IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 202300007
Dominic L. RUIZ, Corporal (E-4) U.S. Marine Corps Appellant	)	USCA Dkt. No. 24-0158/MC

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

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WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN ADMITTING THE COMPLAINING WITNESS'S STATEMENT TO LAW ENFORCEMENT AS A PRIOR CONSISTENT STATEMENT UNDER [MIL. R. EVID.] 801(D)(1)(b)(ii).

Statement of Statutory Jurisdiction

The Entry of Judgment includes a sentence of a bad-conduct discharge. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of abusive sexual contact in violation of Article 120(d), UCMJ. The Military Judge sentenced Appellant to reduction to paygrade E-1 and a bad-conduct discharge. The Convening Authority took no action on the Sentence, the Judge entered the Judgment into the Record, and the Sentence, except for the punitive discharge, was executed.

The lower court affirmed the Findings and Sentence on March 20, 2024. (J.A. 2, 19.) Appellant filed a timely petition to this Court for review.

Statement of Facts

A. The United States charged Appellant with abusive sexual contact.

In Specification 1 of the Charge, the United States charged Appellant with touching the buttocks of the Victim with his penis on May 10, 2020. (J.A. 212.)

B. The Victim testified that Appellant touched the Victim's buttocks with his penis without her consent and with the intent to sexually gratify himself.

The Victim testified she was an active-duty Marine from September 2017 to January 2022. (J.A. 216–17.)

She made plans to hang out with Appellant on May 10, 2020. (J.A. 226.) These plans were not specific; she thought "[j]ust maybe grabbing a bite to eat. If anything was open, maybe going there, like the mall." (J.A. 236–37.)

She informed Ms. Mancini—who knew Appellant—of these plans. (J.A. 229.) The Victim was looking forward to seeing Appellant because she hadn't "hung out with [anyone] in a really long time" and wanted to get out of the house. (J.A. 234.) She was not romantically interested in him. (J.A. 235.)

Appellant drove the Victim to Chili's for take-out and a grocery store to buy alcohol. (J.A. 237–38.) The Victim had no intention of getting drunk. (J.A. 238–39.) Appellant purchased two bottles of wine. (J.A. 239.) Ms. Mancini called the Victim on FaceTime to check in, interacting with her and Appellant. (J.A. 240–41.)

Appellant suggested going to his hotel, but she felt uncomfortable, so they went to her house. (J.A. 239.)

She ate half her food. (J.A. 242.) Appellant got two glasses and kept refilling her glass to the rim with wine. (J.A. 242–43.) Together, they consumed two bottles over about an hour. (J.A. 243.) Thereafter, Appellant got Miller Lites and Twisted Teas out of the Victim's fridge, and he showed her how to shotgun a beer. (J.A. 244–45.)

Appellant began putting his hands on her shoulders, and the next thing she knew, she was sitting on his lap. (J.A. 246.) She kept trying to get off his lap, but "he would pull me back on and put his arms around me and shush me." (J.A. 246–47.) She felt uncomfortable and drunk. (J.A. 247–48.)

She next remembered being on her back, with Appellant over her, supporting his weight on his hands on either side of her. (J.A. 248–49.) He got off her and went into the bathroom. (J.A. 250.)

Next she remembered, Appellant was "running his hand up and down [her] side . . . [her] ribs down [her] waist and to [her] butt and then again." (J.A. 250.) "I felt his hand and I felt his breath breathing in the back of my neck, his hand just running up and down my side, and him saying how much he wanted me, but he knew it was wrong. But he just really wanted to make me feel good. . . . And that my husband didn't deserve me." (J.A. 250–51.)

She affirmed Appellant rubbed his penis on her vaginal area and buttocks. (J.A. 251.)

She told him, "No, stop," when Appellant tried to move "[her] face over to kiss him." (J.A. 251.) She was crying as he continued to "grind against [her] buttocks." (J.A. 251.) She did not want this to happen; she did not feel like she could move. (J.A. 251–52.)

She next remembered Appellant sleeping beside her. (J.A. 252.) She tried not to wake him, left the house, and went to her neighbors' house. (J.A. 252.) She rang their doorbell, pounded on the door, and yelled for help, crying until they answered. (J.A. 252–53.) Apart from the occasional greeting, she had no prior interactions with them. (J.A. 257.)

She next remembered waking up in the ambulance and then waking up in the hospital. (J.A. 253.) She underwent a sexual assault forensic medical examination. (J.A. 254.)

1. On cross-examination, Trial Defense Counsel explored the differences between the Victim's testimony on direct examination and her prior statements to Trial Counsel, law enforcement, and the sexual assault medical forensic exam nurse.

On cross-examination, the Victim acknowledged her memory was not perfect. (J.A. 262.)

Trial Defense Counsel elicited from the Victim that there were aspects of her account to law enforcement that she no longer recalled, such as Appellant touching her breast and inner thigh. (J.A. 263–65.) The Victim testified that she no longer recalled what she told the sexual assault forensic medical exam nurse or Deputy Ford and that she has gaps in her memory. (J.A. 265–66.)

Trial Defense Counsel elicited from the Victim that she gave more facts on direct examination than she previously gave to law enforcement. (J.A. 266.) Pressed on why she gave more details now, she had no explanation. (J.A. 266–67.)

Pressed on potentially contradictory statements, she recalled some, but not all, of her previous statements. (J.A. 263–78, 286–90, 298.) She acknowledged she sat on Appellant's lap and he pulled a blanket over her, but said, "I just forgot. I didn't remember." (J.A. 273–74.)

C. The Victim's neighbors testified she came to their house after the incident, looking for help.

Ms. Figueroa and Mr. Figueroa were the Victim's neighbors, but they had not met her before that night. (J.A. 301.) Around 02:00 on May 11, Ms. Figueroa awoke "to our dogs barking and hearing pounding and screaming . . . , like bloody-murder screams." (J.A. 302–03.)

Through the bedroom window, Mr. Figueroa told her "there was a girl laying at the front of our door naked and screaming for help. So he ran down." (J.A. 303.) Ms. Figueroa dialed 911. (J.A. 303.)

When the paramedics came, the Victim "got[] upset again [and] screamed, 'I was raped.'" (J.A. 310.)

Mr. Figueroa also testified that he saw the Victim through his window "balled up at [his] front door screaming for help saying that she was raped." (J.A. 315–17.)

D. Law enforcement testified to finding empty wine glasses in the Victim's house and Appellant asleep in her bed.

1. Detective McNeil testified to the Victim's affected demeanor.

Detective McNeil testified he arrived after the paramedics. (J.A. 326–27.) He observed the Victim "[s]creaming, yelling; you could see the tears in her face, and she was talking pretty loud." (J.A. 327.) He could not tell if she was intoxicated. (J.A. 327.)

He entered the Victim's house with Deputy Ruth and Deputy Ford, and noticed two empty wine bottles on the table. (J.A. 329–30.)

They found Appellant naked and asleep in the bedroom. (J.A. 332.) Deputy Ford gave him loud commands to wake up and kicked the bed, yet he did not wake up. (J.A. 332–33.) Deputy Ford then tipped the mattress, causing Appellant to roll off the bed and wake up. (J.A. 333–34.) He was confused and disoriented. (J.A. 338.) They helped him up, handcuffed him, and dressed him in shorts they found. (J.A. 334.)

Detective McNeil had sexual assault response training and conducted six sexual assault investigations. (J.A. 337.) He believed sexual assault victims differ in their reactions: "Some [are] hysterical. You have the individuals who can't believe they've been sexually assaulted. You [have] the ones [who] shut down. So it's different emotions that people show . . . ." (J.A. 338.)

2. Deputy Ruth testified to the Victim's shaken demeanor and Appellant's agitated demeanor.

Deputy Ruth arrived after Deputy Ford. (J.A. 339.) She got permission from the Victim, who was in the ambulance, to enter her house. (J.A. 339.) The Victim was "loudly" "crying and shooken [sic] up." (J.A. 341.) Deputy Ruth believed her to be intoxicated because the ambulance smelled of alcohol. (J.A. 340.)

Entering the house with Deputy Ford and Detective McNeil, she saw two empty wine bottles and "two glasses with remnants of red wine in it. And then there was also a box of Twisted Teas on the counter . . . ." (J.A. 342.) The house smelled of alcohol. (J.A. 342.)

They found Appellant lying naked on top of the bedsheets. (J.A. 343.) Deputy Ford "loudly" called his name and kicked the mattress, but he did not wake up. (J.A. 343–44.) Deputy Ford "grabbed the mattress and flipped him," which woke him. (J.A. 344.) Deputy McNeil handcuffed him, and they stood him up and dressed him. (J.A. 344.)

Appellant was "agitated" and "intoxicated"—he had "[g]lassy," bloodshot eyes, "slurred[] [his] words," and was "unsteady." (J.A. 345–46.)

3. Deputy Ford testified to Appellant's drowsy and confused demeanor, and the Victim's state at the hospital.

Deputy Ford was first on scene. (J.A. 347.) Mr. Figueroa told him "he found a female completely nude, got a shirt, put a shirt on her, and called 911 directly." (J.A. 348.)

Entering the house with Deputy Ruth and Detective McNeil, he noticed "two empty wine bottles . . . on a dining room table as well as two . . . wine glasses, a couple cans and stuff on the table, and . . . food." (J.A. 349.)

They found Appellant asleep and naked on the bedsheets. (J.A. 352.) The room had "clothes and other items all over the floor in the room." (J.A. 356.) He tried waking Appellant by loudly calling his name, shaking his leg hard enough to move his whole body, and kicking the mattress. (J.A. 353.) He picked up one side of the mattress, causing Appellant to slide off the bed and wake up. (J.A. 354.)

He thought Appellant was "in a heavy, deep sleep, not knowing where he was." (J.A. 354.) He also appeared intoxicated, with his breath smelling of alcohol. (J.A. 354.) They handcuffed and clothed him. (J.A. 354–55.) Deputy Ford turned him over to Marine Corps Base Camp Lejeune. (J.A. 364.)

He then went to the hospital to speak to the Victim. (J.A. 365–66.) Her eyes were glassy and he "could smell some alcohol" on her breath; however, he

could not tell if she was slurring because she was "distraught, crying, and being emotional." (J.A. 366.)

He recalled the Victim saying "she had two glasses of wine and she shotgunned two beers" and "she recall[ed] his pants coming off." (J.A. 368.) She also said this was her first time shotgunning a beer. (J.A. 369.)

E. Agent Cassidy testified to Appellant's interrogation.

The United States presented the video of Agent Cassidy interrogating Appellant. (J.A. 299, 457.) Agent Cassidy asked Appellant, "Where did you and [the Victim] have sex?" and he replied, "We did not have sex." (J.A. 457, Audio at 14:33.) Agent Cassidy asked, "You did not have sex?" and Appellant replied, "No, sir." (J.A. 457, audio at 14:33.) Agent Cassidy asked, "Why would she tell us you did?" and Appellant replied, "I don't know." (J.A. 457, audio at 14:46.)

F. The United States presented evidence of the Victim's sexual assault medical forensic examination, as well as forensic DNA evidence.

Lieutenant Slegl was recognized as an expert in sexual assault medical forensic examinations. (J.A. 398.)

She administered the Victim's sexual assault examination, during which the Victim "was slouching forward; [she] had her arms crossed; she was intermittently crying." (J.A. 399.)

Lieutenant Slegl found a possible dried secretion on the Victim's left buttock. (J.A. 400–01.) She took swabs of this possible secretion, internal and

external oral swabs, swabs underneath the fingernails, vaginal swabs, and external genitalia swabs. (J.A. 401–02.)

She found a laceration "at around the 4 o'clock of her labia minora" consistent with penetration or friction. (J.A. 403–04.) The Victim was unsure if penetration occurred. (J.A. 403.)

The United States presented the report on the Victim's sexual assault examination and Appellant's DNA. (J.A. 406–07; 455–56.) DNA from the vaginal swabs had male DNA, and Appellant and his paternal male relatives "could not be excluded." (J.A. 408–16.) No semen was found on the vaginal or cervical swabs. (J.A. 417.)

G. The United States elicited two of the Victim's prior statements from Deputy Ford to rehabilitate her memory.

1. The Military Judge permitted the United States to elicit two prior statements under Mil. R. Evid. 801(d)(2)(B)(ii) and 403.

The United States argued Appellant attacked the Victim's "faulty memory," permitting admission under Mil. R. Evid. 801(d)(2)(B)(ii) of two prior consistent statements: "[Appellant] was rubbing [the Victim's] genitals with his penis and she said, 'No;' and that [she] did not know how she got up the stairs." (J.A. 375, 377, 458.) "The issue, as [Appellant] has made clear, is that her memory in general is faulty, that her memory is a total mess." (J.A. 376.)

The Military Judge enunciated the five-part test for admissibility of a prior consistent statement under Mil. R. Evid. 801(d)(1)(B)(ii), and relied on *United States v. Drinkert*, 81 M.J. 540 (N-M. Ct. Crim. App. 2021) to admit these statements. (J.A. 391–92.)

The Military Judge found: "A consistent theory throughout the cross-examination of the witnesses—to include [the Victim]—has been that either due to time or the degree of intoxication—or her degree of intoxication during the night in question and the early morning hours of [May 10–11,] 2020, that she has an inability to recall certain facts about the underlying incident and the report of that incident." (J.A. 393–94.) She ruled the statements admissible: "[f]irst, they add context to the inconsistent statements that were elicited on cross-examination; and two, they demonstrate that [the Victim] has a memory of key events and details that have been consistent." (J.A. 394.)

"[C]onducting [Mil. R. Evid.] 403 balancing" and "considering [Mil. R. Evid.] 401," she "gave heavy weight to the temporal proximity [or] contemporaneous nature of the statements that were elicited on cross-examination" in assessing probative value. (J.A. 394–95.) On balance, she found "the probative value is not outweighed by any danger of unfair prejudice or confusion" and permitted the United States to elicit these statements from Deputy Ford. (J.A. 394–95.)

2. Deputy Ford testified the Victim told Appellant "No."

Deputy Ford testified the Victim said on the morning of May 11 that she did not remember how she got to the bedroom, "[Appellant] rubbed his genitals against her," and she told Appellant "No." (J.A. 396.)

H. Appellant argued in closing that the Victim's memory was faulty and she was on drugs.

Appellant argued in closing: "[Y]ou saw NCIS, they could sit down anybody and ask whatever questions they want. And we even saw [Agent Cassidy]. They have the power to lie to Marines to manipulate and extract a confession." (J.A. 431.)

He argued the Victim's recollection was unreliable, focusing on inconsistencies as well as alcohol-induced amnesia. (J.A. 431–35.) He argued the Victim was on drugs and not reacting to trauma. (J.A. 430, 436–437.)

I. The Members found Appellant guilty of Specification 1.

The Members found Appellant guilty of Specification 1, abusive sexual contact. (J.A. 448.)

Summary of Argument

The Military Judge did not abuse her discretion in admitting the Victim's prior consistent statement to law enforcement. The statement was properly admitted under Mil. R. Evid. 801(d)(1)(B). Appellant attacked the Victim's "faulty memory," and the prior consistent statement directly rebutted that attack.

Even if the Military Judge erred admitting the statement, Appellant suffered no prejudice as the Victim testified to the same substance of the statement, which was corroborated by independent evidence.

Argument

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION ADMITTING THE VICTIM'S PRIOR CONSISTENT STATEMENT UNDER MIL. R. EVID. 801(D)(1)(B)(II), AS APPELLANT ATTACKED HER CREDIBILITY WITH RESPECT TO DIFFERENCES IN HER TESTIMONY ON DIRECT EXAMINATION AND HER PRIOR STATEMENTS TO LAW ENFORCEMENT. REGARDLESS, APPELLANT SUFFERED NO PREJUDICE AS THE VICTIM TESTIFIED TO THE SAME AND HER TESTIMONY WAS CORROBORATED BY INDEPENDENT EVIDENCE.

A. The standard of review is abuse of discretion.

A military judge's ruling admitting evidence is reviewed for abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019).

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 the law." *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013). A "finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United*

States v. Martin, 56 M.J. 97, 106 (C.A.A.F. 2001). To warrant reversal, the decision must be "arbitrary, fanciful, clearly unreasonable or clearly erroneous," not that the court "merely would reach a different conclusion." *United States v. Sullivan*, 74 M.J. 448, 454 (C.A.A.F. 2015).

B. Under Mil. R. Evid. 801(d)(1)(B) and *Finch*, prior consistent statements are admissible when offered to rehabilitate a witness attacked for her "faulty memory."

Under Mil. R. Evid 801(d)(1)(B) and *United States v. Finch*, 79 M.J. 389 (C.A.A.F. 2020): (1) the declarant must testify and (2) be subject to cross-examination; (3) the statement must be consistent with the declarant's testimony at trial; (4) the declarant's credibility as a witness must have been "attacked on another ground;" and the (5) prior consistent statement must be actually relevant to rehabilitate the witness's credibility on the basis on which she was attacked. *Id.* at 396 (citing Mil. R. Evid. 801(d)(1)(B)).

The statement "must precede any motive to fabricate or improper influence that it is offered to rebut." *Frost*, 79 M.J. at 110 (citing Mil. R. Evid. 801(d)(1)(B)(i)). The statement may rebut "charges of inconsistency or faulty memory" *Id.* (quoting Manual for Courts-Martial, United States, app. 22, at A22–61 (2016 ed.)).

"[T]he statement must be 'generally consistent' with the declarant's testimony at trial to be admissible." *Id.* at 398. The proponent need not "remove

every single inconsistency in a statement, since a prior consistent statement need not be identical in every detail to the declarant's . . . testimony at trial"; instead, the proponent need only "omit the inconsistent parts of the statement that pertain to 'fact[s] of central importance to the trial.'" *Id.* (quoting *United States v. Vest*, 842 F.2d 1319, 1329 (1st Cir. 1988)).

C. The *Finch* factors favor admission: the Victim testified, was subject to cross-examination, her testimony was "generally consistent" with the prior consistent statement, Appellant attacked the Victim's memory, and the statements were relevant to its rehabilitation.

1. The Victim testified and was subject to cross-examination.

The Victim testified and was subject to cross-examination; thus, the first two *Finch* factors favor admission are met. (J.A. 216–98); *see Finch*, 79 M.J. at 396.

2. The Victim's prior statement was "generally consistent" with her testimony that she told the Appellant "No."

In *Finch*, the court found the victim's prior statement "generally consistent" with her testimony because her description of the sexual assault partly "mirror[ed] [her] in-court testimony" and was otherwise "similar to" and "closely tracked her account of events" at trial. 79 M.J. at 392.

In *Vest*, the court acknowledged that witnesses' recollections of past events "will diverge" to a certain degree; thus, the statements need not be "identical in every detail." 842 F.2d at 1329.

Like *Finch* and *Vest*, the Victim's prior statements to Deputy Ford that she told Appellant, "No," and that he "rubbed his genitals against her" were "generally consistent," with her testimony that she told Appellant, "No, stop," and that he rubbed his penis against her genital area, though they may not be "identical in every detail." (R. 835); *see Finch*, 79 M.J. at 392; *Vest*, 842 F.2d at 1329.

a. Appellant's argument that the Victim did not "w[a]ke up" to him rubbing his penis on her vagina and buttocks area is immaterial.

Appellant's argument that the Military Judge clearly erred in finding the Victim testified she "woke up" to Appellant rubbing his penis on her vagina and buttocks area is immaterial to Deputy Ford testifying: "[Appellant] rubbed his genitals against her," and she told Appellant "No." (J.A. 396; *see* Appellant Br. at 17–18.) Assuming the "woke up" portion of the Finding of Fact was clear error, the other relevant Findings of Fact—that Appellant elicited an inconsistent statement and that the proffered statement demonstrates "memory of key events and details that have been consistent"—are unaffected. (*See* J.A. 393–94.) Appellant has not asserted otherwise. (*See* Appellant Br. at 17–18.)

b. The Record contradicts Appellant's argument that nonconsent applied only to the kiss.

Appellant's argument that "No" was directed just at kissing and not sexual contact ignores that the two happened contemporaneously and while he proceeded to "grind against [her] buttocks," she continued crying. (J.A. 251; *see* Appellant

Br. at 18–19.) 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. (J.A. 251; *see* Appellant Br. at 18–19.) The Victim's lack of consent to both is also evidenced by the fact that this was responsive to Trial Counsel question, "Did you say anything to him?" as he rubbed her buttocks and vaginal area. (J.A. 251.)

c. Appellant erroneously relies on *Finch*.

Appellant's argument that the *Finch* statement was not consistent with the victim's prior testimony mischaracterizes the court's opinion. (*See* Appellant Br. at 20.) The *Finch* court found "many portions of the videotaped interview were generally consistent" and instead took issues with the portions that were not. 79 M.J. at 398. The court was concerned with the military judge's wholesale admission of the entire video, holding the military judge needed to have separated out the parts that were not consistent. *Id.*

Thus, the third *Finch* factor favors admission. *See* 79 M.J. at 396.

3. Appellant attacked Victim's credibility "on another ground": her memory and inconsistencies in reporting the incident.

In *United States v. Drinkert*, 81 M.J. 540 (N-M. Ct. Crim. App. 2021), *pet. denied,* 81 M.J. 426 (C.A.A.F. 2021), the court held a prior consistent statement can be used to rehabilitate witness credibility when it is attacked on the grounds of "faulty memory." *Id.* at 554. Appellant cross-examined the victim on whether she

heard him unbuckle his shorts. *Id.* at 552. The military judge properly permitted the United States to ask her if she told law enforcement that Appellant pulled down her shorts and underwear, as her credibility had been attacked, the statement was admitted for the limited purpose of rehabilitating her credibility, and her "prior statements about the assault were relevant to demonstrate that her memory about the incident was sound." *Id.* at 553–54.

In *United States v. Purcell*, 967 F.3d 159 (2d Cir. 2020), the court upheld admitting the victim's prior consistent statements after appellant cross-examined her about "inconsistencies between [statements to law enforcement] and the testimony [on direct examination]," as well as "omissions" in her statements to law enforcement because the statements "rebut[ted] the charge of inconsistency and . . . rehabilitate[d] [her] credibility." *Id.* at 196–97.

Like *Drinkert*, Appellant repeatedly questioned the Victim on her recollection of the assault as a whole, attacking her "faulty memory." (J.A. 261–90); *see Drinkert*, 81 M.J. at 552–53. Like *Drinkert* and *Purcell*, this allowed the United States to introduce a prior consistent statement to rehabilitate her. *See Drinkert,* 81 M.J. at 554; *Purcell*, 967 F.3d at 196–97.

a. Appellant's argument relies on narrow and incomplete quotes from the Record.

Appellant's argument that the United States did not identify the particular impeachment should be rejected. (*See* Appellant Br. at 21–24.) The United States

argued that Appellant attacked the Victim's "faulty memory," permitting admission under Mil. R. Evid. 801(d)(2)(B)(ii) of two prior consistent statements: "[Appellant] was rubbing [the Victim's] genitals with his penis and she said, 'No;' and that [she] did not know how she got up the stairs." (J.A. 375, 377, 458.) "The issue, as [Appellant] has made clear, is that her memory in general is faulty, that her memory is a total mess." (J.A. 376.)

Appellant's recitation of Trial Counsel's argument as "asking about her story" is a narrow quotation that avoids the remainder of the argument. (*See* Appellant's Br. at 22.)

Appellant's argues that the United States originally moved for admission as an exited utterance. (Appellant Br. at 23.) However, the initial theory of admissibility does not impact or negate the later, legally meritorious theory of admission as a consistent prior statement for rehabilitation under Mil. R. Evid. 801(d)(1)(B)(ii). 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. (*See* Appellant Br. at 23.)

b. Appellant erroneously relies on *Bishop*.

In *United States v. Bishop*, 264 F.3d 535 (5th 2001), the court found error in the judge admitting law enforcements notes to rebut the implied charge that a

witness made mistakes or lied while testifying under Fed. R. Evid. 801(d)(1)(B). *Id.* at 548.

This Court should reject Appellant's argument. Unlike in *Bishop*, the Victim's own statement was admitted—not Deputy Ford's notes. (*See* Appellant Br. at 22); *Bishop*, 264 F.3d at 548. Further, the error in *Bishop* was made under Fed. R. Evid. 801(d)(1)(B)(i) and not (ii)—analogous to Mil. R. Evid. 801(d)(1)(B)(i) and (ii), respectively—the latter of which concerns not fabrication, but credibility when attacked on another ground. *See Bishop*, 264 F.3d at 548.

c. <u>While the Victim testified on direct examination that her memory was "not perfect," by attacking her memory further on cross-examination, Appellant opened the door to admission of her prior consistent statement</u>.

During the Victim's testimony, the United States asked specific questions in order to clarify to the Members the state of the Victim's memory. (J.A. 216–60.) Had Appellant believed the Victim's memory was already incredible on direct examination, Appellant need not have attacked her memory further on cross-examination. However, Appellant chose to focus his cross-examination of the Victim on the quality of her memory. (J.A. 261–90; *see* Appellant Br. at 24.) Because of Appellant's attacks on the Victim's memory, the cross-examination opened the door and Mil. R. Evid. 801(d)(1)(B)(ii) then allowed the United States to rehabilitate her.

Appellant offers no legal authority, and the United States is aware of no such authority, that renders Mil. R. Evid. 801(d)(1)(B)(ii) unavailable under these circumstances. (*See* Appellant Br. at 25–26.)

Thus, the fourth *Finch* factor favors admission. *See* 79 M.J. at 396.

4. Deputy Ford's statement was relevant to rehabilitate the Victim's credibility because the Victim's memory was challenged with her statements to Deputy Ford.

In *Drinkert*, the court allowed prior consistent statements "demonstrat[ing] that her memory about the incident was sound, as the important elements of her account remained the same over time." *See* 81 M.J. at 553.

In *Purcell*, the victim's prior consistent statements became relevant after appellant cross-examined her on "inconsistencies between [omissions in statements to law enforcement] and [her] testimony," as her prior statements "rebut[ted] the charge of inconsistency and . . . rehabilitate[d] [her] credibility." *See* 967 F.3d at 196–97.

Like *Drinkert* and *Purcell*, Appellant attacked the Victim's "faulty memory" through persistent "you don't recall" and "you have no recollection" questions about what the Victim could and could not recall about the night, and with the differences between her testimony on direct examination and what she told Deputy Ford, Lieutenant Slegl, and Trial Counsel in the past. (J.A. 261–90); *see Drinkert,* M.J. 540 at 553; *Purcell*, 967 F.3d at 159.

a. Appellant's invocation of the temporal proximity rule ignores that he attacked her credibility based on her recollection of what she said to Deputy Ford.

The United States agrees that the prior consistent statement must have been said before "the alleged fabrication, influence, or motive came into being." *Tome v. United States*, 513 U.S. 150, 156 (1995).

Here, Appellant attacked the Victim's credibility by directly pointing to purported discrepancies between her report to Deputy Ford on the night in question and presently on the stand—including things she forgot from the report and facts she gave for the first time on direct examination. (J.A. 263–66.) Any "fabrication, influence, or motive" being attacked "came into being" between her report to Deputy Ford and trial. *See Tome*, 513 U.S. at 156. Thus, Deputy Ford's recall testimony that the Victim said "No" and "stop" directly rehabilitated the argument that the Victim changed her account between the night in question and trial. *See Purcell*, 967 F.3d at 196–97.

The Record refutes Appellant's argument that Counsel questioned her recollection of her saying "No" and "stop" on the basis of her intoxicated state. (*See* Appellant Br. at 20–34.) Appellant's reliance on *United States v. McCaskey*, 30 M.J. 188 (C.A.A.F. 1990), *United States v. Cox*, 871 F.3d 479 (6th Cir. 2017), *Lowery v. Commonwealth*, 566 S.W.2d 750 (Ky. 1978), and *Bussey v.*

Commonwealth, 797 S.W.2d 483 (Ky. 1990), is therefore irrelevant. (*See* Appellant Br. at 21–34.)

The fifth *Finch* factor favors admission. *See* 79 M.J. at 396.

As the *Finch* factors favor admission, the Military Judge did not clearly err in admitting the Victim's prior consistent statement.

D. Assuming error, Appellant suffered no prejudice because the United States' case was strong and the Victim testified to the same facts as those in the prior consistent statement.

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. "For 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).

Courts "evaluate prejudice from an evidentiary ruling by weighing (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." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). They "will reverse a case only if . . . the finder of fact would have been influenced by the evidence that was erroneously omitted." *United States v. Roberson*, 65 M.J. 43, 48 (C.A.A.F. 2007).

1. The United States' case was strong; Appellant's case was weak.

The United States' case was strong, proving beyond a reasonable doubt that Appellant rubbed his penis against the Victim's buttocks without her consent and for his sexual gratification, and that he did not honestly and reasonably believe she consented. *See supra* Section Statement of Facts B-F. The Victim testified she did not consent, told him, "No, stop," and cried while Appellant touched her buttocks and vaginal area. (J.A. 249–52.) The United States corroborated this with witness testimony on the Victim's distraught state, (J.A. 302–03, 315–17, 324, 328, 341, 379, 399), Appellant being found naked on the Victim's bed, (J.A. 332, 343, 352), Appellant's failure to assert the Victim consented, (J.A. 457, audio at 14:33), and DNA consistent with Appellant's DNA, (J.A. 408–16, 451).

By contrast, Appellant's case was weak, comprising just one expert, who relied on the testimony of one witness with no drug experience to opine that the Victim's behavior was consistent with someone on drugs. (J.A. 422–23.)

Appellant overstates the weight of Ms. Figueroa's testimony. (*See* Appellant Br. at 33.) While Ms. Figueroa testified that the Victim said she was worried about what her husband would think and that she was acting odd, (J.A. 307–08), none of this directly contradicts the Victim's testimony, (J.A. 249–52), which the United States heavily corroborated, (J.A. 302–03, 315–17, 324, 328, 332, 341, 343, 352, 379, 399, 457, audio at 14:33, 408–16, 451).

Appellant also overstates the weight of his expert's testimony on blackouts in defense of his theory the Victim consented but did not remember. (*See* Appellant Br. at 33.) The expert's testimony—and Appellant's theory— are contradicted by: testimony that the Victim was in a distraught state, (J.A. 302–03, 315–17, 324, 328, 341, 379, 399); and Appellant's own inability to tell law enforcement that the Victim consented. (J.A. 457, audio at 14:33.)

Even with the expert testimony, Appellant's theory—and case—was weak.

2. Appellant's invocation of the Preliminary Hearing Officer's recommendation is irrelevant because he is not the factfinder. His reliance on *Hill* is inapt.

Appellant's argument relying on the Preliminary Hearing Officer's recommendation fails because he was not the factfinder—the Members were. (*See* Appellant Br. at 32–33.) The Preliminary Hearing Officer makes recommendations to the Convening Authority. Art. 32, UCMJ. "Determinations and recommendations of the preliminary hearing officer are advisory." R.C.M. 405(a) Discussion. Thus, the Preliminary Hearing Officer's recommendation has no bearing on the findings.

Appellant cites to *United States v. Hill*, 75 M.J. 350 (C.A.A.F. 2016), to support his claim that the Preliminary Hearing Officer's "recommendation demonstrates the objective weakness of the [United States'] case from the beginning." (Appellant Br. at 33.) However, in *Hill*, the findings and sentence

were ultimately set aside not because of a legal or factual insufficiency or the United States' inability to prove all elements of the offenses, but because the military judge erroneously allowed the United States to use Mil. R. Evid. 413 "to show that the charged conduct demonstrates an accused's propensity to commit… the charged conduct." *Id*. at 353. The Court of Appeals for the Armed Forces included the fact that the "investigating officer recommended against pursuing a court-martial" as part of its analysis on why admitting other charged misconduct under Mil. R. Evid. 413—which requires a preponderance of the evidence—is problematic as the charged misconduct requires proof beyond a reasonable doubt. *Id*. at 352, 357. The *Hill* court does not opine that a preliminary hearing officer's recommendation can or should negate the factfinder's determination of guilt.

3. The statement did not substantially influence the verdict because it was of minimal materiality and quality given the Victim had already testified to the same.

In *Roberson*, the court found no prejudice, as the evidence that should have been admitted "was of no better quality than that which was already before the finder of fact." 65 M.J. at 47–48 (citing *Holmes v. South Carolina*, 547 U.S. 319, 323–24 (2006)). The testimony concerned appellant telling him he was under duress. *Id.* The victim had already testified to the same. *Id.*

Like *Roberson*, Deputy Ford's testimony on the Victim's statements was lower quality than the Victim's testimony that she said, "No, stop" to Appellant.

(J.A. 251); *see Roberson*, 65 M.J. at 43. The additional evidence would not have swayed the factfinder, as the Victim's testimony had already emphatically demonstrated nonconsent.

This case is distinct from *United States v. Bowen*, 76 M.J. 83 (C.A.A.F. 2017) where the court found prejudice in admitting hearsay. In *Bowen*, the victim was attacked and there were two primary suspects: the appellant—the victim's husband—and Senior Airman BB, both of whom blamed the other for the assault. *Id*. at 85–87. When law enforcement arrived at the home, the victim nodded her head "yes" when asked if her husband "did this" to her. *Id*. at 86. At trial, the appellant's theory was that Senior Airman BB was the perpetrator. *Id*. Even the victim testified that she did not believe her husband would harm her. *Id*. The appellant argued that the head nod was not sufficiently spontaneous to be admitted under the Mil. R. Evid. 803(2) exception and because the United States' case was primarily circumstantial and relied on a single eyewitness with a motive to lie, its admittance was prejudicial. *Id*. at 87.

This Court agreed that the military judge abused his discretion in admitting the statement. *Id*. at 89. It further found the error to be prejudicial given the importance of Senior Airman BB's testimony as the potential perpetrator, testifying under a grant of immunity, and the impact the victim's head nod would have in either corroborating or rebutting the testimony. *Id*. at 89–90.

Here, while the United States mentioned Deputy Ford's testimony in closing, as did the prosecutor in *Bowen*, here, the testimony was not dispositive in giving credibility to or discrediting a potential perpetrator of the offenses. Here Deputy Ford's testimony was simply re-stating what the Victim herself already testified to, and which Appellant attacked for credibility on cross-examination. Briefly mentioning the consistency in the Victim's statements and testimony is not akin to the *Bowen* reliance on the hearsay as dispositive and therefore is not prejudicial.

4. The Record contradicts Appellant's arguments.

Appellant's contention that Deputy Ford's testimony was the "only time the [M]embers heard that the Government's case-dispositive witness said 'no' to Appellant rubbing his penis on her buttocks" is incorrect, as the Victim testified to saying "No, stop" and crying during the contact, and had previously tried to get off Appellant's lap, only for him to pull her back on. (J.A. 246, 251; *see* Appellant's Br. at 34–35.)

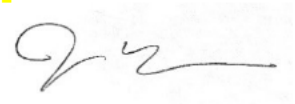
Furthermore, saying the word "no" is not the only way to express nonconsent, and the Victim was not required to say "no"—crying and resisting the contact are also means of indicating nonconsent. Therefore, even without the prior consistent statement, the Victim's testimony was more than sufficient to prove to the Members that the contact was nonconsensual.

Thus, Appellant suffered no prejudice because the United States' case was strong and the Victim testified to the same.

Therefore, this error is without merit.

Conclusion

The United States respectfully requests this Court affirm the findings and sentence adjudged below.



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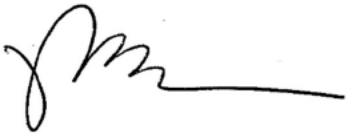

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