IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Specialist (E-4) **DAVID M. FINCH,** United States Army, Appellant	)))))))))	FINAL BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 20170501 USCA Dkt. No. 19-0298/AR

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UNITED STATES,	)	BRIEF ON BEHALF OF APPELLEE
Appellee	)	
	)	
v.	)	
	)	Crim. App. Dkt. No. 20170501
Specialist (E-4)	)	
DAVID M. FINCH,	)	USCA Dkt. No. 19-0298/AR
United States Army,	)	
Appellant	)	

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING OVER DEFENSE OBJECTION THE VIDEO-RECORDED INTERVIEW OF AH BY CID BECAUSE IT WAS NOT A PRIOR CONSISTENT STATEMENT UNDER MIL. R. EVID. 801(d)(1)(B).

Statement of Statutory Jurisdiction

This Court exercises jurisdiction over appellant's case pursuant to Article 67(a)(3), Uniform Code of Military Justice [UCMJ]. On 9 August 2019, this Court granted appellant's petition for review. *United States v. Finch*, 2019 CAAF LEXIS 587 (C.A.A.F. 9 Aug. 2019).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of violating a lawful general regulation

(providing alcohol to a minor), one specification of sexual abuse of a child, and three specifications of rape of a child who had not attained the age of twelve years, in violation of Articles 92 and 120b, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920b, UCMJ. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for six years, and reduction to the grade of E-1. On 13 March 2019, the Army Court of Criminal Appeals, exercising its Article 66, UCMJ, jurisdiction, set aside the finding of guilty for the Article 92, UCMJ, offense. *United States v. Finch*, 78 M.J. 781, 792 & n.5 (Army Ct. Crim. App. 2019); (JA 4, 19). It affirmed the remaining findings and the sentence. 78 M.J. at 792; (JA 19).

Statement of Facts

A. Appellant's sexual abuse of his daughter, AH.

AH testified that at the time of the charged offenses, she was eleven-years old and lived with her mother, SF, and stepfather, appellant, near Fayetteville, North Carolina. (JA 33–35, 137). The family moved to the Fort Bragg area in 2012 from New York. (JA 112). Prior to appellant's sexual abuse, AH got along well with appellant and would routinely accompany him without SF's presence for outdoor activities such as dirt-bike riding, camping, and fishing. (JA 36, 333–34, 374). In the summer of 2015, appellant took AH on at least two occasions to Mott Lake, a recreational lake within the confines of Fort Bragg, North Carolina, to go

camping. (JA 40–41, 374). AH stated her relationship with appellant changed after the 2015 camping trips because he "raped" her in their shared tent at Mott Lake. (JA 41, 374). AH clarified that by "rape" she meant appellant "did something bad to [her]" and "did sexual things to [her]." (JA 41).

1. Conduct charged Specifications 2–4 of Charge II.

After swimming and drying off by the campfire, AH read a book before going to sleep in her and appellant's tent. (JA 48). Appellant was lying next to AH in the tent. (JA 48). Before AH fell asleep, she felt appellant put his arm around her abdominal area and then begin rubbing her vaginal area over her clothing. (JA 48–49). Appellant then moved his hand underneath AH's pants and underwear and began rubbing AH's vagina. (JA 50). Appellant digitally penetrated AH's vagina with his finger for a few seconds, which was painful to AH, and made her feel uncomfortable. (JA 50). While digitally penetrating AH, appellant moved his hand from AH's vagina and inserted two of his fingers into AH's mouth. (JA 55, 149–50, 377). Concerning appellant's penetration of AH's mouth with his fingers after digitally penetrating AH's vagina, appellant had previously performed this particular sexual act multiple times with SF. (JA 239–41). AH attempted to move her body so that he would stop, but appellant continued rubbing her vaginal area. (JA 50).

Appellant then tugged on AH's pants, pulling them down towards her knees. (JA 53). After this, he penetrated AH's vagina with his penis. (JA 53, 152–53). AH testified she felt the difference between appellant's digital penetration of her compared to his penile penetration. (JA 152). Specifically, she said appellant's penis felt bigger and "didn't feel like a finger." (JA 152). At some point, a light shined on the tent and appellant temporarily stopped touching AH. (JA 52, 55–56). AH believed the light was from a car driving by their campsite. (JA 55). AH then "forced" herself to go to sleep, and appellant and AH left Mott Lake the following morning. (JA 56). She did not talk about what happened with appellant. (JA 56).

2. Conduct charged in Specification 1 of Charge II.

AH stated that on a prior occasion in the summer of 2015 while camping at Mott Lake, she woke up in the tent to appellant rubbing her vagina over her clothing. (JA 56–57, 70–71). She initially thought it might have been a dream because she was still half asleep and half awake but came to realize that it had actually occurred. (JA 56–58).

B. AH's disclosure of appellant's sexual abuse.

AH disclosed appellant's sexual abuse, in varying degrees, to her family and friends. (JA 137–40). AH testified she first told her friend AC. (JA 59, 177). AC recalled AH telling her that appellant penetrated her vagina with his fingers and

penis while on a camping trip. (JA 178–79). AC stated this disclosure occurred prior to the initiation of the law enforcement investigation. (JA 203). Then, at AC's encouragement, AH told her mother, SF, on 25 September 2015. (JA 59, 222, 225). AH was hesitant to tell SF because SF was pregnant and AH knew SF loved appellant. (JA 60, 205). While AH and SF were eating at a McDonald's restaurant, AH told SF that appellant "molested" her. (JA 61, 118, 222, 225). SF recalled AH saying at the McDonald's that appellant "touched her private parts" and "raped" her. (JA 225, 243–44). This disclosure surprised SF. (JA 225). SF asked AH, "what do you mean?" thinking that AH did not fully understand what she was saying, to which AH stated that appellant had "touched" her. (JA 225).

On 25 September 2015, appellant was living with a friend, Sergeant (SGT) Aric Olson, and not in the same household as AH and SF. (JA 62, 226). After AH told SF of appellant's sexual abuse, SF took AH to SGT Olson's house to confront appellant. (JA 62–63, 228). SF and appellant had a conversation at SGT Olson's house, but AH was only present for portions of their conversation. (JA 63). At one point, SF brought AH into the same room as appellant and appellant said to her, "why would you say that? That's not true." (JA 228). SF was confused how to proceed with AH's disclosure, which she characterized as an "absolutely insane, ridiculous piece[] of information." (JA 229). SF never notified the police. (JA

230). Appellant returned to live with SF and AH weeks later, after SF gave birth to a son, WF. (JA 231, 234).

AH made other disclosures to her friends, including BT, HB, and her former boyfriend, BM. (JA 64–65, 135–36, 159–61, 316, 323–24). On 11 March 2016, months after AH disclosed appellant's abuse to SF, AH ran away to BM's house and upon her arrival, disclosed appellant's abuse to BM's mother, Specialist (SPC) Crystal Boyd. (JA 66–67, 122, 130–31, 208–09, 232–33). After hearing AH's disclosure that appellant "raped her" and that SF "hadn't done anything about it," SPC Boyd notified the police. (JA 67–68, 123, 211). AH later discussed the abuse with Dr. Thomas-Taylor in April 2016. (JA 133–35). Dr. Thomas-Taylor interviewed AH and documented her evaluation of AH. (JA 259–60, 371–79). Dr. Thomas-Taylor's written medical examination was later admitted into evidence after defense counsel affirmatively withdrew her initial objection. (JA 262–66).[1]

C. Admission of AH's video-recorded interview.

On 12 March 2016, Army Criminal Investigation Command (CID) Special Agent (SA) JB conducted a video-recorded interview of AH. (JA 248). After AH, SF, BT, AC, and SPC Boyd's direct and cross-examinations, the government called SA JB and offered into evidence AH's video-recorded interview. (JA 249).

[1] While the record of trial indicates this exhibit was originally marked as Pros. Ex. 4, it was actually admitted into evidence as Pros. Ex. 10.

Defense counsel objected on two grounds, that the video was hearsay and that it was cumulative. (JA 249–50). Trial counsel argued that it was admissible as a prior consistent statement given the defense, through cross-examination of AH and other government witnesses, had attacked AH's credibility, her timeline, her memory, and had suggested AH had a motive to fabricate. (JA 249–50). The military judge overruled the defense objection and admitted the video into evidence. (JA 250; Pros. Ex. 3). Previously, the military judge reminded the parties that the rules of evidence are generally "rules of inclusion" and that he would "lean in favor of including evidence that is relevant to [the] trial." (JA 154). Additionally, he stated "of course I'll give all evidence the weight it – that it deserves." (JA 154).

Prosecution Exhibit 3 contains two separate videos that were recorded on the same day, 12 March 2016. (Pros. Ex. 3). The first video [Video 1] is approximately fifty-eight minutes in length; the second video is approximately twenty-five minutes in length. (Pros. Ex. 3). AH's description of the first incident (conduct charged in Specification 1 of Charge II) was largely consistent with her trial testimony, specifically when she discussed appellant touching her vaginal area over her clothing while she was "half asleep and half awake." (Pros. Ex. 3, Video

1, 15:34–16:30, 21:17–24:35).[2] AH's description of the second incident (conduct charged in Specifications 2–4 of Charge II) was also largely consistent with her trial testimony, specifically when she discussed appellant digitally penetrating her vagina and then penetrating her with his penis after pulling her pants down. (Pros. Ex. 3, Video 1, 38:30–43:04). AH and SA JB did not discuss appellant inserting his fingers into her mouth during the second sexual assault incident, though AH disclosed that act the following month to Dr. Thomas-Taylor. (JA 55, 275, 377).

AH stated in the video that she was eleven-years old when both incidents occurred, that they occurred at Mott Lake, and that they occurred around the end of August or early September 2015. (Pros. Ex. 3, Video 1, 28:45–30:15). Finally, AH discussed her disclosures to SF and BM, the confrontation of appellant that ensued at SGT Olson's house, and what motivated her to run away to BM's house. (Pros. Ex. 3, Video 1, 16:36–17:57, 47:00–51:15). AH told SA JB she did not tell either SF or BM all of the details that she disclosed to SA JB. (Pros. Ex. 3, Video 1, 50:15–51:15).

D. Appellant's theory of the case and attacks on AH's credibility.

Appellant submitted the sexual abuse and assaults never occurred and everything was fabricated by AH for multiple and evolving reasons. (JA 362–68).

[2] The government's citation to specific times corresponds with the duration of the video files rather than the time of day on 12 March 2016.

During cross-examination of AH, defense counsel attacked AH's credibility, memory, presented motives for her to fabricate, and charged her with testifying under improper motivations. Specifically, the cross-examination focused on inconsistent statements of AH, AH's strained familial relationship, the attention her recently born younger brother was receiving from SF, AH's desire not to live in her parent's household, and AH's desire to live with her friend. (JA 117–23, 132). In one instance, defense counsel specifically charged AH with testifying for the improper motivation of her desire to live with her friend. (JA 120). Defense counsel asked AH several questions about her disclosure of appellant's misconduct, focusing on the individuals to whom AH disclosed and when the disclosures occurred. (JA 135–36). Defense reserved its opening statement to just prior to the start of its case in chief and told the court-martial that AH "is not a credible witness." (JA 284).

Defense counsel's attacks on AH's credibility were not confined to the cross-examination of AH and arguments. Defense counsel attempted to elicit prior inconsistent statements of AH through multiple witnesses on direct and cross-examination. (JA 192–96, 275–81, 286–87, 303–09, 322–30). During multiple colloquies regarding objections, defense counsel specifically acknowledged the purpose of the questioning was to attack AH's credibility by eliciting prior statements of AH allegedly inconsistent with her trial testimony. (JA 286–87, 307,

322). Defense also introduced testimony from two witnesses concerning AH's character for untruthfulness. (JA 336, 352).

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and law." *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013) (citation omitted) (internal quotation marks omitted). "This standard requires more than just [this Court's] disagreement with the military judge's decision." *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)).

Summary of Argument

The military judge did not abuse his discretion in admitting Pros. Ex. 3 as a prior consistent statement. The defense theory of the case was that AH fabricated her claims of sexual assault. In support of this theory, defense counsel employed a broadside, multi-faceted attack on AH's credibility beginning with the cross-examination of AH and ending with closing argument. The layered attack included charging AH with multiple and evolving motives to fabricate, impeachment

through elicitations of prior inconsistent statements, impeachment by omission, assertions of faulty memory, and the presentation of character witnesses. Defense counsel did more than open the door to the admission of prior consistent statements—she breached it. As such, Pros. Ex. 3 was independently admissible under both Mil. R. Evid. 801(d)(1)(B)(i) and (ii). The military judge did not abuse his discretion in so ruling because his decision was within the range of choices reasonably raised by the facts and law. Even if this Court determines otherwise, it should affirm nonetheless because the admission of Pros. Ex. 3 did not have a substantial influence on the military judge's findings.

Argument

Although hearsay is generally not admissible in courts-martial, a prior consistent statement is "not hearsay." Mil. R. Evid. 801(d)(1)(B). Provided (1) the declarant testifies and is subject to cross-examination about a prior statement; and (2) the prior statement is consistent with the declarant's testimony, the statement is admissible as substantive evidence under two scenarios. Mil. R. Evid. 801(d)(1)(B). The first scenario is when the prior statement is offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." Mil. R. Evid. 801(d)(1)(B)(i). Additionally, as a precondition to admissibility under this first scenario, the prior statement must precede the motive to fabricate or improper

influence that the prior statement is offered to rebut. *See United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998) (citing *United States v. Faison*, 49 M.J. 59 (C.A.A.F. 1998)). Under the second scenario, the prior statement must be offered "to rehabilitate the declarant's credibility as a witness when attacked on another ground." Mil. R. Evid. 801(d)(1)(B)(ii).

The division of Mil. R. Evid. 801(d)(1)(B) into two subsections is a result of presidential revision. *See* Executive Order 13730, 81 Fed. Reg. 33331, 33355 (20 May 2016). It mirrors "an identical change to Federal Rule of Evidence 801(d)(1)(B)." Mil. R. Evid. 801 analysis at A22-61. The first subsection merely restates the well-established rule. Mil. R. Evid. 801(d)(1)(B)(i). The second subsection "extends substantive effect to consistent statements that rebut other attacks on a witness – such as the charges of inconsistency or faulty memory." Mil. R. Evid. 801 analysis at A22-61. "[P]rior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well." Mil. R. Evid. 801 analysis at A22-61.

Long before the amendments, federal courts, including the Army Court of Criminal Appeals, expressly endorsed the nonsubstantive admission of prior consistent statements for rehabilitative purposes. *See United States v. Adams*, 63 M.J. 691, 696 (Army Ct. Crim. App. 2006) (citing *United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001)); Floralynn Einesman, *Using Prior Consistent*

Statements to Rehabilitate Credibility or to Prove Substantive Assertions Before and After the 2014 Amendment of Federal Rule of Evidence 801(d)(1)(B), 41 AM. J. TRIAL ADVOC. 1 (2017). This Court, in dicta, recently discussed the theory of admissibility of prior consistent statements for rehabilitative purposes. *See United States v. Coleman*, 72 M.J. 184, 188–89 (C.A.A.F. 2013) (alternatively noting that the prior consistent statement would have been admissible "simply to corroborate, or rehabilitate, the in-court testimony of [the] witness" after defense counsel contended the witness had a motive to alter his testimony to obtain clemency) (internal quotation marks and citations omitted).

Here, because Pros. Ex. 3 was admissible under either of Mil. R. Evid. 801(d)(1)(B)'s subsections, it was not admitted in error.

I. The military judge did not abuse his discretion in admitting Pros. Ex. 3.

The threshold admissibility issues are easily satisfied in this case. AH testified and was subject to cross-examination about her CID interview. Turning to the consistency of AH's CID statement with her trial testimony, the government readily acknowledges that not everything AH said to SA JB mirrored her trial testimony. However, the government is unaware of any requirement that a prior consistent statement duplicate exactly the witness's trial testimony as a precondition to admissibility under Mil. R. Evid. 801(d)(1)(B). In fact, it is settled that "a prior consistent statement need not be identical in every detail to the

declarant's . . . testimony at trial." *United States v. Vest*, 842 F.2d 1319, 1328–30 (1st Cir. 1988) (upholding admission of prior consistent statement that "was for the most part consistent" with respect to "fact[s] of central importance to the trial"). Another federal court applying the identical hearsay rule upheld the admission of a previously recorded video statement that was "largely consistent" with the witness's trial testimony, even though the witness's trial testimony covered new matters not mentioned in the prior statement. *United States v. J.A.S.*, 862 F.3d 543, 545 (6th Cir. 2017); *see also United States v. Evans*, 754 Fed. App'x 898, 902–03 (11th Cir. 2018) (holding prior statements of a victim were admissible after "defense attacked the victim's credibility 'on another ground,'" because the prior statements "tended to show a consistency in the victim's memories of the event").

Here, AH's CID statement was largely consistent with her testimony on the material issues before the court-martial, specifically the acts alleged in Charge II and its Specifications. Concerning appellant's over-the-clothes touching of AH, she told SA JB about appellant touching her vaginal area over her clothing while she was "half asleep and half awake." (Pros. Ex. 3, Video 1, 15:34–16:30, 21:17–24:35). AH's description of the penetrative acts were congruent with her trial testimony, specifically her discussion with SA JB of appellant digitally penetrating her and then penetrating her with his penis after pulling her pants down. (Pros. Ex. 3, Video 1, 38:30–43:04). AH and SA JB did not discuss appellant inserting his

fingers into her mouth during the second sexual assault incident, though AH later disclosed that act to Dr. Thomas-Taylor. (JA 55, 275, 377). That omission, however, does not preclude the admission of the statement under Mil. R. Evid. 801(d)(1)(B). *See J.A.S.*, 862 F.3d at 545. Even if another military judge could possibly have determined otherwise, it does not make this military judge's decision an abuse of discretion.

Concerning appellant's remaining arguments about consistency, this Court assumes military judges know and follow the law absent clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). As such, in this judge-alone court-martial, where there is no clear evidence to the contrary, it must be assumed that the military judge knew what AH said during her testimony and was therefore able to give Pros. Ex. 3 whatever weight he deemed it deserved. Indeed, the military judge specifically told counsel that he would "give all evidence the weight it – that it deserves." (JA 154). With the threshold matters addressed, the independent bases for the admission of Pros. Ex. 3 under each of Mil. R. Evid. 801(d)(1)(B)'s subsections are addressed in turn.

A. Application of Mil. R. Evid. 801(d)(1)(B)(i)—Defense counsel opened the door to the admission of Pros. Ex. 3 when she charged AH with fabricating her testimony and testifying under an improper motive post-dating her CID statement.

During the cross-examination of AH, questioning of other witnesses, and argument, defense counsel charged AH, expressly and impliedly, with fabricating additional details after she provided her CID statement and testifying with improper motives at the court-martial. (JA 120). In one line of attack, defense counsel asserted AH was testifying not because what she was saying was the truth, but because she wanted to live with her friend rather than in her parent's household. (JA 120, 133–34). Defense counsel reasserted this improper motive during the cross-examination of Dr. Thomas-Taylor when counsel questioned Dr. Thomas-Taylor about what AH told her on 22 April 2016—six weeks after AH's CID interview—regarding AH's desire to live with a friend rather than with her mother. (JA 278–80). The purpose of defense counsel's overall strategy with respect to this line of attack is clear—she wanted the fact finder to discredit AH's trial testimony and instead conclude AH was lying under oath to further her currently held desire to live with a friend and not in her parent's household.

Appellant broadly asserts that all alleged improper motivations pre-dated AH's CID interview, but the record demonstrates otherwise. Indeed, the cross-examination of AH shows that defense counsel alleged AH was testifying for an

improper motivation that she was experiencing "right now;" that is, while she sat in the witness box. (JA 120). Defense counsel then immediately followed-up with questions to AH about her recently running away from home to a friend's house, implying that this was the friend whom AH currently wanted to live with so much that her desire distorted her trial testimony. If it was defense counsel's intent to limit the admissibility of the prior consistent statement, the onus was on her to ask precise questions, focusing exclusively on the impact of whatever motivations AH may have had while talking to CID, not the impact of additional improper motivations she was currently experiencing while testifying.

Appellant's reliance on AH's alleged "long-held bias" against appellant is also not supported by the record. (Appellant's Br. 11). He embraces the Army Court's discussion of whether a witness who has "always been biased" against an accused could have his or her credibility rehabilitated by the admission of a prior consistent statement. (Appellant's Br. 11). In the Army Court's view, the admission of a prior consistent statement from a witness who has always been biased against an accused would "offer little in rehabilitation of the witness' credibility." 71 M.J. at 788; *cf. United States v. Lozada-Rivera*, 177 F.3d 98, 104 (1st Cir. 1999) (holding questions to a key government witness about his having gone to school with the defendant's children were not sufficient indication of bias, improper motive, or recent fabrication, to justify admitting the witness's

typewritten notes as a prior consistent statement to repair the witness's credibility). The Army Court offered this as an illustrative example, not because it mirrored the facts of appellant's case. Appellant clings to the Army Court's example as a lifeline even though his case is inapposite. Indeed, there is no evidence that AH ever held bias against appellant prior to the sexual assaults. In fact, AH's testimony and her statements to Dr. Thomas-Taylor indicate AH and appellant got along well before appellant sexually assaulted her. (JA 36, 374).

As discussed below in greater detail, defense counsel also cross-examined AH and other witnesses on inconsistencies and omissions between her prior statements and her trial testimony in order to lay the foundation for the ultimate argument that AH "kept fabricating new versions of the story to try and support it." (JA 362). Defense counsel further asserted that AH "told CID it happened on the start of seventh grade, but *now*, depending on who tells when and how, the dates shift accordingly." (JA 365) (emphasis added). The fair implications of these charges were that AH continued fabricating new details after her 12 March 2016 CID statement.

Assembling the different lines of attack employed by defense counsel presents a straightforward application of Mil. R. Evid. 801(d)(1)(B)(i). Alleging recent fabrication and that the complaining child witness's testimony is "colored or distorted" by her desire to live with someone else qualifies as a charge of testifying

under an improper motive. *United States v. Meyers*, 18 M.J. 347, 351 (C.M.A. 1984). Indeed, it was the very motive at issue in *Tome v. United States*. 513 U.S. 150 (1995). There, the Court addressed the admissibility of a child victim's prior consistent statement to "rebut the implicit charge that her testimony was motivated by a desire to live with her mother." *Id.* at 154. The Court rejected the government's argument in *Tome* not because the alleged motivation was insufficient, but because it determined the child victim's motivations existed before the prior consistent statement at issue. *Id.* at 167.

Such is the not the case here, where defense counsel's questioning clearly attacked AH's testimony on the basis that it was given not for its truth, but for her then-existing, self-interested motivation. *See Meyers*, 18 M.J. at 350–51 (finding no error in admission of prior consistent statement when cross-examination questions of a witness suggested the witness's testimony was influenced by his then-held desire to receive a favorable letter of recommendation from the Army). Because in at least one explicit instance defense counsel charged AH with an additional improper motive, currently held while on the witness stand, the government was legally permitted to offer Pros. Ex. 3 to rebut that particular charge. *See Allison*, 49 M.J. at 57 ("Where multiple motives to fabricate or improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut.").

Contrary to appellant's assertion, defense counsel did not charge AH with a singular improper motivation that predated her CID interview. A fair reading of AH's cross-examination suggests at least three charges of different improper motivations: (i) AH did not like SF; (ii) AH did not want to live with SF and appellant; and (iii) AH wanted to live with her friend "right now" and was willing to run away from home and lie under oath in order to achieve that desire. The differences may be nuanced, but the implications are different nonetheless. The third alleged improper motivation was so significant that defense counsel reasserted it in her cross-examination of Dr. Thomas-Taylor. (JA 278–80). With respect to recent fabrication, because defense counsel's cross-examination of AH, impeachment efforts of other witnesses, and argument fairly implied that AH continued fabricating new versions of her abuse after her CID statement, it was not error to introduce the statement to rebut the charges of recent fabrication post-dating the CID statement. *See United States v. Morgan*, 31 M.J. 43, 46 (C.M.A. 1990) (where defense alleged that accusations were falsified from the beginning and additionally charged fabrication since the testimony of the witness at the Article 32, UCMJ, hearing, a videotaped interview that occurred prior to the hearing was properly admitted to rebut the implication of the most recent fabrication).

Defense counsel could have crafted a defense in such a way as to avoid the admission of Pros. Ex. 3 as a prior consistent statement under Mil. R. Evid. 801(d)(1)(B)(i). However, by design, defense counsel chose to charge AH with multiple improper motives, irrespective of when they originated, to include a charge of improper motivation arising at the time of her testimony. When a defense counsel engages in this kind of "broadside attack," counsel must be prepared to "reap what [they] sow." *United States v. Robles*, 53 M.J. 783, 794 (A.F. Ct. Crim. App. 2000). This Court has long recognized that defense counsel is the gatekeeper to the admission of prior consistent statements. *See Morgan*, 31 M.J. at 46 ("[A]dmission of such declarations is a matter of choice by the party opposed to the witness, who may open the door to the use of such statements by engaging in a particular kind of impeachment, or leave the door shut by refraining.") (citation and internal quotation marks omitted). This is not a criticism of counsel's representation, but merely a truism that decisions at trial have consequences. Appellant cannot use these attacks on AH as a sword at trial and then as a shield on appeal.

Nor is it the government's obligation on appeal to analyze the record exhaustively and cabin each and every one of defense counsel's questions and arguments as express or implied charges of (i) recent fabrication; (ii) improper influence; or (iii) improper motive. *See Robles*, 53 M.J. at 794 ("Analysis of the

allegations of recent fabrication or improper influence is more difficult because appellant's charges were a broadside attack."). The military judge, sitting as trier and fact and presumptively knowing and following the law, made a ruling that the record manifestly supports. Given the nature of this particular hearsay rule, deference to his ruling is especially important. *See United States v. Frost*, 79 M.J. 104, 114 (C.A.A.F. 2019) (Maggs, J., dissenting) (noting the importance of affording deference to trial judge's rulings on prior consistent statement rulings given that assertions of improper influences and motives are "not always made directly and expressly" and sometimes rely on "implication and innuendo"); *United States v. Frazier*, 469 F.3d 85, 93 (3d Cir. 2006) ("A district court's determination of the premotive requirement—which should be made after an examination of the parties' positions, the record, and the Court's own judgment—will not be reversed unless no reasonable person would adopt the district court's view.") (internal quotation marks and citation omitted).

Reasonable attorneys might disagree about the nature and extent of cross-over in the varying attacks lodged by defense counsel. What is beyond dispute, however, is that defense counsel put forth multiple and evolving charges and arguments. This Court need look no further than the closing argument to get a sense of the breadth of attack:

- AH "kept fabricating new versions of the story to try and support it." (JA 362).
- AH "continued to build on the original lie." (JA 364).
- "She was lonely and bullied and wanted the attention. She didn't like her mom. She wanted to live with someone else." (JA 367).

To the extent the record is somewhat muddied by defense counsel's imprecision, that is a consequence appellant must live with on appeal.

Appellant's case presents the opposite situation confronted by this Court in *Frost*. Rather than a broadside attack on a witness alleging evolving and mixed charges of recent fabrication and improper motivations, defense counsel in *Frost* presented the case with precision and caution. This Court, reading the record in its entirety, determined defense counsel's "sole theory and line of approach during opening statement, questioning, and closing argument" was linked to a singular improper influence exerted on the witness preceding the prior consistent statement at issue. *Id.* at 111. This Court reversed because it determined defense counsel tailored the case along that singular theory precisely to avoid admission of the victim's prior consistent statement. *Id.* at 112.

Here, unlike *Frost*, defense counsel chose not to guard the door. Given the defense counsel's strategy, including—but hardly limited to—an express charge that AH was fabricating her in-court testimony for the purpose of living with her friend, the military judge did not abuse his discretion in admitting Pros. Ex. 3.

This Court could decide this case narrowly and affirm the judgment on this basis alone.

B. Application of Mil. R. Evid. 801(d)(1)(B)(ii)—Defense counsel opened the door to the admission of Pros. Ex. 3 because she assiduously attacked AH's credibility and memory.

As noted above, defense counsel did more than allege AH was testifying under improper motivations and had recently fabricated her testimony. Defense counsel impeached AH through eliciting prior inconsistent statements, noting omissions in her CID statement compared to her trial testimony, and by suggesting she had a faulty memory. Impeachment, by definition, is a tactic employed on cross-examination to attack a witness's credibility. *See* LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES, 478 (2d ed. 2009) ("Whether the witness is determined to be honestly mistaken or willfully deceitful, impeachment is the vehicle to expose that to the fact finder."); 520 ("The point of impeachment by omission is to show that the current testimony is not deserving of belief."). Separate and apart from Mil. R. Evid. 801(d)(1)(B)(i)'s well-recognized rule, under the rule's second subsection, these kinds of impeachment methods may open the door to the admission of a witness's prior consistent statement for its substance. Mil. R. Evid. 801(d)(1)(B)(ii). Just as defense counsel must exercise vigilance to preclude the substantive admission of prior consistent statements under Mil. R. Evid. 801(d)(1)(B)(i), the same is true

under the rule's second subsection. *See* Einesman, at 28 ("Although an attorney may intend simply to impeach a witness with a prior inconsistent statement or a claim of bias, that attorney may well open the door to the admission of damaging consistent out-of-court statements by the witness.").

Appellant's case is nearly identical to the facts of *J.A.S.* In *J.A.S.*, the eight year-old sexual assault victim provided a video-recorded interview to law enforcement detailing the defendant's sexual abuse. *See* 862 F.3d at 544–45. At the defendant's bench trial, the victim testified and described the sexual assault "essentially as she described it" to the law enforcement officer in the video-recorded interview. *Id.* at 545. On cross-examination, defense counsel tried to impeach the victim by, among other things, "pointing out that some aspects of her trial testimony were new (*e.g.*, that [the defendant] had put his hand on her thigh before the assault) and by highlighting some collateral points on which her testimony and her prior descriptions supposedly differed." *Id.* The government then moved to admit the video-recorded interview, which was ultimately entered as substantive evidence over defense objection. *Id.* Although the district court judge entered the video under Federal Rule of Evidence 807, the 6th Circuit held that it was "plainly admissible" under Fed. R. Evid. 801(d)(1)(B)(ii). *Id.* at 545.

Here, AH's testimony concerning the specifics of appellant's over-the-clothes sexual touching of her on the first occasion and his digital and penile

penetration of her on the second occasion was essentially as she described it to SA JB. (JA 50, 53, 56–58, 70–71, 152–53; Pros. Ex. 3, Video 1, 15:34–16:30, 21:17–24:35, 38:30–43:04). During cross-examination, defense counsel lodged attacks on multiple fronts, including impeaching AH's credibility, her memory, and confronting her with inconsistencies and omissions between her trial testimony and what she told SA JB. (JA 116–24). Defense counsel was able to, and did, cross-examine AH about the video. Indeed, defense counsel mentioned the video multiple times when confronting AH with alleged inconsistencies and omissions. (JA 116–24). By attacking AH's credibility on other grounds, defense counsel opened the door to the admission of her CID interview. Just as in *J.A.S.*, the facts of this case satisfy the requirements of Mil. R. Evid. 801(d)(1)(B)(ii), and the military judge did not abuse his discretion in admitting Pros. Ex. 3.

The government does not contend, nor did the Army Court hold, that any kind of impeachment will automatically open the door to admission of prior consistent statements under Mil. R. Evid. 801(d)(1)(B)(ii). For example, in *United States v. Magnan*, the 10th Circuit Court of Appeals, analyzing the revised rule, found the district court judge abused his discretion in admitting prior consistent statements from multiple victims. *See* 756 Fed. App'x 807, 817–18 (10th Cir. 2018). The court found an abuse of discretion because at trial, the defendant "introduced no evidence of prior statements by the victims that were inconsistent

with what they told their friends or law enforcement, and did not argue that the victims' stories had changed over time." *Id.* at 817. Additionally, the court found the defendant did not attack the witness' credibility on another ground because he "did not extract inconsistent statements or accuse the victims of misremembering the alleged abuses." *Id.* at 818. Rather, the court reasoned that defense counsel was attacking the sufficiency of the government's evidence, which did not open the door to admission of the prior consistent statements. *Id.*

Here, for all of the reasons the court in *Magnan* found an abuse of discretion, this Court should determine there was no abuse of discretion in this case. The record is replete with examples of defense counsel "extract[ing] inconsistent statements" of AH and alleging that her "stor[y] had changed over time." *Id.* at 817–18. Defense counsel explicitly made the charge that AH "kept fabricating new versions of the story to try and support it." (JA 362). During cross-examination of AC, defense counsel elicited that AH did not tell AC about appellant penetrating AH's mouth with his fingers and, attempting to downplay appellant's criminality, endeavored to get AC to agree that AH only told AC about one instance of sexual abuse instead of two. (JA 192–93). During the defense case-in-chief, defense counsel questioned BM about statements AH made to him, inconsistent with AH's trial testimony, regarding where, when, and how the abuse occurred. (JA 303–08).

In another example, defense counsel questioned HB about whether AH had stated she was "awake" or had been "woken up" during the abuse; whether AH told HB if there was alcohol involved; and whether AH ever told HB that appellant put his fingers in AH's mouth. (JA 322–27). Defense counsel also questioned HB about AH's disclosures to her that appellant had abused her in her bedroom in addition to the Mott Lake incidents. (JA 329–30). Defense counsel's strategy was clear. She admitted to the military judge on four separate occasions that the purpose of her examination of HB was to elicit inconsistent statements of AH. (JA 322, 324–26).

These are not all of the express or implied attempts at impeaching AH on other grounds through inconsistent statements, omissions, and challenging her memory. Defense counsel's goal in using these impeachment efforts is transparent—to discredit AH on every conceivable ground in the hopes that the trier of fact would disbelieve her testimony and acquit. Defense counsel's closing argument eliminates any doubt about the trial strategy employed: "She's not remembering more details. She's remember (sic) whatever details she feels like because they never happened." (JA 363). "[AH] told her friend [AC] that there was only one time [appellant] ever touched her." (JA 364). "[AH] told her boyfriend at the time, [BM], she was drug from her room while sleeping and raped outside of the car at the campground on the ground. Vastly different than what she

was testifying to." (JA 364). "She told CID it happened on the start of the seventh grade, but *now*, depending on who tells when and how, the dates shift accordingly." (JA 365) (emphasis added).

Given defense counsel's attack on AH's credibility on not just "another ground," but every available ground, Pros. Ex. 3 was independently admissible under Mil. R. Evid. 801(d)(1)(B)(ii). The rule "extends substantive effect to consistent statements that rebut other attacks on a witness – such as the charges of inconsistency or faulty memory." Mil. R. Evid. 801 analysis at A22-61. Although the rule's applicability is not limited to "charges of inconsistency or faulty memory," as indicated above, defense counsel clearly raised both of those bases.

Contrary to defense counsel's assertions, admission of Pros. Ex. 3 does not constitute mere repetition. In this case, it served to rebut the wide-ranging attacks against AH's credibility appellant acknowledges defense counsel employed.[3] Despite this acknowledgement, appellant maintains defense counsel's strategy did not trigger Mil. R. Evid. 801(d)(1)(B)(ii). Appellant's strained interpretation should be rejected, as it imposes an exceedingly stringent standard as a precondition to the admissibility of prior consistent statements after a witness's credibility has been attacked on another ground. Decades of case law dispenses

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[3] Appellant offers the attacks on AH's credibility as the strength of the defense case. (Appellant's Br. 23).

with appellant's proposed, heightened standard. *See United States v. Ellis*, 121 F.3d 908, 920 (4th Cir. 1997) ("[C]ourts employ a more relaxed standard to determine 'whether the particular consistent statement sought to be used has some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with her trial testimony.'") (quoting *United States v. Castillo*, 14 F.3d 802, 806 (2d Cir. 1994)); *United States v. Rubin*, 609 F.2d 51, 70 (2d Cir. 1979) (Friendly, J., concurring) (arguing that use of prior consistent statements for rehabilitation should be generously allowed "since they bear on whether, looking at the whole picture, there was any real inconsistency").

The strategy here is clear: defense counsel wanted the fact finder to consider the impeachment evidence and conclude AH was untruthful because she could not keep her stories straight and continued to fabricate new versions of the abuse. AH's CID statement contains probative force beyond mere repetition because it rebuts this charge by demonstrating AH had in fact been largely consistent in how she described appellant's sexual abuse. Admission of her CID statement, therefore, assisted the fact finder in determining "whether the impeaching statements really were inconsistent within the context of the interview, and if so, to what extent." *United States v. Harris*, 761 F.2d 394, 400 (7th Cir. 1985). Moreover, a prior consistent statement is not mere repetition if it serves to rebut the allegation that a victim previously made a statement exculpating or downplaying

an appellant's misconduct. *See United States v. Brennan*, 798 F.2d 581, 589 (2d Cir. 1986) (finding no error in the admission of a prior consistent statement in part because defense counsel suggested the victim had previously exculpated the defendant in a grand jury proceeding). Here, as one clear example, defense counsel's questioning of AC was structured to suggest AH told AC about only one instance of appellant's sexual abuse instead of two. (JA 192–93). Defense counsel argued this specific point in closing, stating "[AH] told her friend [AC] that there was only one time [appellant] ever touched her." (JA 364). The admission of Pros. Ex. 3, wherein AH discusses separate and distinct instances of appellant's sexual abuse, was therefore not mere repetition because it specifically rebutted this line of impeachment.

Abuse of discretion "is a stringent standard of review." *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018). It requires more than a disagreement with the military judge's decision. *Bess*, 75 M.J. at 73. "Reading the record in its entirety," assessing defense counsel's theory and lines of approach advanced in "opening statement, questioning, and closing argument," the military judge did not abuse his discretion in admitting Pros. Ex. 3. *Frost*, 79 M.J. at 111. The existence of federal case law, addressing the identical rule under nearly

identical facts, and finding no error further underscores that no abuse of discretion occurred in this case. *See J.A.S.*, 862 F.3d at 545; Article 36(a), UCMJ.[4]

II. Even if the military judge erred, appellant suffered no prejudice.

This Court reviews "the prejudicial effect of an erroneous evidentiary ruling de novo." *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011). "For [preserved] nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019). It is the government's burden to demonstrate that the admission of erroneous evidence is not prejudicial. *See United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014). In assessing prejudice, this Court weighs "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Kohlbek*, 78 M.J. at 334 (citations omitted) (internal quotation marks omitted).

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[4] Because appellant objected on the basis of hearsay and that Pros. Ex. 3 would be "cumulative," he waived any Mil. R. Evid. 403 objection. *United States v. Halford*, 50 M.J. 402, 404 (C.A.A.F. 1999) ("The failure to object under Mil. R. Evid. 403 constitutes waiver in the absence of plain error.") (citing *United States v. Nelson*, 25 M.J. 110, 112 (C.M.A. 1987)). Even if a Mil. R. Evid. 403 issue was preserved, it is "outside the scope of the granted issue." *United States v. Bodoh*, 78 M.J. 231, 233 n.1 (C.A.A.F. 2019) (citing *United States v. Guardado*, 77 M.J. 90, 95 n.1 (C.A.A.F. 2017)).

The strength of the government's case was the in-court testimony of AH, who credibly recalled appellant's sexual abuse and did not fold under the crucible of cross-examination. The military judge, as trier of fact, saw and heard her testimony and was able to determine her credibility in the face of defense counsel's attacks. Unlike the child victim in *Frost*, who was six-years old at the time of the offenses and under the influence of her motivated mother, AH had not repeatedly denied or recanted her allegations to multiple people, much less denying the allegations at an official proceeding under Article 32, UCMJ. *See* 79 M.J. at 111–12. Indeed, AH affirmatively disclosed appellant's sexual abuse, in varying degrees, to her family, friends, and law enforcement. She maintained her allegations notwithstanding the unsupportive environment fostered by SF who, rather than notifying authorities, characterized AH's allegations as an "absolutely insane, ridiculous piece[] of information." (JA 229–30).

Without question, the CID interview was helpful to rebut the defense attacks on AH's credibility and memory, but it did not add new or aggravating details about appellant's sexual abuse of AH. As pointed out by the defense counsel on multiple occasions, there were certain inconsistencies and omissions in the video, which could tend to cut against AH's testimony. At best, and given the defense's theme and reliance on the video in closing argument, Pros. Ex. 3 marginally enhanced the strength of the government's case but also provided fodder for the

defense's relatively weak case. Ultimately though, the military judge was "best situated to assess the defense efforts to impeach [AH] and concluded those efforts were insufficient" in light of the government's relatively stronger case. *Frost*, 79 M.J. at 113 (Sparks, J., concurring in part and dissenting in part).

Compared to AH's actual testimony, the video was not as material and of lower quality. It was also largely cumulative to Pros. Ex. 10, Dr. Thomas-Taylor's written report, which was entered into evidence with consent of the defense. (JA 262–66, 375–77). Presumably, defense counsel saw a tactical advantage in having Dr. Thomas-Taylor's report admitted into evidence. It appears the purpose of not objecting to Pros. Ex. 10 was to further delve into AH's alleged improper motivation to live with her friend. (JA 278–80). In her report, Dr. Thomas-Taylor recounts in detail AH's allegations of appellant's sexual abuse. (JA 375–77). As such, even if Pros. Ex. 3 was erroneously admitted, it had minimal impact given that Pros. Ex. 10 contained prior statements of AH largely consistent with her trial testimony and her CID statement. Because of the overlap between Pros. Exs. 3 and 10, the admission of Pros. Ex. 3 "added insignificant detail beyond the unobjected-to" report of Dr. Thomas-Taylor and AH's testimony. *Frost*, 79 M.J. at 113. (Sparks, J., concurring in part and dissenting in part); *see United States v. Lovett*, 59 M.J. 230, 234–35 (C.A.A.F. 2004) (noting this Court is reluctant to find reversible error from the erroneous admission of hearsay evidence when the

"challenged information is simply cumulative of the victim's own in-court testimony") (citing *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001)).

Finally, "and quite importantly, this was a military judge alone trial." *United States v. Hamilton*, 78 M.J. 335, 343 (C.A.A.F. 2019) (finding the quality of improperly admitted evidence relatively low in part because of the judge-alone forum and the military judge's reiteration that he would give evidence only the weight it deserves). As in *Hamilton*, the military judge in this case stated during appellant's trial that he would "give all evidence the weight it – that it deserves." (JA 154). Accordingly, assuming error, the government satisfies its burden of demonstrating the admission of Pros. Ex. 3 did not substantially influence the military judge's findings.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the judgment of the Army Court of Criminal Appeals.

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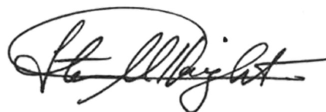

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1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 9,111 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was trasmitted by electronic means to the Court at *efiling@armfor.uscourts.gov* and contemporaneously served electronically on appellate defense counsel, on October __21__, 2019.

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