IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Specialist (E-4) **NICHOLAS L. FROST** United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20160171 USCA Dkt. No. 18-0362/AR

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

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING HEARSAY STATEMENTS AS PRIOR CONSISTENT STATEMENTS UNDER MIL. R. EVID. 801(d)(1)(B)(i) WHERE THE DEFENSE THEORY POSITED THE IMPROPER INFLUENCE OR MOTIVE PRECEDED THE ALLEGEDLY CONSISTENT STATEMENTS.

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Statement of Statutory Jurisdiction

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

Statement of the Case

On January 12 and March 14-15, 2016, a military judge sitting as a general court-martial convicted Specialist (SPC) Nicholas L. Frost, contrary to his plea, of one specification of rape of a child in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012) [hereinafter UCMJ]. The military judge sentenced appellant to be reduced to the grade of E-1, to be confined for ten years, and to be dishonorably discharged from the service. The convening authority approved the sentence as adjudged.

On June 20, 2017, Appellant filed two pleadings with the Army Court: a brief assigning four errors in his court-martial, and a petition for a new trial. The government filed its Answer to Petition for New Trial on July 19, 2017. The Army Court denied appellant's Petition for a New Trial on February 14, 2018. Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, the undersigned appellate defense counsel filed a Petition for Grant of Review on April 13, 2018 while seeking leave to file

the supplement separately. On April 17, 2018, this Court granted appellate defense counsel's motion granting until May 3, 2018 to file the supplement. On May 3, 2018, appellate defense counsel again sought leave to extend time to file the supplement. On May 11, 2018, this Court granted appellate defense counsel's motion, granting until May 18, 2018 to file the supplement. On May 30, 2018, the Army Court ruled on Appellant's Brief on Behalf of Appellant, and denied him any relief on the basis of the four assignments of error which he raised before that court. On July 9, 2018, appellant moved the Army Court to reconsider its decision with a suggestion that it do so *en banc* because of the split decision of the panel which ruled on his filing. Appellant concurrently moved the Army Court to consider matters which he personally submitted under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The Army Court denied appellant's motions in their entirety.

On November 28, 2018, this honorable court denied appellant's motion to attach additional matters to the record. On November 29, 2018, this honorable court granted appellant's petition for a grant of review as to one of his two specified issues.

Statement of Facts

The government alleged that SPC Frost inserted his penis into DF's mouth during the summer months of 2013 while DF visited appellant (her biological father) at Ft. Hood, Texas. As a part of a custody agreement, DF and her older brother Daemon would spend time with appellant. (JA 118). On or about June 9, 2013, DF went to visit appellant. (JA 120). DF testified that at some point during that summer, appellant "put his wee-wee in [DF's] mouth." (JA 033).

On or about August 24, 2013, Jennifer Moore—mother of DF—was driving with her then-boyfriend Sam Casey, DF, and Daemeon, to J.M.'s mother's house. (JA 131-32). During the trip, DF stated, "Daddy put his pee-pee in my mouth." (JA 131). Daemon then said "You're lying," and "You want to get daddy in trouble." (JA 131). Miss Moore dropped the children off at her parent's home. (JA 145-46). After dropping the children off, Miss Moore and Mr. Casey did not immediately seek police or social work assistance. Instead, they went to dinner and drank margaritas. (JA 198).

After completing a leisurely dinner with her boyfriend, Miss Moore reported DF's allegation to the police the next day. (JA 151). On March 12, 2014, Mrs. Allison Boynes conducted a forensic interview with DF that lasted about 40 minutes. (JA 199). In that interview, DF "did not make any disclosures of abuse

against SPC Frost . . . . [and DF] advised that she is not afraid of anyone in either of her parents' residences." (JA 199). On November 18, 2014, at the request of the government, Mrs. Kristin Webb conducted another forensic interview with DF (JA 200). During that interview, DF "did not make any disclosures of abuse against SPC Frost [and] stated that she was scared to talk during her prior interview, but was not scared during this interview." (JA 200). On September 1, 2015, during an interview with the government attorneys, DF said, "nothing happened during the summer of 2013; in that she did not tell her mother anything happened during the summer of 2013." (JA 202). During the Article 32 preliminary hearing, DF testified but, "did not make any disclosures of sexual abuse against SPC Nicholas Frost." (JA 203).

On the two-year anniversary of DF's alleged outcry, J.M. posted the following statement on her Facebook account:

> On this day, two years ago, I made a decision that would change my life . . . . I struggled with it a week before I acted . . . . It was the best decision, because I haven't struggled as much as I did the four years leading up to that.

(JA 148-150).

At trial, DF testified that she did not remember when she started seeing a counselor because "my mom never told me." (JA 037). She also testified she saw a counselor two to three times a week because "Dad put his pee-pee in my mouth."

(JA 038). DF also agreed that when she was "answering those questions on the phone" for trial counsel, [she] told him that "nothing bad happened at [her] Dad's house." (JA 041). DF also agreed that when she was "talking to a lady in a room with a camera that had colored walls and a chair and a desk . . . [DF] told her nothing happened at [her] dad's house that summer. . . ." (JA 041-42). The only trauma that DF alleged during that interview was that Zoey, her step-sister, tried to choke her during the Summer of 2013. (JA 047).

Dr. Karen Landry[1] testified for the government. (JA 054). She was one of DF's counselors and saw DF for five sessions lasting 40-50 minutes each. (JA 061). Dr. Landry saw DF, in part, because she "didn't disclose much in the forensic interview, and it was referred to me for counseling for [sic] her." (JA 062). Dr. Landry testified that DF was having nightmares about Mrs. Moore disciplining DF and DF's brother being a monster and trying to eat DF. (JA 096). Despite multiple sessions with Dr. Landry, DF made only one vague statement to Dr. Landry about appellant's alleged crimes in which she mentioned that the appellant "*tried* to put his 'pee-wee'in her mouth." (emphasis added) (JA 097).

[1] Dr. Landry has a PhD in "Education Counseling Psychology." (JA 055). She is not a psychologist or psychiatrist.

Dr. Landry's testimony was neither offered nor received under Mil. R. Evid. 807, but instead under Mil. R. Evid. 803(4), over defense objection. (JA 051).

Over defense objection, the government admitted two inculpatory statements as prior consistent statements:

1. On August 24, 2013, while DF was driving in a car with Ms. Moore, Mr. Casey, and Deameon Frost, Miss Moore testified DF spontaneously stated, "out of the blue," that "daddy stuck his penis in her mouth." (JA 130).

2. On August 24, 2013, while DF was driving in a car with Mrs. Moore, Mr. Casey, and Deameon Frost, Mr. Casey testified DF spontaneously stated, "daddy put his pee-pee to my lips." (JA 162).

The military judge ruled that:

> The court is going to allow it on the basis that . . . it is consistent with a declarant's prior testimony, and that . . . it is being offered to rebut--specifically, this is solidly within 801(d), about—it's offered to rebut the express or implied charge that the declarant fabricated or acted from some other recent improper influence, and I believe that's what the defense is trying to do, is to imply that there was a recent fabrication, you know, as of September--or, excuse me, August, that that fabrication--you know, more recent fabrication occurred, and therefore, that this statement is prior to that and is consistent with the statement that was made in court today."

(JA 129).

Trial Counsel relied on both of these statements in opening and closing statements as central to the government's case. (JA 024, 025, 180-82).

Issue

THE MILITARY JUDGE ERRED IN ADMITTING HEARSAY STATEMENTS AS PRIOR CONSISTENT STATEMENTS UNDER MIL. R. EVID. 801(d)(1)(B)(i) WHERE THE DEFENSE THEORY POSITED THE IMPROPER INFLUENCE OR MOTIVE PRECEDED THE ALLEGEDLY CONSISTENT STATEMENTS.

Standard of Review

This court reviews a military judge's decision to admit evidence for abuse of discretion. *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006).

Law

Hearsay is not admissible except as provided by the Military Rules of Evidence. Mil. R. Evid. 802. A prior consistent statement that precedes an allegation of improper influence is not hearsay. Mil. R. Evid. 801(d)(1)(B).

A prior consistent statement is not hearsay if it is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Mil. R. Evid. 801(d)(1)(B). This court

> has consistently interpreted the rule to require that a prior statement, admitted as substantive evidence, precede any motive to fabricate or improper influence that it is offered to rebut. Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut.

United States v. Allison, 49 M.J. 54, 57 (C.A.A.F. 1998) (citations omitted)(*see also Tome v. United States*, 513 U.S. 150, 157 (1995)). "As a matter of law, the timing of the prior consistent statement vis-a-vis the fabrication or improper influence or motive affects the statement's admissibility." *United States v. McCaskey*, 30 M.J. 188, 189 (C.M.A. 1990).

For a prior consistent statement

> to be logically relevant to rebut [a motive to fabricate or improper influence], the prior statement typically must have been made *before* the point at which the story was fabricated or the improper influence or motive arose. Otherwise, the prior statement normally is mere repetition which, if made while still under the improper influence or after the urge to lie has reared its ugly head, does nothing to 'rebut' the charge. Mere repeated telling of the same story is not relevant to whether that story, when told at trial, is true.

Id. at 192. That motive to fabricate or improper influence must be asserted *by the defense*. *Allison*, 49 M.J. at 57 (emphasis added).

A defense counsel alleges an improper influence from a forensic interviewer only when he alleges suggestive interview techniques. *United States v. Gunkle*, 1999 CCA LEXIS 356, *6-8 (Army Ct. Crim. App. 18 Oct. 1999)(mem. op.). A mere allegation of a forensic purpose for an interview is not an allegation of an improper influence on the interviewee. *Id.*

Argument

1. The motive, as alleged by defense, preceded the prior consistent statements.

Miss DF's outcry to her mother, Miss Moore, was inadmissible as a prior consistent statement because that outcry did not precede the improper influence, as alleged by defense counsel. A prior consistent statement must precede the alleged improper influence or motive in order to be admissible as non-hearsay. *Tome*, 513 U.S. at 156. Military Rule of Evidence 801(d)(1)(B) incorporates the common law rule that "'Where the testimony is assailed as a fabrication of a recent date, . . . in order to repel such imputation, proof of the *antecedent* declaration of the party may be admitted.'" *Tome*, 513 U.S. at 156, citing *Ellicott v. Pearl*, 10 Pet. 412, 439 (1836); *see also United States v. Taylor*, 44 M.J. 475, 480 (C.A.A.F. 1996); *United States v. Morgan*, 31 M.J. 43, 46 (C.A.A.F. 1990); *United States v. McCaskey*, 30 M.J. 188, 193 (C.A.A.F. 1990).

The defense controls whether a prior consistent statement is admissible; a prior consistent statement must pre-date the time of the improper influence as alleged by the defense in order to be admissible under Mil. R. Evid. 801(d)(1)(B). *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998).

Trial Defense Counsel stated "just to be clear—the defense's position has been, prior to this trial and throughout the trial, that [Miss Moore] has put this idea

in DF's head preceding the date of the statements…." (JA 127-28). Defense Counsel alleged in his opening that "[T]his case is about what a mom will do to ensure that she does not have to share her children." The Defense therefore alleged that Miss Moore's motive to coach DF was firmly established when she realized that she would need to share custody, and the defense alleged Miss Moore had the motive well before DF ever alleged any misconduct on the part of the appellant. Miss Moore's lies under oath about the problems she had regarding sharing custody of the children with the appellant validated this theory. (JA 142).

Defense counsel alleged that Miss Moore's Facebook post was compelling proof of her improper influence. The timing that the defense alleged controls the admissibility of a purportedly prior consistent statement. *Allison*, 49 M.J. at 57. Here, Miss Moore posted to Facebook on the *exact* two-year anniversary of her report to the police of the matter now in contest. (JA 150). This report to the police was on the same day as the "outcry" itself. (JA 130). In that Facebook post, Miss Moore states "on this day, two years ago, I made a decision that would change my life," (JA 150), that she struggled with it a week before she acted, (JA 150), and "it was the best decision because [Miss Moore hasn't] struggled as much as [Miss Moore] did for the four years leading up to it." (JA 150).

The record does not support the Army Court's finding that "Miss DF's initial statement to her mother and Mr. Casey in August 2013 was properly admitted by the military judge" as a prior consistent statement. *United States v. Frost*, ARMY 20160171, 2018 CCA LEXIS 263 (A. Ct. Crim. App. 30 May 2018) (mem. op.). The majority opinion merely ignored the timing issues related to the prior consistent statement. The dissent dismisses them by asserting that trial defense's theory was a mother who coached DF sometime after DF's initial "outcry" in the car. *Frost* at n.6. (noting the defense's opening statement and closing argument). This theory is not supported by the record.

The Army court correctly found that Miss Moore's explanation for her Facebook post was incredible. Miss Moore testified that her Facebook post was not about appellant, but about her decision to terminate her relationship with Mr. Casey. This explanation was a lie: Mr. Casey testified that the two broke up two years after Miss Moore claimed. *Frost*, 2018 CCA LEXIS 263 at *8; (JA 165). Consistent with the Court's finding, Miss Moore's Facebook post is therefore about the significant event which did occur on the date in question—DF's "outcry." Defense thus alleged that Miss Moore's week-long struggle could not have been about an "outcry" that had not yet occurred, because Miss Moore stated that she reported the "outcry" within twenty-four hours of its occurrence.

The "struggle" on which Defense counsel cross-examined Miss Moore was the Defense allegation of improper influence leading up to the staged outcry. This improper influence therefore preceded the "outcry," because if Miss Moore "struggled" a week prior to reporting DF's "outcry," DF's "outcry" occurred twenty-four hours before the report. The Defense therefore alleged that Miss Moore's "struggle" for six days prior to the outcry was evidence of improper influence which predated DF's allegation. Miss Moore's and Mr. Casey's testimonies concerning what DF said in the vehicle were not admissible as prior consistent statements because the statements did not pre-date the time of the defense-alleged improper influence.

2. The military judge made clearly erroneous findings of fact.

The military judge made clearly erroneous findings concerning the timing of the alleged improper influence, as alleged by the Defense. "[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted." *United States v. Flesher*, 73 M.J. 303, 313 (C.A.A.F. 2014). However, the inverse is also true:

"When the standard of review is abuse of discretion, and we do not have the benefit of the military judge's analysis of the facts before him, we cannot grant the great deference we generally accord to a trial judge's factual findings because we

have no factual findings to review. Nor do we have the benefit of the military judge's legal reasoning in determining whether he abused his discretion . . . ." *Id*. at 312; (quoting *United States v. Benton*, 54 M.J. 717, 725 (A. Ct. Crim. App. 2001)).

Here, the military judge's muddled analysis is unclear as to when and from whom the supposed improper influence occurred. He ruled that the Defense "impl(ied) that there was a recent fabrication, you know, as of September--or, excuse me, August." (JA 129). It is uncertain how the military judge reached this conclusion. Defense counsel's theory of the case was that Miss Moore, in a desperate attempt to maintain custody of the children she had with appellant, manipulated DF to make the allegation. The first line of the defense's opening was, "Today, sir, this case is about what a mom will do to ensure that she does not have to share her children." (JA 025). During cross-examination of DF, the government's first witness, defense counsel elicited how Miss Moore has DF use Miss Moore's last name instead of appellant's name. (JA 039). The Defense therefore made clear the improper influence that it alleged. This influence, from Miss Moore, predated DF's alleged "outcry" about which the military judge allowed Miss Moore and Mr. Casey to testify.

To the extent that the military judge's muddled finding dealt with Dr. Landry, the military judge erred because the defense did not allege that Dr. Landry coached or tampered with DF's testimony. The defense alleged that DF believed that the purpose of Dr. Landry's interview was for a non-medical, forensic purpose and was therefore not within the medical treatment hearsay exception. The defense did not, however, allege that she engaged in impropriety by coaching DF. A defense counsel alleges an improper influence from a forensic interviewer only when he alleges suggestive interview techniques. *United States v. Gunkle*, 1999 CCA LEXIS 356, *6-8 (Army Ct. Crim. App. 18 Oct. 1999)(mem. op.). An allegation of a forensic, instead of medical, purpose for an interview is not an allegation of an improper influence on the interviewee. *Id.* In this case, defense counsel made no allegation of suggestive interview technique. He merely alleged that DF understood Dr. Landry to be a forensic interviewer, not a healthcare provider. The record contains absolutely no allegation from defense counsel that Dr. Landry implanted in DF the substance of her testimony. Rather, defense counsel argued that DF believed Dr. Landry to be an extension of law enforcement, with which she had previously dealt. Defense counsel did not make any allegation of unseemliness on Dr. Landry's part; he merely argued that DF perceived Dr. Landry to be other than a medical provider. Therefore, if the military judge viewed

DF's statements as rebutting an allegation of improper influence from Dr. Landry, he erred because the defense never alleged such impropriety.

The record does not support the military judge's holding that the improper influence which the Defense alleged postdated Miss DF's initial allegation. Therefore, this court should find that the military judge improperly admitted Miss DF allegation because the influence alleged predated the statements.

3. The appellant was prejudiced by the improper admission of hearsay.

The government specifically referenced DF's statement in the vehicle in its closing argument, calling it "spontaneous, as corroborated by Samuel Casey." (JA 181). The government relied on these prior, allegedly consistent statements to make up for a startling deficiency in the evidence it presented for its case-in-chief. DF's brief testimony was impeached by five different witnesses:

(1) Prosecution Exhibit 2 is a stipulation of expected testimony in which Mrs. Allison Boynes, a forensic interviewer at a Child Advocacy Center in Georgia, stated she conducted a forensic interview of DF on March 12, 2014. She stated DF did not make any disclosures of abuse against the appellant, and that DF advised she is not afraid of anyone at either of her parents' house. (JA 181, 199). DF acknowledged telling Mrs. Boynes nothing happened during cross-examination. (JA 042).

(2) Prosecution Exhibit 3 is a stipulation of expected testimony from Mrs. Kristen Webb, a clinical social worker and forensic interviewer for the Armed Forces, whose job is to provide comprehensive evaluations to children and their families referred for treatment of abuse. (JA 171-72, 200). Mrs. Webb's stipulated testimony was that she conducted a forensic interview of DF on November 18, 2014, during which DF made no disclosures of abuse against SPC Frost. DF told Mrs. Webb she was scared to talk during a previous interview, but was not scared during this interview. (JA 172; 200).

(3) Defense Exhibit O is a stipulation of expected testimony from Lauren Frost, stepmother to DF who was present at the home during the alleged misconduct. Mrs. Frost's stated that DF never told her that SPC Frost had ever touched her inappropriately. (JA 177).

(4) Defense Exhibit P is a stipulation of expected testimony from Staff Sergeant (SSG) Maria Johnson, a special victim non-commissioned officer who was present for a telephonic interview between the prosecution team and DF on 1 September 2015. SSG Johnson stated that during that phone call, DF told the prosecutors that nothing happened during the summer of 2013. (JA 178).

(5) Defense Exhibit Q is a stipulation of expected testimony from Sergeant (SGT) Maurice Williams, a paralegal who served as the recorder for the Article 32

hearing in this case. Sergeant Williams stated that during the Article 32 hearing on April 14, 2015, DF testified telephonically, but did not make any disclosures of sexual abuse against SPC Frost. (JA 178).

The military judge also allowed the government to present evidence from Dr. Karen Landry, who testified that DF told her she had nightmares, but said the nightmares related to her brother being a monster and trying to beat her, and her mother disciplining her. (JA 096). Dr. Landry also testified that DF did eventually tell her that SPC Frost "tried" to put his "pee-wee" in her mouth, but never corroborated an actual touch. (JA 097).

Without DF's "spontaneous" accusation in the vehicle, the government's case was limited to DF's impeached testimony. The defense's theory of the case was that Miss Moore was a "mom who will go to any length" to avoid sharing her child. (JA 184). The military judge's abuse of discretion in admitting this improper evidence materially prejudiced the appellant's rights.

Conclusion

SPC Nicholas L. Frost respectfully requests this Court set aside the findings and sentence.

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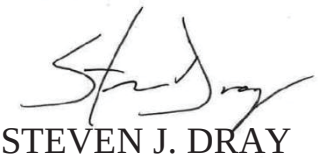

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Frost*, USCA Dkt. No. 18-0362 / AR, was delivered to the Court and Government Appellate Division on January 22, 2019.

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