IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	REPLY BRIEF ON BEHALF OF
Appellee	)	APPELLANT
	)	
v.	)	Crim. App. Dkt. No. 20170336
	)	
Staff Sergeant (E-6)	)	USCA Dkt. No. 20-0033/AR
THOMAS AYALA	)	
United States Army	)	
Appellant	)	

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

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TABLE OF CONTENTS

ISSUE PRESENTED……....1

LAW AND ARGUMENT……1

A. Pros. Ex. 14 failed to meet threshold admissibility requirements of Mil. R. Evid. 801(d)(1)(B)(i)……..1

B. Eliciting information surrounding SPC AN's pretrial meetings with the government was not grounds to invoke Mil. R. Evid. 801(d)(1)(B)(i)……...2

C. Because the defense did not attack SPC AN's credibility on "another ground," Pros. Ex. 14 was inadmissible under Mil. R. Evid. 801(d)(1)(B)(ii)……...6

D. This court should not resort to the tipsy coachman doctrine…….9

E. Appellant was prejudiced by the admission of Pros. Ex. 4 and 14……..10

CONCLUSION……...12

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Tome v. United States, 513 U.S. 150 (1995)…….4, 7, 8

COURT OF APPEALS FOR THE ARMED FORCES

United States v. Carista, 76 M.J. 511 (C.A.A.F. 2017)……9
United States v. Faison, 49 M.J. 59 (C.A.A.F. 1998)……...6
United States v. Finch, 79 M.J. 389 (C.A.A.F. 2020)……7, 8, 11
United States v. Flesher, 73 M.J. 303 (C.A.A.F. 2014)……9
United States v. Frost, 79 M.J. 104 (C.A.A.F. 2020)……..4, 5, 11
United States v. McCaskey, 30 M.J. 188 (C.M.A. 1990)……..4, 6

OTHER COURTS

United States v. Kenyon, 397 F.3d 1071 (10th Cir. 2005)…….5
United States v. Magnan, 756 Fed. Appx. 807 (10th Cir. 2018)……...5
United States v. Portillo, 2020 U.S. App. LEXIS 24776 (5th Cir. 2020)….5, 6, 7, 8
Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259 (11th Cir. 2008)

OTHER AUTHORITIES

Mil. R. Evid. 801(d)(1)(B)…….*passim*

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE VICTIM'S PRIOR CONSISTENT STATEMENTS UNDER MIL. R. EVID. 801(D)(1)(B)(I) AND 801(D)(1)(B)(II).

LAW AND ARGUMENT

A. Pros. Ex. 4 failed to meet threshold admissibility requirements of Mil. R. Evid. 801(d)(1)(B)(i).

The government unavailingly contends that Pros. Ex. 4 met threshold admissibility requirements under Mil. R. Evid. 801(d)(1)(B). First, the government overlooks that Specialist (SPC) AN's mother never testified at trial; because she was not a declarant-witness, her statements constituted inadmissible hearsay. *See* Mil. R. Evid. 801(d)(1). Second, the government relies heavily on the military judge stating that he would not consider some portions of Pros. Ex. 4. (Gov't Br.

19). However, this paints the military judge's ruling in false light. While the military judge stated he would not consider portions of SPC AN's mother's comments in some parts of the conversation (JA 119–30), he expressly stated— over defense objection and without providing any rationale— he would consider the mother's statements in other parts. (JA 128). The government hazards a guess that the military judge used the mother's statements for context. (Gov't Br. 19). However, this argument ignores the military judge's treatment of the rest of the exhibit. (JA 119–30). The absence of explanation for why he substantively considered otherwise inadmissible hearsay, juxtaposed with his exclusion of other likewise inadmissible statements made by SPC AN's mother, should cause this court to treat his ruling with little if any deference. Because Pros. Ex. 4 failed to meet threshold admissibility requirements under Mil. R. Evid. 801(d)(1)(B)(i), the military judge erred when he admitted it.

B. Eliciting information surrounding SPC AN's pretrial meetings with the government was not grounds to invoke Mil. R. Evid. 801(d)(1)(B)(i).

The government argues the defense counsel's inquiry into SPC AN's pretrial meetings with trial counsel is dispositive proof that the defense alleged SPC AN possessed an improper influence or motive to testify. (Gov't Br. 20–21). This argument is problematic for several reasons.

First, this theory was dispelled at trial. The defense counsel repeatedly reiterated the line of questioning was not intended to allege an improper motive

(JA 120; 132–34, 157–66), but rather to show how remarkably consistent her statements had been from thirteen months before trial through her in court testimony: ". . . I did not do it for that purpose; I did not imply it; I did not intend it. Just because we asked about prep doesn't mean we think her answers have changed because of prep; in fact, we don't think that. We're not going to argue that." Moreover, the military judge himself concurred with the defense's position: "What he's saying, Trial Counsel, is that nothing that she said here is inconsistent with what she said in prior—is inconsistent with what she's ever said before. So, in other words, this isn't—this isn't rebutting any implication of a different story." (JA 160–61). The military judge went on to again discredit the government's rationale:

> Now, if they had come in and said that she testified differently now than she testified, and the statement that she made to somebody sometime previous—and—and—that there was a motive in between those two times for her to tell some—tell a different story here at trial, and you have a statement that predates the motive to come in and say something different at trial, then that statement would come in to show a consistency in what she said before the motive to what she said at trial rebutting the implication that there's something different in what she said at trial and what really happened. But, here, you're—you're giving me oranges to prove oranges.

(JA 174). Lastly, SPC AN herself told the court that meeting with the prosecutor in no way influenced her testimony. (JA 75).

Second, for such statements to be admissible, they must be made *before* the improper motive or influence arises. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) ("Statements made *after* an improper influence arose do not rehabilitate a witness's credibility.") (emphasis in original) (citing *United States v. McCaskey*, 30 M.J. at 188, 192 (C.M.A. 1990); *Tome v. United States*, 513 U.S. 150, 167 (1995) ("The Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence of motive only when those statements were made before the charged recent fabrication or improper influence or motive."). Specialist AN's intrigues began moments after the alleged assault—before she made any statements to anyone—thirteen months before appellant's trial. (JA 78, 80, 82, 99–100).

Third, the government ignores the requirement that any allegation of improper influence or motive to testify must be *recent*. Mil. R. Evid. 801(d)(1)(B)(i). Motives arising over a year before testifying by definition cannot be classified as recent. The government unpersuasively contends the defense's inquiry into pretrial preparation provided a new motive to fabricate or influence SPC AN's testimony. Specialist AN's motives to fabricate—to avoid getting in trouble for her misconduct and save her reputation—arose immediately after returning to her room in the early morning hours of April 17, 2016. She maintained those same motives as she prepared for trial. Pretrial preparation

enabled SPC AN keep her lies consistent in order to effectuate her original motives to fabricate. It did not serve to separately motivate her to fabricate the assault or to influence her testimony. Simply put, SPC AN's motivations never changed. Because her motives remained the same, pretrial preparation cannot form the basis of a separate, more recent motive.

Fourth, the government claims that Mil. R. Evid. 801(d)(1)(B)(i) does not require the witness' testimony to actually change in order for the rule to be invoked. But the government provides nothing to support this theory. When analyzing the admissibility of prior consistent statements, courts have routinely looked to whether an allegation exists that the witness' testimony changed. *United States v. Portillo*, 2020 U.S. App. LEXIS 24776 (5th Cir. 2020); *United States v. Magnan*, 756 Fed. Appx. 807 (10th Cir. 2018)[1]; *United States v. Kenyon*, 397 F.3d 1071 (10th Cir. 2005).

Just like *Frost*[2], SPC AN had a distinct improper influence—to not get in trouble for misconduct and to save her reputation on Camp Lemmonier. That influence began moments after her tryst with appellant. She spun those lies to her

[1] In *United States v. Magnan*, the government argued that a vague statement implied a conspiracy amongst victims to "get their stories straight before trial." *Id*. at 817. The court declined to countenance the charge of recent fabrication as the statement did not specify ". . . when the stories were changed, what they were changed from, or why they were changed." *Id*.
[2] 79 M.J. at 111.

mother, SGT Rolf, and law enforcement. (JA 65–67, 131, 253, 276). She then perpetuated those lies through her pretrial preparation. (JA 74–75). She persisted telling those lies throughout trial. Unlike *Faison*[3], SPC AN's testimony was not shaped by events after her initial outcries. (JA 78, 80, 82, 99–100). Rather, her pretrial preparation was a step in effectuating her original lies, and her testimony was the end result of the original lies. *See United States v. McCaskey*, 30 M.J. at 192–93 (statements made "after the urge to lie has reared its ugly head does nothing to 'rebut' the charge.").

As her motives existed before she made the purported prior consistent statements, *and* those motives persisted at trial, those statements were inadmissible under Mil. R. Evid. 801(d)(1)(B)(i). *See Portillo*, 2020 U.S. App. LEXIS at *48 (statements inadmissible where the motive to fabricate arose before the prior consistent statements were made and that motive persisted at trial).

C. Because the defense did not attack SPC AN's credibility on "another ground," Pros. Ex. 14 was inadmissible under Mil. R. Evid. 801(d)(1)(B)(ii).

The government argues that to counter the notion SPC AN was a liar generally, it was allowed to rebut that theory by introducing her statements untethered to specific attacks on her credibility. This argument, however, runs counter to the rule's limitations: it is not intended to "bolster the veracity of the

[3] 49 M.J. 59, 62 (C.A.A.F. 1998).

story told," nor is it intended to "counter all forms of impeachment to bolster the witness merely because she has been discredited." *Tome* 513 U.S. at 157–58 (1995). Prior consistent statements are not vehicles for general character rehabilitation. Rather, those statements must rehabilitate grounds not otherwise delineated in Mil. R. Evid. 801(d)(1)(B)(i), and must be relevant to rehabilitating the witness' credibility on the basis of which she was attacked. *See United States v. Finch*. 79 M.J. 389, 396 (C.A.A.F. 2020); *Portillo*, 2020 U.S. App. LEXIS. at 51.

In *Portillo*, the defense attacked the credibility of two prosecution witnesses, alleging that they only provided statements to law enforcement in order to receive leniency in subsequent prosecutions. 2020 U.S. App. LEXIS at 43–44. On re-direct, the government introduced prior statements of both witnesses. *Id*. at 44. While noting the inconsistencies identified by the defense between the witnesses' prior statements and in court testimony during cross-examination, the Fifth Circuit determined it went to the defense's "broader point" that the witnesses "fabricated their stories—a motive that fits squarely within 801(d)(1)(B)(i)[4], and not the alternative 801(d)(1)(B)(ii)." *Id*. at 50. Determining that the witnesses' credibility had thus not been attacked on another ground, the court concluded that the

[4] The court held that the statements were also inadmissible under Fed. R. Evid. 801(d)(1)(B)(i) because the witnesses' statements were made after they possessed the motive to fabricate. *Id.* at *48.

statements were inadmissible, finding "[i]n light of the clear limitation in *Tome* and the defense's consistent attempts to argue that the [witnesses] had a motivation to lie, we decline to hold that 801(d)(1)(B)(ii) permits such an end-run around the limitation in 801(d)(1)(B)(i)." *Id.* at 53.

Just like *Portillo*, the defense in appellant's case did not make targeted attacks upon SPC AN's memory or inconsistencies in her story. The defense elicited multiple motives to fabricate, all of which predated her prior statements. (JA 78, 80, 82, 99–100). The defense also adduced information regarding SPC AN's sexual assault prevention and response training and victim advocacy training, suggesting that she was uniquely postured to take advantage of the system by making a false allegation. As in *Portillo*, the defense's questioning went to a broader point: SPC AN lied from the beginning. Because SPC AN's credibility was not attacked on another ground, the military judge erred when admitted Pros. Ex. 14 under Mil. R. Evid. 801(d)(1)(B)(ii).

While the government contends that it is "circular logic" (Gov't Br. 33) to preclude the introduction of prior consistent statements to rehabilitate the credibility of a witness who is painted as a liar, this court was concerned with such an issue in *Finch*. Impeachment is the bread and butter of cross-examination. Testing a witness' credibility is essential to the factfinder assigning appropriate weight to evidence. Should this court find that any credibility test of a witness

triggers the introduction of prior consistent statements—statements which the factfinder may then use substantively to prove a charged offense—we may dispense with trials altogether.

D. This court should not resort to the tipsy coachman doctrine.

The government suggests this court salvage the military judge's rulings by applying the "tipsy coachman" doctrine. But the tipsy coachman doctrine is reserved for instances when the military judge achieves the correct result, although for the wrong reasons. *United States v. Carista*, 76 M.J. 511, 515 (C.A.A.F. 2017) (internal citations omitted). In appellant's case, the military judge improperly admitted Pros. Ex. 4 by incorrectly applying Mil. R. Evid. 801(d)(1)(B)(i), to include basic threshold admissibility requirements. (JA 120–30). While he articulated his rationale for admitting portions of Pros. Ex. 4, he failed to do so for other portions of the exhibit. (JA 128). Worse, when he realized his error in admitting Pros. Ex. 4 (JA 174), he never returned to correct his mistake. He then improperly admitted Pros. Ex. 14 under an expansive interpretation of Mil. R. Evid. 801(d)(1)(B)(ii). (JA 224). He also provided no rationale for doing so, which should cause this court to accord his ruling with even less deference. *See United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014). Because the military judge did not reach the correct conclusion in his application of either Mil. R. Evid. 801(d)(1)(B)(i) or 801(d)(1)(B)(ii), the employment of the tipsy coachman doctrine

here is inappropriate. Furthermore, this court should not countenance the musings of a military judge who, while also serving as factfinder, entreats appellate courts to save him from his ignorance of the law. (JA 179). When the "chariot 'w[i]nd[s] up at the wrong house," this court should "neither chart its course nor let stand its destination." *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259 (11th Cir. 2008).

E. Appellant was prejudiced by the admissions of Pros. Ex. 4 and 14.

Contrary to the government's contention, its case was weak. Without any forensic or physical evidence, the government built its case around SPC AN's questionable testimony. The government also exaggerates the ostensible damning nature of appellant's statements to SPC AN, SPC Larkin, and law enforcement. (Gov't Br. 37– 38). "Crossing a line" or "making a mistake" could have easily referred to appellant's recognition that he was a non-commissioned officer and SPC AN was not, making any romantic relationship between the two impermissible. The government also gives undue weight to the fact that the defense did not object to the admission of Pros. Ex. 5. (Gov't Br. 39). Such a tactical decision, however, does not doom appellant to accept improperly admitted statements unsupported by the rules of evidence. As the proponent of the evidence, it was the government's burden to establish that Pros. Ex. 4 and 14—irrespective of Pros. Ex. 5—met threshold admissibility requirements of Mil. R.

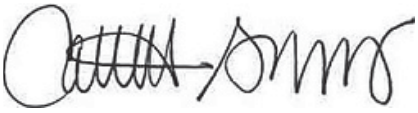
Evid. 801(d)(1)(B) and demonstrate the relevancy link between the prior consistent statement and how it would rehabilitate SPC AN with respect to the particular type of impeachment that occurred. *See Finch*, 79 M.J. at 396.

The defense's case on the other hand was strong. The defense painted SPC AN as a self-serving liar, with numerous reasons to fabricate the assault. (JA 78, 80, 82, 99–100). Additionally, Staff Sergeant Cavanaugh, a neutral third party, wholly disputed SPC AN's version of events. (JA 193–195).

The materiality and quality of the improperly admitted evidence unquestionably went to the crux of appellant's case: But for the military judge's erroneous rulings, the government would not have been able to impermissibly bolster the veracity of SPC AN's story. The government ignores that the military judge's ruling enabled SPC AN to lie, and lie, and lie again. It also ignores that the military judge then substantively used those lies to find the government proved the charged offense. (JA 250). While the government gives credence to appellant's trial being judge alone, the military judge himself noted that he would not have admitted the purported prior consistent statements had appellant's trial been before a panel, seemingly recognizing the inflammatory nature of the statements. (JA 222). A military judge is not infallible. It therefore cannot be presumed that such improperly admitted evidence did not have a substantial influence on the military judge's guilty findings. *See Frost*, 79 M.J. at 112.

CONCLUSION

WHEREFORE, appellant respectfully requests this Court set aside the findings and sentence.



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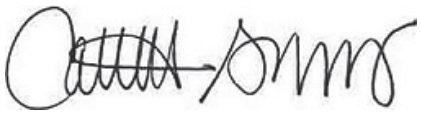
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Ayala, Crim. App. Dkt. No. 20170336, USCA Dkt. No. 20-0033/AR, was electronically filed with the Court and the Government Appellate Division on August 17, 2020.



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