appellant*	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 20150130 USCA Dkt. No. 16-0705/AR

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Issue Presented:

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

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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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2012) [hereinafter, UCMJ]. The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ.

Statement of the Case

On January 27, 2015, a panel consisting of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault and one specification of adultery, in violation of Articles 120 and 134, UCMJ. (SJA 280, 298). The panel sentenced appellant to be reduced to the grade of E-1, to be confined for three years, and to be discharged from the service with a bad-conduct discharge. The convening authority dismissed one specification of sexual assault (Specification 4 of Charge I, renumbered as Specification 1) and approved the sentence as adjudged.

On June 27, 2016, the Army Court summarily affirmed the findings of guilty and the sentence. (JA 1). Appellant petitioned this court for review and filed a supplement to the petition on August 18, 2016. The above stated issue was included in appellant's matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), attached to the supplement to the petition. On September 9, 2016, appellant filed a motion to consider *Grostefon* matters out of time. On October 19, 2016, this court granted appellant's petition for grant of review on three issues, all of which were raised in appellant's *Grostefon* matters, but ordered briefs only on the above stated issue. *United States v. Erikson*, No. 16-0705/AR (C.A.A.F. October 19, 2016) (order).

Statement of Facts

A. Evidence presented at a pretrial motions hearing regarding Specialist (SPC) BG's accusation of abusive sexual contact against SPC Robert Mergen.

In August 2012, SPC BG and SPC Devon Hunter began dating. (JA 157 (sealed)). In May 2013, SPC BG went with SPC Hunter to Cassie and Daniel Usher's house for dinner. (JA 179, 234, 240 (sealed)). Specialist Mergen also went to the Usher's house for dinner. (JA 179 (sealed)). Specialist BG did not know SPC Mergen. (JA 179 (sealed)). After dinner, everyone had a few alcoholic drinks and played board games. (JA 157, 179, 243 (sealed)). Specialist BG and SPC Hunter fell asleep on the couch in the living room together while SPC Mergen and Mr. Usher stayed up and played video games in the same room. (JA 179 (sealed)). The lights in the living room were out and SPC Mergen sat on a part of the couch a few feet away from SPC BG. (JA 165, 244 (sealed)). As Mr. Usher played the video game, SPC Mergen watched and asked questions about the game. (JA 244 (sealed)).

Something woke up SPC BG, although she did not know what it was. (JA 179 (sealed)). She closed her eyes and began to fall back to sleep. (JA 179 (sealed)). A few minutes later she felt something touching her left breast; she opened her eyes and saw that it was SPC Mergen grabbing her breast as he played video games. (JA 179-80 (sealed)). Specialist BG immediately jumped up and "freaked out." (JA 180 (sealed)). She yelled at SPC Mergen, "You are caught. I

caught you." (JA 180 (sealed)). Mr. Usher did not see SPC Mergen touch SPC BG's breast. (JA 244 (sealed)). However, Mr. Usher described that he was playing the video game and he would have had to turn and look to see what SPC Mergen was doing. (JA 244 (sealed)). After SPC BG's outburst, SPC Hunter woke up and started questioning Mr. Usher and SPC Mergen about what happened. (JA 167 (sealed)). Specialist Mergen denied touching SPC BG. (JA 166 (sealed)). A few minutes later, SPC BG and SPC Hunter left the house. (JA 167 (sealed)).

On May 17, 2013, a proceeding pursuant to Article 15, UCMJ, was initiated against SPC BG. (JA 248 (sealed)). On May 30, 2013, SPC BG was found guilty of failing to obey an order by traveling outside the permitted radius without proper authorization and for failing to report to accountability formation. (JA 248 (sealed)). The record of this proceeding was filed temporarily in SPC BG's local file. (JA 248 (sealed)).

On June 21, 2013, SPC BG reported abusive sexual contact against SPC Mergen to the criminal investigation command (CID) and provided a sworn statement. (JA 240 (sealed)). The incident was brought before a summary court-martial and SPC Mergen was found not guilty. (JA 167 (sealed)).

In November 2013, SPC BG and SPC Hunter's relationship ended. (JA 158 (sealed)). In February 2014, SPC BG began dating Staff Sergeant (SSG) PG. (JA

171 (sealed)). On July 28, 2014, SPC BG and SSG PG were married. (JA 171 (sealed)).

B. Evidence presented at trial regarding appellant sexually assaulting SPC BG.

Specialist BG and appellant were in the same battalion at Joint Base Lewis-McChord. (JA 11). Appellant was a cook in the dining facility. (JA 13). In May and June 2014, SPC BG temporarily worked in the dining facility while she awaited a permanent change of station (PCS) move. (JA 12). During this time, she worked with appellant for a few hours every day, but knew appellant only on a professional basis. (JA 13). Appellant primarily worked with the other cooks, Private First Class (PFC) Jamie Wilkerson and SPC Israel Flora. (JA 13). Specialist BG primarily washed dishes with PFC Terrance Freeman. (JA 13).

Specialist BG lived in a female barracks room with PFC Wilkerson. (JA 14). Private Wilkerson's bunk and living area were directly across the hallway from SPC BG's bunk and living area. (JA 111). Each living area was separated by walls and there were openings in the walls to see into the living areas, but the view of the bunks was blocked. (JA 23, 111-12, 152). There were separate entrance ways into each living area and a hallway approximately seven to ten feet wide between the living areas. (JA 23, 113; 152). Males were prohibited from entering the barracks at all times, and a sign on the front door notified entrants of this rule. (JA 14).

On June 20, 2014, appellant went with SPC Flora and PFC Wilkerson to bring dinner to soldiers in the field. (JA 15). Specialist BG and PFC Freeman stayed behind. (JA 15). Private First Class Freeman and SPC BG met at the dining-facility and PFC Freeman brought two bottles of vodka with him. (JA 16, 65). Private First Class Freeman brought one bottle of peach-flavored vodka for himself and SPC BG to drink. (JA 68). The other bottle of vodka was for the cooks when they returned from the field. (JA 68).

Specialist BG and PFC Freeman began drinking the alcohol in the dining facility around 1600. (JA 16). They drank out of cardboard cups that were used when serving soldiers in the field. (JA 16). Specialist BG recalled that she made her first drink with two-thirds of the cup filled with vodka and the rest with Powerade. (JA 17). Private First Class Freeman recalled that he and SPC BG finished the bottle of peach-flavored vodka prior to the cooks returning from the field. (JA 65, 68). Specialist BG believed about twenty minutes went by and then appellant, SPC Flora, and SPC Wilkerson returned to the dining facility. (JA 16). The group of five soldiers drank, listened to music, and socialized. (JA 19, 66). Specialist BG made herself another drink the same way she made her first. (JA 20). The group drank at the dining facility for about an hour or an hour and a half. (JA 20, 81). The second bottle of vodka was nearly finished before the soldiers left the dining facility. (JA 68).

Specialist BG's vision was affected by the alcohol, and she began seeing things. (JA 21). Private First Class Freeman noticed that SPC BG exhibited signs of intoxication by "acting like a little teenager" and walking slowly. (JA 66). Specialist BG felt very intoxicated, so she told everyone that she was drunk and was going to bed. (JA 21, 67). Private First Class Wilkerson said SPC BG appeared drunk, stumbled, and slurred her speech when she left the dining facility. (JA 109, 125).

Specialist BG walked to her barracks, which was about fifty feet from the dining facility. (JA 22). Around 2330, SPC BG called her now ex-boyfriend, SPC Hunter, on the phone. (R. 25, 139-40). Specialist Hunter recalled SPC BG slurring her words and crying, and he could barely understand her. (JA 140). Specialist Hunter could tell that SPC BG was drunk. (JA 141). After the phone call, SPC BG lay down in her bed, and passed out. (JA 25-26).

After SPC BG left the dining facility, SPC Wilkerson left, but PFC Freeman, SPC Flora, and appellant stayed in the dining facility and cleaned up. (JA 70). Specialist Flora and appellant went to SPC BG's barracks room and attempted to bring her back to the dining facility. (JA 84). They found SPC BG asleep; SPC Flora shook her, but she did not respond. (JA 84-85).

The next thing SPC BG recalled was gaining consciousness while appellant was on top of her, penetrating her. (JA 26-27). She passed out again, but regained

consciousness after a few minutes and realized that appellant was still on top of her, but now performing oral sex on her. (JA 26-27). She pulled on appellant's head a couple of times and kicked him off of her. (JA 26). She then ran to the other side of the barracks and called SSG PG, who was her boyfriend at the time. (JA 26). She told SSG PG, "I woke up and he was inside me." (JA 93). Sergeant PG recalled receiving this phone call around 0200. (JA 98). While SSG PG was on the phone, he heard SPC BG tell appellant to leave the barracks. (JA 95).

The next day, appellant told PFC Freeman that he went to check on SPC BG the night before. (JA 70). Appellant then gave PFC Freeman a detailed account of sexual intercourse with SPC BG, describing multiple sex positions. (JA 71). Private First Class Freeman also spoke with SPC BG the next day around noon. (JA 58, 74). Private First Class Freeman told SPC BG that appellant had mentioned having sex with her. (JA 58, 74). Specialist BG told PFC Freeman that appellant sexually assaulted her, and she reported the incident to the sexual assault response representative fifteen to twenty minutes later. (JA 57-59, 74). Private First Class Freeman recalled SPC BG was crying and her voice was raspy. (JA 74).

C. Defense pretrial motion.

The defense moved pretrial to admit evidence barred by Military Rule of Evidence [hereinafter Mil. R. Evid.] 412. (JA 214 (sealed)). The motion asserted

that the evidence of SPC BG's report that SPC Mergen made abusive sexual contact with her was admissible under Mil. R. Evid. 404(b). (JA 218-19 (sealed)). The defense argued that the circumstances of that report were similar to her report that appellant sexually assaulted her. (JA 194 (sealed)). The theory for admissibility was that both reports were false and the defense intended to show a pattern that both reports were made at times when SPC BG had problems with the person she was dating and was involved in some sort of military misconduct. (JA 194-95, 218 (sealed)). The defense claimed that SPC BG knew she would receive favorable treatment each time she reported the sexual incidents, which gave her a motive to fabricate each report. (JA 194-95, 218 (sealed)).

Granted Issue

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

Summary of Argument

The military judge did not abuse his discretion, as his exclusion of SPC BG's prior accusation of abusive sexual contact against SPC Mergen was a reasonable limit on appellant's right to cross-examination. This evidence was properly excluded under Mil R. Evid. 412(a)(1) because the defense failed to establish that the prior complaint was actually false and failed to establish any applicable exception in Mil. R. Evid. 412(b) for its admission. Even if this

evidence should not have been excluded by Mil. R. Evid. 412(a)(1), it was properly excluded under Mil. R. Evid. 403 as the minimal probative value of the evidence was substantially outweighed by the danger of unfair prejudice, developing a trial within a trial causing confusion of the issues, undue delay, and a waste of time.

Standard of Review

"A military judge's ruling on the admissibility of evidence is reviewed for an abuse of discretion." *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000) (citing *United States v. Schlamer*, 52 M.J. 80, 84 (C.A.A.F. 1999)). "Appellant has the burden under M.R.E. 412 of establishing his entitlement to any exception to the prohibition on the admission of evidence 'offered to prove that any alleged victim engaged in other sexual conduct.'" *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010) (quoting *United States v. Banker*, 60 M.J. 216, 218, 223 (C.A.A.F. 2004)). "A decision to admit or exclude evidence under Mil. R. Evid. 403 is also reviewed for an abuse of discretion." *McElhaney*, 54 M.J. at 129-30 (citation omitted). In a military judge's evidentiary ruling, "Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011).

"The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." *Id.* at 130. "To reverse for an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be

found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997) (citations and quotation marks omitted).

Law and Analysis

"The Sixth Amendment protects an accused's right to confrontation and cross-examination: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *McElhaney*, 54 M.J. at 129 (quoting U.S. CONST. amend. VI). "The right to confrontation includes the right of a military accused to cross-examine adverse witnesses." *Smith*, 68 M.J. at 447. "Uncovering and presenting to court members 'a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Id.* (quoting *Davis v. Alaska,* 415 U.S. 308, 316 (1974)).

"While the right to cross-examination is broad, it is not unlimited in scope; nor can it be conducted without due regard for applicable rules of evidence." *United States v. Velez*, 48 M.J. 220, 226 (C.A.A.F. 1998) (citing *Davis* 415 U.S. 308). "Reasonable limits on cross-examination intended to attack a witness's credibility may be based on concerns such as harassment, prejudice, confusion of issues, witness safety, repetitiveness, or marginal relevancy." *Id.* (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). The restrictions Mil. R. Evid. 412

places on the scope of cross examination are constitutionally justified as reasonable limits of an attack of a witness's credibility. *Id.*

In this case, the military judge did not abuse his discretion by placing reasonable limits on the cross-examination of SPC BG and excluding evidence of her prior report of abusive sexual contact. In his ruling on the defense motion, the military judge accurately stated the law regarding Mil. R. Evid. 412. (JA 206-07 (sealed)). The military judge identified that the analysis of Mil. R. Evid. 412 states that past false complaints of sexual offenses by an alleged victim of a sexual offense are not excluded by this rule. *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter *MCM*], App. 22, Analysis of Mil. R. Evid. 412, A22-36; (JA 193 (sealed)). The military judge correctly identified that the appropriate rules of evidence implicated by the defense theory of admissibility were Mil. Rs. Evid. 608(b) and (c) and he accurately described the application of these rules. (JA 208 (sealed)).

The military judge then cited the concurring opinion in *United States v. Pagel*, 45 M.J. 64, 70 (C.A.A.F. 1996), to show that this court has had varied opinions about whether a prior report of sexual assault is excluded under Mil. R. Evid. 412(a). (JA 209-10 (sealed)). He cited *Velez*, 48 M.J. at 227, as an example of when this court found that evidence of a prior sexual assault complaint was properly excluded by Mil. R. Evid. 412(a) and not constitutionally required

because the defense failed to establish the complaint was false. (JA 210 (sealed)). The military judge found SPC BG's testimony about SPC Mergen's abusive sexual contact to be more credible than SPC Mergen's denial. (JA 210 (sealed)). Then the military judge determined that the evidence of SPC BG's prior report should be excluded by Mil. R. Evid. 412(a)(1) because the defense failed to establish that it was false. (JA 210 (sealed)).

The military judge then conducted an alternative analysis under the premise that the evidence of the prior report was not excluded by Mil. R. Evid. 412(a) to determine if it was admissible under Mil. Rs. Evid. 403, 608(b), or 608(c). He compared this case to *State v. Guenther*, 181 N.J. 129, 157 (N.J. 2004), in which the Supreme Court of New Jersey set out five factors for determining when a prior false accusation by a victim can be admitted by the defendant. (JA 211 (sealed)). These factors are only considered after the defendant has proven by a preponderance of the evidence that the prior accusation was false. *Guenther*, 181 N.J. at 157. The military judge used the five factors as a method for weighing the admissibility of the evidence under Mil. R. Evid. 403. He determined that the defense "failed to establish any similarity of the assault involved with Specialist Mergen in May 2013 to the facts of this case." (JA 211 (sealed)). He found that the evidence of the prior report was of a collateral nature, admission of the evidence would result in a trial within a trial, and "the minimal probative value

would be substantially outweighed by M.R.E. 403 concerns, including danger of unfair prejudice, confusion of the issues, considerations of undue delay, and a waste of time." (JA 212 (sealed)). Finally, he stated that his decision to exclude this evidence was the same "whether the allegation is deemed to fall within M.R.E. 412 [or] with the remaining rules of evidence." (JA 212 (sealed)).

A. The military judge reasonably limited appellant's right to cross-examination by excluding evidence of SPC BG's prior accusation under Mil. R. Evid. 412(a)(1).

The defense failed to establish that the prior complaint was actually false and to establish any applicable exception in Mil. R. Evid. 412(b) for the admission of this evidence. When this Court has determined that the right to cross-examine a victim required the admission of evidence of a prior false accusation made by the victim, it was uncontroverted that the accusation was false. *See United States v. Bahr*, 33 M.J. 228, 233 (C.A.A.F. 1991) (military judge erroneously barred the defense from questioning the prosecutrix about "admitted prior false statements to her classmates that she had been raped and suffered from various terminal diseases"); *United States v. Moss*, 63 M.J. 233, 235 (C.A.A.F. 2006) (trial defense counsel was erroneously precluded from questioning the child victim about "prior false statements she made on various occasions to her parents, school officials, and mental health professionals"). In *United States v. Stavely*, this Court determined that the military judge erred by not admitting evidence that a principal government

witness had testified during an administrative board hearing "that she had lied to [her husband] about checks cashed with insufficient funds." *United States v. Stavely*, 33 M.J. 92, 93 (C.A.A.F. 1991). Although this Court stated that it was a question of fact for the panel whether the witness lied under oath at the hearing or lied to her husband, it was uncontroverted that the witness lied at some point. *Id.* at 94.

In this case, the only evidence presented by the defense was that SPC BG allegedly lied when she made her initial report to CID because SPC Mergen denied the incident and testified that the summary court-martial found him not guilty of this offense. In *McElhaney*, the military judge excluded evidence of a report of rape made by the child victim against Mr. Perez, a family friend, a couple of years prior to the incidents charged in the case. *McElhaney*, 54 M.J. at 127. The defense counsel wanted to call Mr. Perez to testify that the victim's prior accusation was false and to impeach the victim with the false accusation. *Id.* This Court was unconvinced by the evidence that the accusation was false, stating, "[D]efense counsel proffered no evidence showing the complaint to be false, other than the unsurprising denial by Mr. Perez." *Id.* at 130. In this case, the defense proffered very similar unconvincing evidence in the form of the unsurprising denial by SPC Mergen.

This Court has found that the mere filing of a complaint is not probative of the truthfulness or untruthfulness of the complaint filed. *Velez,* 48 M.J. at 227. In this case, SPC BG filed a complaint and the complaint was tried at a summary court-martial. A summary court-martial officer must abide by the same beyond a reasonable doubt standard of proof that is required in every court-martial. Rule for Courts-Martial 1304 (b)(2)(F)(i). There was no evidence that the summary court-martial officer found SPC BG's accusation to be fabricated.

Federal Courts of Appeals have also determined that the Sixth Amendment right to confrontation does not require the admission of prior sexual assault accusations based on "simple denial testimony as proof that another sexual assault accusation was false." *Quinn v. Haynes*, 234 F.3d. 837, 851-52 (4th Cir. 2000) (upholding a requirement of "sufficient proof of falsity"); *Cookson v. Schwartz* 556 F.3d 647, 652-55 (7th Cir. 2009) (the right to confrontation does not require the admission of a prior sexual abuse allegation that was denied by the subject of the allegations and classified as unfounded by the Department of Children and Family Services). *See also Hughes v. Raines*, 641 F.2d 790, 792 (9th Cir. 1981) (applying a "shown convincingly" standard); *United States v. Stamper*, 766 F. Supp. 1396, 1403 n.3 (W.D.N.C. 1991), aff'd 959 F.2d 231 (4th Cir. 1992) (requiring "substantial proof of falsity"); *United States v. Crow Eagle* 705 F.3d 325, 328-29 (8th Cir. 2013) (determining that the right to confrontation does not require

admission of prior sexual assault allegations made by child victims even though the allegations were delayed reports and were not prosecuted, because there was "'no firm proof of the falsity' of the previous allegation" (citing *United States v. Tail*, 459 F.3d 854, 860-61 (8th Cir. 2006))).

Since the military judge correctly determined that the defense had failed to establish that SPC BG's prior accusation was false, he properly excluded the evidence under Mil. R. Evid. 412(a). If an accused is to avail himself of the constitutionally required exception in Mil. R. Evid. 412 (b)(1)(C), he "must demonstrate that the evidence is relevant, material, and favorable to his defense, and thus whether it is necessary." *Smith,* 68 M.J. at 448 (citations and quotation marks omitted). Whether the evidence is material "is a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to that issue." *Ellerbrock*, 70 M.J. at 319. (citations and quotation marks omitted). The term favorable is synonymous with vital. *Id.* (quoting *Banker*, 60 M.J. at 222) (quotation marks omitted).

In both *Valez* and *Smith*, this court upheld a military judge's decision to exclude evidence of a victim's prior allegedly false rape and sexual assault accusations under Mil. R. Evid. 412. *Valez*, 48 M.J. at 227; *Smith*, 68 M.J. at 447-49. In *Valez*, this court found the evidence to be irrelevant and inadmissible under

Mil. R. Evid. 412. *Valez*, 48 M.J. at 226. In *Smith*, the military judge excluded all references to the sexual assault allegations under Mil. R. Evid. 412(a)(1), and this Court found that the evidence was not constitutionally required because it was neither material nor vital to the appellant's defense. *Smith*, 68 M.J. at 447-48.

Similarly, the evidence of the abusive sexual contact accusation against SPC Mergen was properly excluded under Mil. R. Evid. 412(a)(1) and was not constitutionally required because it was only relevant if the panel was able to decide the accusation was indeed false and it was not material to appellant's defense. The sexual assault was alleged by incapacity; therefore, evidence of SPC BG's prior accusation would only have been relevant to whether SPC BG fabricated her testimony about her own intoxication and fabricated her lack of consent to the sexual act. (JA 5, 70). The importance of impeaching SPC BG on her level of intoxication and lack of consent was lessened by the significant amount of evidence from other witnesses demonstrating that SPC BG was highly intoxicated and unable to consent. The defense theory during trial was that SPC BG fabricated the sexual assault claim against appellant because she was afraid other people knew she had sex with appellant and she wanted to preempt SSG PG's discovery of the incident to save their relationship. (SJA 281-84, 286-89, 291-94, 296-97). The defense did not need the evidence of the prior accusation to present its theory of SPC BG having a motive to fabricate. The defense cross-

examined SPC BG on her motive to fabricate by questioning her about her relationship with SSG PG and that she reported the sexual assault after she found out that appellant was talking about it. (JA 42-43, 58-59). The defense also called multiple witnesses who testified that SPC BG was an untruthful person. (JA 143, 148). Considering the defense theory and the evidence that was admitted, it was unnecessary for the defense to admit evidence of SPC BG's prior allegedly false accusation. Therefore, the military judge in this case properly excluded the evidence of the prior accusation under Mil. R. Evid. 412(a)(1).[1]

B. The military judge properly limited appellant's right to cross-examination under Mil. R. Evid. 403.

The military judge properly determined that the probative value of the evidence of SPC BG's prior accusation was substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, and a waste of time. Although the defense moved to admit this evidence under Mil. R. Evid. 404(b), the military judge properly analyzed whether it was admissible under Mil. R. Evid. 608(c), and properly identified that extrinsic evidence could be permitted for the purpose of proving SPC BG's motive to fabricate. (JA 208, 219 (sealed)); *See*

[1] The evidence of SPC BG's prior accusation also fails the test in Mil. R. Evid. 403 which is incorporated into the analysis of Mil. R. Evid. 412. *See Ellerbrock*, 70 M.J. at 318. Because the analysis of the evidence under Mil. R. Evid. 403 is discussed by the military judge as an alternative analysis, if it is determined that Mil. R. Evid. 412 does not apply, this brief addresses it in the same way in subsection B. (JA 211-12 (sealed)).

Stavely, 33 M.J. at 94. However, a military judge has "broad discretion to impose reasonable limitations on cross-examination, 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *McElhaney*, 54 M.J. at 129 (quoting *Van Arsdall*, 475 U.S. at 679).

Appellant's theory for admissibility of SPC BG's prior accusation is that SPC BG had the same motive to fabricate at the time of the prior accusation against SPC Mergen and at the time of the allegation against appellant. (Appellant's Br. 10; JA 194-95, 218 (sealed)). This theory depends on a finding that the initial accusation against SPC Mergen was indeed false. Appellant's theory draws the motive to fabricate from what it claims are similarities in the circumstances when SPC BG made each accusation, but these similarities are unsupported by the facts. (Appellant's Br. 10; JA 194-95, 218 (sealed)). Not only has the defense failed to identify why these circumstances caused SPC BG to make two false reports, it also failed to establish any similarities between the initial accusation and the accusation against appellant. The military judge found SPC BG to be more credible than SPC Mergen and found no similarities between the two accusations made by SPC BG. Therefore, for this court to find SPC BG's prior accusation to be false and to find that the two accusations are related, it would have to find that the military judge's findings are clearly erroneous.

The first similarity offered by the defense was that the accusations were both made when SPC BG had recently committed military misconduct. (Appellant's Br. 10, JA 218 (sealed)). Specialist BG accused SPC Mergen of touching her breast at the Usher's house in May 2013, at which point her Article 15, UCMJ, proceedings had begun but were not completed. (JA 236, 248 (sealed)). The Article 15, UCMJ, proceedings were completed on May 30, 2013. The defense evidence provided no indication of what punishment SPC BG received; instead, it only indicated that the record was not permanently filed. (JA 248 (sealed)). Three weeks after the Article 15, UCMJ, proceedings were completed, SPC BG reported SPC Mergen's actions to CID. (JA 237, 240 (sealed)). The defense theory fails to demonstrate why a locally filed record of proceedings pursuant to Article 15, UCMJ, would cause SPC BG to fabricate an accusation against a service member she did not even know. It also fails to explain why, if SPC BG wanted to obtain favorable treatment from her command, she would have waited until three weeks after the Article 15, UCMJ, proceeding was completed to report the incident.

The defense then compares these circumstances to SPC BG's drinking alcohol on June 20, 2014, during a field training exercise prior to the accusation against appellant. (JA 218 (sealed)). The defense provided no evidence that SPC BG committed military misconduct when she consumed alcohol or that she was going to be punished by her command for this incident. Instead, the facts show

that SPC BG was finished with drinking alcohol and in her barracks room when she originally reported the incident. (JA 26).

The other similarity offered by the defense was that the accusations were both made when SPC BG was having problems in her relationship, and she initially reported the incidents to the person she was dating. (Appellant's Br. 10, JA 218 (sealed)). The testimony showed that during the time of the accusation against SPC Mergen, SPC BG and SPC Hunter had some conflict in their relationship. (JA 158 (sealed)). The only elaboration on this conflict came from the person SPC BG accused of abusive sexual contact, SPC Mergen. (JA 167 (sealed)). Assuming some conflict existed between SPC BG and SPC Hunter, the defense failed to establish that SPC BG received any sympathy from SPC Hunter by making the report or to otherwise link the conflict with her boyfriend to a fabricated claim of abusive sexual contact. On the contrary, the evidence indicated that SPC Hunter did not believe SPC BG because he did not see what happened. (JA 240 (sealed)). Finally, it is unclear why SPC BG waited almost a month to report the incident to CID if she was attempting to obtain sympathy from SPC Hunter.

The defense then compares these circumstances to SPC BG's report on June 20, 2014, after her relationship with SPC Hunter ended and she started dating SSG PG. The defense failed to provide any evidence that SPC BG and SSG PG were

having any problems in their relationship when the allegation was made against appellant. Instead, the defense provided evidence of a phone call made by SPC BG to SPC Hunter while she was heavily intoxicated as evidence of her problems with SSG PG. (JA 178 (sealed)). If this phone call was going to cause problems in the relationship it would have to be assumed that SSG PG would have found out about the phone call. However, both SSG PG and SPC Hunter testified that they had stopped talking to each other at least eight months prior to this incident. (JA 161, 182 (sealed)). Finally, it seems beyond belief that SPC BG would have been so concerned about this phone call with her ex-boyfriend that she decided to fabricate a report of sexual assault in the middle of the night in order to save her four-month relationship with SSG PG.

Ultimately, the defense wanted to admit the evidence of the prior accusation for the same reason the defense wanted to in *United States v. Owen,* to argue that "because [the victim] had made false accusations against other men, she was capable of making false accusations against appellant." *United States v. Owen*, 24 M.J. 390, 393 (C.M.A. 1987) (emphasis omitted). The facts in *Owen* are very similar to this case. The defense failed to establish that the prior accusations were false. *Id.* at 392. The defense counsel made various arguments for admission of the prior accusation which implicated Mil. Rs. Evid. 404(b) and 608(c). *Id.* at 393. This court determined that even if the falsity of the accusations is assumed, the

evidence was too collateral. *Id.* This court agreed with the military judge's decision to exclude the evidence, stating that it "would have amounted to a pointless diversion and established nothing. Instead, there would have been 'a small trial within a trial.'" *Id.* This court further determined that considering the evidence which was allowed at trial, the appellant was not prejudiced by the exclusion of this evidence. *Id.*

In this case, the defense failed to establish the falsity of SPC BG's prior accusation, and the evidence of the prior accusation would have caused unfair prejudice, developing a trial within a trial, causing confusion of the issues, undue delay, and a waste of time. Considering the evidence that was presented at trial, evidence of the prior accusation was too collateral to have any impact on appellant's trial. This court should find, as it did in *Owen*, that the military judge acted within his broad discretion when he excluded the evidence of the prior accusation under Mil. R. Evid. 403.

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court affirm the decision of the Army Court.

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CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on December 19, 2016.

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