IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Dominic L. RUIZ
Corporal (E-4)
U.S. Marine Corps,

Appellant

REPLY ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 202300007

USCA Dkt. No. 24-0158/MC

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REPLY

The Military Judge abused her discretion in admitting Ms. B.S.'s prior statement, which is neither consistent with nor rehabilitative of her in-court testimony.

A. In comparison with her in-court testimony, Ms. B.S.'s prior out-of-court statement to Deputy Ford is not "consistent with respect to facts of central importance to the trial."[1]

Ms. B.S. testified at trial as follows:[2]

> ATC: What did he rub in your vaginal area to your buttocks?
>
> WIT (Ms. S[redacted]): His genitals.
>
> ATC: His penis?
>
> WIT (Ms. S[redacted]): Yes, sir.
>
> ATC: Did you say anything to him?
>
> WIT (Ms. S[redacted]): I did when he tried to kiss me, he kept trying to put his hand against my cheek and kept on trying to bring my face over to kiss him. And I said, "No, stop." And I pushed his face away.
>
> ATC: Did he continue to grind against your buttocks after that?
>
> WIT (Ms. S[redacted]): Yes, sir.
>
> ATC: Were you crying at the time?
>
> WIT (Ms. S[redacted]): Yes, sir.
>
> ATC: Why?
>
> WIT (Ms. S[redacted]): Because I didn't want it to happen.
>
> ATC: What is your very next memory?
>
> WIT (Ms. S[redacted]): I remember just crying out for my husband, just wanting him to be there. And then I remember just blacking out.

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[1] *United States v. Finch*, 79 M.J. 389, 395 (C.A.A.F. 2020) (citation omitted).
[2] J.A. at 251.

On recall, Deputy Ford testified as follows:[3]

> TC: Deputy Ford, I want to direct your attention to the early morning hours of May 11th, when you were in the hospital speaking with B[redacted].
>
> Do you remember that?
>
> WIT (Deputy Ford): Yes, sir.
>
> TC: Okay. Did she tell you that she doesn't remember how she got to the bedroom?
>
> WIT (Deputy Ford): Yes, sir.
>
> TC: Did she tell you that he rubbed his genitals against her?
>
> WIT (Deputy Ford): Yes, sir.
>
> TC: And that she said, "No"?
>
> WIT (Deputy Ford): Yes, sir.

The key inconsistency here is that by testifying, "I did *when he tried to kiss me* . . . I said, 'No, stop.' And I pushed his *face* away,"[4] Ms. B.S. unequivocally stated that she made no verbal objection when Appellant began rubbing his penis on her buttocks. Her verbal objection, "No, stop," occurred "when [Appellant] tried to kiss [her]."[5] By contrast, the only way to view her prior statement to Deputy Ford is that she told him she had said, "No," in response to Appellant "rub[bing] his genitals against her."[6]

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[3] J.A. at 396.
[4] J.A. at 251 (emphasis added).
[5] *Id.*
[6] J.A. at 396.

The point is that, when examined side-by-side, these two statements are materially *in*consistent. Admitting this prior statement violated *Finch*'s axiomatic holding that, in order for an out-of-court statement to be admitted under the prior consistent statement rule, the prior statement must be just that: *consistent*.[7]

The Government's Answer misses this point entirely, arguing that "Appellant's attempt to distinguish consent to rubbing her buttocks and vaginal area from consent to kissing simply because the rubbing came first is unavailing because the rubbing had not stopped before the attempted kiss began."[8] The reason for comparing the two statements is not to discern the parameters of Ms. B.S.'s consent; it is to demonstrate that, vis-à-vis her in-court testimony, her prior statement is not "consistent with respect to facts of central importance to the trial."[9] And the facts of when, and in what context, the Government's case-dispositive witness to the charged abusive sexual contact voiced a lack of consent could not be of more "central importance to the trial."[10]

Thus, in using the prior consistent statement rule to admit a prior *in*consistent statement, the Military Judge abused her discretion by applying the law "to the facts in a way that is clearly unreasonable."[11]

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[7] *Finch*, 79 M.J. at 396.
[8] Gov. Answer at 17.
[9] *Finch*, 79 M.J. at 395 (citation omitted).
[10] *Id.*
[11] *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022).

B. The Government's evolving theory of admissibility at trial demonstrates that Ms. B.S.'s prior statement was admitted for its substantive value, not to rehabilitate her "credibility on the basis on which . . . she was attacked."[12]

The Government in its Answer conflates purpose with effect.[13] Military Rule of Evidence (M.R.E.) 801(d)(1)(B)(ii) maintains a longstanding, sole *purpose* of rehabilitating a witness' credibility on the ground on which she was attacked.[14] Thus, a party's *purpose* in admitting a prior consistent statement must be for its rehabilitative value. As of 2014, the *effect* of admitting the statement is that it may also be treated as substantive evidence.[15] But the Rule does not permit a party to admit hearsay evidence for its substantive effect under the mere guise that it rehabilitates a witness' credibility.

That is precisely what the Government did here, as evident by both its initial theory of admissibility and its subsequent argument to the members. The Trial Counsel first attempted to admit the prior statement as an excited utterance, for the

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[12] *Finch*, 79 M.J. at 396.
[13] *See* Gov. Answer at 19.
[14] *Finch*, 79 M.J. at 396; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 801(d)(1)(B)(ii) (2019) [hereinafter MCM] (" . . . *is offered*: . . . *to rehabilitate* the declarant's credibility as a witness when attacked on another ground . . . .") (emphasis added).
[15] USCS FED. R. EVID. 801, Notes of Advisory Committee on 2014 amendments (providing "[t]he amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.").

purpose of its substantive value.[16] Only after that theory failed did the Trial Counsel offer the statement as a prior consistent statement, for the purported purpose of rehabilitation.[17] In closing, however, the Trial Counsel did not use the statement for its rehabilitative value, but argued only the initial (failed) purpose for its admissibility: its substantive value.[18]

Appellant agrees with the Government that "Evidence may be admissible under more than one legal theory, and because the Military Judge did not admit the statement as an excited utterance, that issue is not before this Court."[19] But what *is* before this Court is the manner in which the Government admitted the prior statement, how the Government then used that statement, and why that use is antithetical to the purpose of the Rule: "*to rehabilitate* the witness's credibility on the basis on which . . . she was attacked."[20] While the Rule allows a prior consistent statement to be used substantively (for its truth), to hold in the Government's favor would create a precedent that allows the Government to exploit the Rule unjustly for a purpose for which, by its plain meaning, it was not intended.

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[16] J.A. at 367.
[17] J.A. at 369.
[18] J.A. at 429.
[19] Gov. Answer at 19.
[20] *Finch*, 79 M.J. at 396 (emphasis added). *See also* MCM, *supra* note 14, MIL. R. EVID. 801(d)(1)(B)(ii) (2019) (" . . . *is offered*: . . . *to rehabilitate* the declarant's credibility as a witness when attacked on another ground . . . .") (emphasis added).

C. The Government's Answer mischaracterizes Appellant's argument, misapplies the temporal priority doctrine, and shifts its theory of admission.

The Government is mistaken in its argument that the "Record refutes Appellant's argument that counsel questioned [Ms. B.S.'s] recollection of her saying 'No' and 'stop' on the basis of her intoxicated state."[21] To the contrary, both the Record and the Military Judge's ruling support that the Defense never questioned Ms. B.S.'s testimony of saying "no" and "stop."[22]

While the Defense did question Ms. B.S. about her intoxicated state and associated memory issues, these were subjects the Government itself raised throughout the case, including during its direct examination of Ms. B.S. As the Government acknowledges, the Defense's theory was that Ms. B.S. "consented but did not remember"[23] because of "alcohol-induced amnesia."[24] To that end, the Defense elicited expert testimony about alcohol-induced amnesia and the possibility to consent to sexual activity during such amnesia.[25]

That is why application of the temporal priority doctrine is crucial in this case. Contrary to the Government's argument, Ms. B.S.'s prior statement did not rehabilitate her credibility on the ground on which she was attacked at trial—her

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[21] Gov. Answer at 22.
[22] J.A. at 393.
[23] Gov. Answer at 25. *See also* J.A. at 435 (Defense states in closing argument, "she absolutely forms consent and doesn't recall it.").
[24] Gov. Answer at 12.
[25] J.A. at 418-24.

alcohol-induced amnesia—because she did not speak to Deputy Ford until after she began experiencing alcohol-induced amnesia. Whether a witness's prior statement is consistent with her in-court testimony is irrelevant if the statement is made *after* the onset of the physical condition that is the basis for the credibility attack. At that point, the prior statement does nothing to rehabilitate the witness's credibility on the ground on which she was attacked.

This is same logic that has already been applied to M.R.E. 801(d)(1)(B)(i). If a witness's credibility is attacked based upon a motive to fabricate, any prior consistent statements made *after* the motive to fabricate arose are irrelevant because they do not address that issue. Likewise, if a witness's credibility is attacked based on alcohol-induced amnesia, any prior consistent statements made *after* the alcohol-induced amnesia arose are irrelevant because they do not address that issue. This legal doctrine, and the logic underpinning it, persists unchanged from the common law despite the codification of M.R.E. 801(d)(1)(B)(ii), just as it persisted despite the codification of M.R.E. 801(d)(1)(B)(i).[26]

The Government is therefore mistaken in both of its arguments in this area: (1) that "[a]ny 'fabrication, influence, or motive' being attacked 'came into being' between her report to Deputy Ford and trial[;]" and (2) "Deputy Ford's recall testimony that the Victim said 'No' and 'stop' directly rehabilitated the argument

[26] *See* Appellant's Br. at 26-28.

that the Victim changed her account between the night in question and trial."[27] As to the first argument, the Trial Counsel never sought admission of the prior statement to rebut a recent-fabrication attack (which the Defense never made), which in any event is based on M.R.E. 801(d)(1)(B)(*i*). Aside from excited utterance, the Trial Counsel only sought admission of the prior statement pursuant to M.R.E. 801(d)(1)(B)(*ii*).[28] Further, as the proponent of the evidence, it is the Government's burden "to demonstrate the *relevancy link* between the prior consistent statement and how it will *rehabilitate the witness's credibility*."[29] And in demonstrating the relevancy link, the movant must identify "the *particular* type of impeachment that has occurred."[30] As the Trial Counsel acknowledged, the purpose for admitting the prior statement was "to show that her memory is not faulty . . . ."[31] The Government cannot now suddenly change its theory of admissibility on appeal.

As to the second argument, the Defense's attack on Ms. B.S.'s credibility was not based on recent fabrication or any other improper influence or motive that arose between the night in question and the trial. The third question the Defense asked Ms. B.S. during cross-examination was, "Ma'am, *that night*, it's fair to say that your

[27] Gov. Answer at 22 (quoting *Tome v. United States*, 513 U.S. 150, 156 (1995)).
[28] J.A. at 367, 369-71; J.A. at 458-59.
[29] *Finch*, 79 M.J. at 398 (emphasis added) (citation omitted).
[30] *Id.* at 396 (emphasis added) (citation omitted).
[31] J.A. at 458.

memory is not completely clear as to what transpired?"[32] The next two questions were, "There's a lot of gaps; is that correct?" and "your testimony is that you had never blacked out before; is that right?"[33] Soon thereafter, the Defense asked her, "Now I asked you if there were gaps. You're saying 'blackouts.' When you say 'blackouts,' you just mean, like, there are gaps in your memory?"[34]

Thus, the Record demonstrates that the Defense's attack on cross-examination and its case theory was always that Ms. B.S. had a faulty memory *due to* an alcohol-induced amnesia. When applying the temporal priority doctrine correctly, the erroneously-admitted prior statement is not "actually [] relevant to rehabilitate the witness's credibility on the basis on which . . . she was attacked"[35] because the statement was made *after* Ms. B.S.'s alcohol-induced blackout arose, not *before*. Thus, the Military Judge abused her discretion because she "use[d] incorrect legal principles" in admitting Ms. B.S.'s statement to Deputy Ford.[36]

D. Admission of a prior *in*consistent statement, for substantive use, bearing on what conduct the complaining witness said "no" to, was not harmless error.

Finally, admission of this prior *in*consistent statement, which rehabilitated nothing about Ms. B.S.'s credibility for the reason she was attacked, had a

[32] J.A. at 262 (emphasis added).
[33] *Id.*
[34] J.A. at 265.
[35] *Finch*, 79 M.J. at 396.
[36] *Rudometkin*, 82 M.J. at 401.

"substantial influence on the findings."[37] Far from "simply re-stating what the Victim herself already testified to," as the Government argues,[38] the Government used the hearsay to fill a gap in its case at trial that went directly to the "heart of the matter in dispute."[39] But not only that, the Government received the benefit of this prior statement being elicited through a law enforcement officer stating what Ms. B.S. told him about the incident close-in-time to that incident. That categorically—albeit not consistently—corroborates Ms. B.S.'s allegation in general terms because it can now be used for its truth. That is the point the Government made when the Trial Counsel emphasized to the Members in rebuttal, "[Ms. B.S.] told Deputy Ford what happened."[40] Regardless, when the strength of the Government's case relies upon the testimony of a single witness to prove non-consent, the timing of when that witness verbally and physically rejected Appellant's advances does not get more material.

Indeed, the Government's efforts to downplay the value of this hearsay on appeal are in stark contrast to the efforts it went through to get the hearsay admitted at trial, where it: (1) persistently argued for its admission at two Article 39(a) sessions; (2) drafted and submitted a bench brief about it; (3) requested that the

[37] *Finch*, 79 M.J. at 398 (citation omitted).
[38] Gov. Answer at 28.
[39] *United States v. Frost*, 79 M.J. 104, 112 (C.A.A.F. 2019).
[40] J.A. at 438.

members be instructed that the testimony should be considered for the truth; and then (4) specifically relied on the prior statement when arguing Appellant's guilt in closing. The Government went through all of those efforts to admit this evidence, and then relied on it in closing, for the same reason its admission constitutes prejudicial error: it was the lynchpin of the case.

CONCLUSION

Because the erroneously-admitted, out-of-court statement materially prejudiced Appellant's substantial rights, he respectfully requests that this Honorable Court set aside the findings and sentence.

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