IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Granted Issue:

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Statement of Statutory Jurisdiction and Statement of the Case

The United States adopts appellant's statement of statutory jurisdiction and statement of the case

Statement of Facts

A. Family Background

Appellant raped his then-six-year-old daughter, Ms. D.F., by sticking his penis in her mouth. (JA 16, 117). The victim's mother, Ms. Jennifer Moore, testified that Ms. D.F. was born after she and appellant had stopped seeing each other. (JA 117). Ms. Moore and appellant had one other child together: Dae. F. (JA 117). Although Ms. Moore had full custody of their two mutual children, appellant had regular visitation. (JA 118). Ms. D.F., however, refused to see appellant on weekends. (JA 119). After appellant moved to Ft. Bliss, Texas, Ms. D.F. traveled out to see him in 2013 for nearly two months. (JA 120). When the summer visit was over and Ms. D.F. got back from Texas, she gave Ms. Moore a hug and made her "pinky-promise" not to let her go back to Texas. (JA 122).

Mr. Samuel Casey dated Ms. Moore on and off for approximately fifteen years. (JA 160). By the time of trial, Mr. Casey and Ms. Moore had split up and neither "s[aw] each other" nor "really communicate anymore." (JA 162).

B. Opening Statements

A single sentence of trial counsel's opening statement arguably discussed the prior consistent statements giving rise to this appeal. Trial counsel told the military judge that he would hear that "less than a month after she returned from El Paso, [Ms. D.F.] was in the car with her mother, her brother, and Samuel Casey,

her mother's boyfriend, when unprompted, she said 'Daddy put his pee-pee in my mouth.'" (JA 24).

Appellant's opening statement told the military judge "[w]hat you will hear today in this case is a bunch of conflicting statements . . . , and what you will hear from the evidence, is about what contradicts those statements." (JA 25).

C. Victim Testimony

Before Ms. D.F. testified, the court-martial took a recess because Ms. D.F. had became extraordinarily emotional while walking into the courtroom. (JA 26). Eventually, with the assistance of multiple comfort items, Ms. D.F. took the stand and began testifying. (JA 27-28). After establishing that she understood the difference between the truth and a lie and promising to tell the truth, Ms. D.F. was asked if she was okay with discussing "serious stuff" like when the last time was that she saw her father (appellant). (JA 29, 32). When the trial counsel asked the first question about appellant, Ms. D.F. again became emotional and asked for her mother. (JA 32). When told "we just can't have your mom in here right now. Is it okay if we just talk, you and I, really quick about some of the stuff that we talked about before?" she said, "I think so." (JA 33).

When asked if something bad happened with her father during the summer a few years prior, she said, "Yes . . . . He put his wee-wee in my mouth." (JA 33-34). She said it happened around nighttime, in the hallway at appellant's house.

(JA 35). Appellant did not say anything during the incident, but she saw his penis and described it by saying, "there was a little circle around it." (JA 36).

Ms. D.F. testified, without objection, that she told her mother, her mother's now ex-boyfriend Sammy, and her counselor that appellant put his penis in her mouth. (JA 36-37). When asked if she knew why she was seeing a counselor, Ms. D.F. replied "because my dad put his pee-pee in my mouth" and that she was having problems, including nightmares. (JA 38).

On cross-examination, defense counsel got Ms. D.F. to admit that when she was "answering those questions on the phone for that Army Officer, you told him that nothing bad happened at your dad's house." (JA 3, 41). Ms. D.F.'s telephonic testimony for the Article 32 Hearing occurred on 14 April 2015. (JA 203).

Defense counsel further elicited from Ms. D.F. that she told a counselor Allison Boynes that nothing happened at appellant's house. (JA 2-3, 41-42). That conversation between Ms. D.F. and Ms. Boynes occurred on 12 March 2014. (JA 199).

Defense counsel next inquired whether Ms. D.F. told the prosecutors "nothing bad happened with your dad during the summer" and "that you never told your mom anything." (JA 42-43). Appellant introduced a stipulation of expected testimony from a Special Victim Noncommissioned Officer ("NCO") that Ms. D.F. had such a conversation on 1 September 2015. (JA 202).

D. Testimony from Dr. Landry, the Victim's Psychotherapist.

Dr. Karen Landry is a psychotherapist who specializes in childhood trauma. (JA 54-57). Before Dr. Landry could even take the stand, appellant objected that her testimony would not qualify as Statement Made for Medical Diagnosis or Treatment under Military Rule of Evidence ("MRE") 803(4) because Ms. D.F. "was referred to Dr. Landry" "based on [Dr. Landry's] service in a sexual assault trauma center" and that the testimony would be "about making the child comfortable for testifying, not solely for the purposes of medical treatment." (JA 51). Defense counsel agreed with the military judge's attempt to distill the essence of the objection down to the idea that Dr. Landry's counseling "was not actually for medical treatment . . . , and that it was primarily to make [Ms. D.F.] comfortable with coming to court." (JA 52). The military judge deferred ruling on the objection until after hearing the relevant portion of Dr. Landry's testimony. (JA 53-54).

Dr. Landry described her work as "counsel[ing] people who have problems." (JA 55). Dr. Landry met with Ms. D.F. for counseling at a sexual assault center. (JA 60-61). When Ms. D.F. arrived at the sexual assault center, she first had a forensic interview, and then – as with all victims regardless of what they say in the forensic interview – was referred for counseling. (JA 69). The forensic interview took place in March 2014 and the first counseling session with Dr. Landry did not occur until nearly a year-and-a-half later, in August 2015. (JA 81).

Ms. D.F. was brought to the sexual assault center due to appellant's sexual misconduct. (JA 63). Her symptoms included bed-wetting, nightmares, oppositional behavior, tantrums, and sleep issues (problems sleeping, not wanting to sleep alone, and not wanting to be alone in her room). (JA 64). Ms. D.F. also experienced anxiety at the thought of seeing appellant again. (JA 96). Some of these symptoms were relayed from Ms. D.F.'s mother to Dr. Landry. (JA 98-99, 140-41). Dr. Landry's routine practice was to not bring up the reasons for the sessions, but to allow the children to lead the therapy session with respect to actual events. (JA 66).

During appellant's voir dire of Dr. Landry for the MRE 803(4) issue, appellant highlighted that law enforcement brought Ms. D.F. to the sexual assault center where Dr. Landry worked, that Ms. D.F. did not disclose the rape in her initial forensic interview, and Ms. D.F. was still referred for counseling even though she did not reveal any abuse. (JA 68-69). Appellant further explored the fact that Dr. Landry obtained initial background information from sources other than Ms. D.F. directly. (JA 70-71).

After the court-martial received the foundational testimony for the MRE 803(4) objection, appellant argued that the purpose of Dr. Landry's sessions with Ms. D.F. "were for the purposes of getting [Ms. D.F. to disclose and talk about what was occurring," "preparing the child's statements for the purposes of trial," and "in furtherance of the investigation . . . ." (JA 73-74, 78). Appellant claimed

that the purpose of Dr. Landry's treatment was "to get the child talking about the incident . . . because she wasn't talking about it at that point in time" and that Ms. Moore "could be viewed as an arm of the government" by bringing Ms. D.F. for counseling under these circumstances. (JA 84, 87). To emphasize the purported improper purpose, appellant highlighted "the timing in which [Ms. D.F.'s counseling sessions with Dr. Landry] occurred. That is directly a month before the last time this case was supposed to go to trial." (JA 80). Appellant argued that Dr. Landry slanted the interviews by bringing up appellant and concluded that "Dr. Landry's actions and what she did and didn't inquire in demonstrate to . . . the court what her intent was . . . with the child in this case." (JA 88-89). After extensive argument and an hourlong recess to consider the issue, the military judge allowed Dr. Landry to testify as to the substance of her sessions. (JA 89-90).

The first two sessions between Ms. D.F. and Dr. Landry occurred in August and September of 2015. (JA 61, 105). At those first two sessions, Ms. D.F. did not open up about the sexual abuse, but she did open up on the third session. (JA 65). The third session occurred in October of 2015. (JA 109). When Ms. D.F. eventually opened up to Dr. Landry, Ms. D.F. said that she was afraid of appellant because he tried to put his "pee-wee" in her mouth. (JA 97). Dr. Landry noted that in her experience it was difficult for children to go into specific details of traumatic experiences, based on fear, shame, feelings of anxiety, or depression. (JA 98).

E. Outcry Witness Testimony.

1. Appellant's Objection.

As Ms. Moore prepared to testify to something that Ms. D.F. said, "out of the blue," defense counsel raised a hearsay objection, and the trial counsel responded that the proffered statement would be admissible both as a prior consistent statement and as residual hearsay under MRE 807. (JA 122). Defense counsel said that "in regards to the motive to fabricate, the defense's contention is . . . that [Ms. Moore] was placing things in [Ms. D.F.]'s head which was encouraged to be said through Dr. Landry." (JA 123). The military judge sustained the objection as to MRE 807 and heard further argument as to whether the proffered statement constituted a prior consistent statement. (JA 125). Trial counsel explained

> the motive to fabricate the government is pointing to is defense's assertion, as the defense just pointed out in their argument, of whether it's Dr. Landry herself talking to [Ms. D.F.] about potential testimony and influencing that testimony, or mom – or you know, Ms. Moore, trying to use Dr. Landry or trying to – to use Dr. Landry as a surrogate in a way to get her to say whatever she wanted to say on the witness stand.

(JA 126). Trial counsel reminded the military judge that the outcries "pre-dated the potential motive to fabricate involving Dr. Landry." (JA 126). Defense counsel responded that Ms. Moore implanted the crime in Ms. D.F.'s head and that Ms. Moore "continued to use the process to include Dr. Landry to encourage the

statements" that appellant raped Ms. D.F. (JA 127). After hearing extensively from the parties, the court took a twenty-minute recess to consider the prior consistent statement issue. (JA 131). The military judge permitted Ms. Moore to testify about Ms. D.F.'s outcry "to rebut the express or implied charge that the declarant fabricated or acted from some other recent improper influence, and I believe that's what the defense is trying to do, is to imply that there was a recent fabrication . . . as of September – or, excuse me, August." (JA 129).

2. Ms. D.F.'s Spontaneous Outcry.

Ms. D.F. told her mom about bad things that had happened in the summer, to include "locking in a closet" and that her "daddy had stuck his pee-pee in her mouth." (JA 130). Ms. Moore described this statement as coming "out of the blue." (JA 122, 130). When Ms. D.F. spontaneously mentioned appellant's sexual misconduct, she was in a car with Ms. Moore, Mr. Casey, and Mr. Dae. F. (JA 131, 161). Mr. Casey recalled that – in the late summer of 2013 –Ms. D.F. said "something along the lines of 'Daddy put his pee-pee to my lips.'" (JA 161-62). Ms. Moore contacted the police in Georgia, who were little help as the offense occurred in Texas. (JA 132). The Army Court determined that Mr. Casey was a credible witness and that Ms. Moore testified credibly with respect to Ms. D.F.'s outcry. (JA 4-5).

Ms. Moore confirmed that appellant had an unusual feature on his penis: two "Prince Albert piercings," which were earrings through the tip of the penis, the

size of a pencil eraser. (JA 138). When he took the piercings out, there was a noticeable hole (like loops) next to the vein in the top of his penis. (JA 139).

F. The Defense Case.

The defense case-in-chief consisted of three stipulations of expected testimony. One was from appellant's current spouse, who would have testified (1) that Ms. D.F. never made any allegation to her and (2) that appellant has a penile piercing but rarely wears an implement in the piercing. (JA 201). Another was from the Special Victim NCO at Ft. Bliss, who would have testified that she was present during a telephonic interview in September 2015 where the victim told the prosecutors that nothing happened during the summer of 2013 and that she did not tell her mother that anything happened during the summer of 2013. (JA 202). The final stipulation was from the recorder at the Article 32 hearing, who would have testified that the victim testified but did not make any disclosures of sexual abuse against appellant. (JA 203).

G. Closing Arguments.

Trial counsel's six-page closing argument only referenced the outcry testimony in a single sentence: Ms. D.F. "told her mom a few weeks after she got back, spontaneous[ly], as corroborated by Samuel Casey, that 'Daddy put his pee-pee in my mouth.'" (JA 181).

Defense counsel focused on inconsistencies in Ms. D.F.'s statements. Early on in the argument, defense counsel argued "now, why should you find [appellant]

not guilty? Inconsistencies. [Ms. D.F.] made one statement on the stand, a statement that was void of detail." (JA 186). At one point, defense counsel shifted her argument by simply announcing, "[Ms. D.F.]'s denials" before launching into prior statements inconsistent with her testimony. (JA 186). Defense counsel then attacked Dr. Landry's credibility, saying "[t]hat therapist wants this court to believe what [Ms. D.F.] says is true because she's an advocate for kids, but all of her information is coming from Jennifer Nichole Moore and a kid who every time she says nothing happened, is being asked again and again and again." (JA 189).

Trial counsel's five-page rebuttal argument obliquely referenced the outcry testimony in portions of eight lines. Trial counsel explained that this

> isn't some 'she has always denied it until she's finally convinced to say it happened.' She initially came forth and said it happened. And then for some period of time, then yes, there were occasions where she said it did not happen. But then . . . after additional counseling with Dr. Landry, she was more comfortable and . . . she was willing to, today, to get on that stand and tell this court what actually happened.

(JA 192-93).

Summary of Argument

The military judge did not abuse his discretion in admitting Ms. D.F.'s outcry as a prior consistent statement. Appellant invited prior consistent statements through both express and implied charges that Dr. Landry's counseling improperly influenced Ms. D.F.'s trial testimony. In his cross-examination of Ms.

D.F. – the government's first witness – appellant laid out three occasions prior to the counseling sessions with Dr. Landry where Ms. D.F. either did not disclose that appellant raped her or affirmatively denied the abuse. Appellant claimed that Dr. Landry's counseling sessions with Ms. D.F. were actually an investigative tool used by Ms. Moore – acting as an arm of the government – because Ms. D.F. did not consistently claim appellant raped her as appellant's trial approached. In a clear and unambiguous manner, appellant proffered that Dr. Landry's counseling served to prepare Ms. D.F. for trial rather than provide a medical benefit. Appellant therefore invited the government to offer prior consistent statements to rebut the assertion that the counseling sessions had in improper influence on Ms. D.F.'s trial testimony.

GRANTED ISSUE

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

Standard of Review

This Court "review[s] a military judge's decision to admit evidence for abuse of discretion." *United States v. Springer*, 58 M.J. 164, 167 (C.A.A.F. 2003). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly

unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks and citations omitted). Put more simply, an abuse of discretion occurs when "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. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015).

Law and Analysis

A. The Military Judge did not abuse his discretion when he admitted prior consistent statements that pre-dated the charge of improper influence that the government sought to rebut.

A declarant-witness' prior out-of-court statement is not hearsay where she "testifies and is subject to cross-examination about a prior statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant . . . acted from a recent improper influence or motive in so testifying." Mil. R. Evid. 801(d)(1)(B)(i). The out-of-court statement must have been made before the alleged improper influence or motive arose. *See United States v. Taylor*, 44 M.J. 475, 480 (C.A.A.F. 1996); *see also Tome v. United States*, 513 U.S. 150, 167 (1995) (Federal Rule of Evidence 801(d)(1)(B)[1] "permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged . . . improper

[1] Federal Rule of Evidence 801(d)(1)(B) and Military Rule of Evidence 801(d)(1)(B) contain identical wording.

influence"). "Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut." *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998). The United States Court of Appeals for the Ninth Circuit distilled Federal Rule of Evidence 801(d)(1)(B) into a four-element test for admission of the prior consistent statement:

> (1) the declarant must testify at trial and be subject to cross-examination;
> (2) there must be an express or implied charge of recent fabrication;
> (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and
> (4) the prior consistent statement must be made prior to the time that the supposed motive to testify falsely arose.

United States v. Collicott, 92 F.3d 973, 979 (9th Cir. 1996).

Appellant does not challenge that Ms. D.F. testified at trial and was subject to cross-examination.[2] Nor does appellant challenge that the outcry testimony provided by Ms. Moore and Mr. Casey was consistent with Ms. D.F.'s trial testimony.[3] Moreover, appellant does not attempt to argue that the 2013 outcry happened after Ms. D.F.'s counseling sessions with Dr. Landry in 2015. Rather,

[2] Ms. D.F. testified that appellant "put his wee-wee in my mouth," and she further testified she reported that abuse to Ms. Moore and Mr. Casey. (JA 33-34, 36-37). Appellant cross-examined Ms. D.F. (JA 39-49).

[3] Ms. Moore recalled the outcry as "daddy had stuck his pee-pee in her mouth," and Mr. Casey recalled Ms. D.F. said "something along the lines of 'Daddy put his pee-pee to my lips.'" (JA 130, 162).

appellant only argues that trial defense counsel never expressly or impliedly alleged that Ms. D.F.'s counseling with Dr. Landry exerted an improper influence.[4]

Appellant began laying the foundation for the admission of the prior consistent statements in his methodical cross-examination of Ms. D.F. *See United States v. Reed*, 887 F.2d 1398, 1406 (11th Cir. 1989) (permitting a prior consistent statement because the record "clearly reflects that defense counsel implied on cross-examination that [the declarant-witness] fabricated his testimony regarding" the crime). The cross-examination began by obtaining Ms. D.F.'s admission that she denied the abuse both to a counselor on 12 March 2015 and in her Article 32 hearing testimony on 14 April 2015. (JA 41-42, 199, 203). Appellant next inquired whether Ms. D.F. told prosecutors, in a conversation on 1 September 2015, that nothing bad happened at her father's house, but Ms. D.F. claimed that she did not deny the abuse to the prosecutors. (JA 42-43, 202). After highlighting that appellant Ms. D.F. had denied the abuse several times – all of which occurred prior to Ms. D.F.'s disclosure of abuse to Dr. Landry in October of 2015 – appellant moved on to cross-examine Ms. D.F. on other topics not relevant for this appeal.

Appellant fully opened the door to the prior consistent statements when he shifted from implying that Dr. Landry improperly influenced Ms. D.F.'s trial

[4] Because trial counsel sought to admit the outcry testimony to rebut an assertion that Dr. Landry improperly influenced Ms. D.F.'s trial testimony, appellant's argument that Ms. Moore's animus towards appellant pre-dated the outcry is legally irrelevant. *See Allison*, 49 M.J. at 57.

testimony to expressly alleging it in his Rule 803(4) argument. Appellant implored the military judge to exclude Dr. Landry's testimony as inadmissible hearsay because it served to prepare Ms. D.F. to testify rather than to treat her. *See United States v. Heath*, 76 M.J. 576, (Army Ct. Crim. App. 2017) (allowing a prior consistent statement where "the defense's entire opening line of inquiry [on cross-examination of the victim] was directed to show [the victim]'s testimony at trial had been influenced by her pretrial preparations"). Defense counsel explicitly stated that Ms. Moore "was placing things in [Ms. D.F.]'s head *which was encouraged to be said through Dr. Landry*." (JA 123) (emphasis added). Appellant claimed that temporal proximity of Ms. D.F.'s disclosure in therapy to the trial date demonstrated that the purpose of Dr. Landry's treatment was "to get the child talking about the incident and – because she wasn't talking about it at that point in time." (JA 80, 84). A crucial part of appellant's trial strategy was to attack Dr. Landry as an arm of the prosecution who improperly influenced Ms. D.F.'s testimony: appellant claimed that "Dr. Landry's sessions with [Ms. D.F.] were for the purpose of getting her to disclose and talk about what was occurring," that Dr. Landry's methods show she worked to develop evidence rather than treat Ms. D.F., that Dr. Landry encouraged Ms. D.F. to simply repeat what Ms. Moore wanted, and that Dr. Landry was a pawn of Ms. Moore. (JA 73, 76, 123, 189). Although attempting to portray Dr. Landry as an aid to trial preparation rather than a medical provider may be "a legitimate line of inquiry, such a broad-based attack

carries with it the concomitant risk the government may introduce prior consistent statements which predate the express or implied influence." *Heath*, 76 M.J. at 578

The child-victim in *Allison* made a statement regarding sexual abuse by the victim's stepfather. 49 M.J. at 55. Similar to appellant, Sergeant Allison claimed that the victim's mother pressed forward with the prosecution because she "saw an opportunity to manipulate [the victim] so that she could . . . gain custody of the children . . . ." *Id*. The possibility of that additional influence notwithstanding, this Court allowed that initial outcry statement to come in to rebut the assertion that others – including the prosecution team – had "coached [the victim] or exerted improper influence on him after the" outcry. *Id.* at 57. By repeatedly claiming throughout the trial that Dr. Landry improperly influenced Ms. D.F.'s testimony, appellant allowed the government to introduce a prior consistent statement occurring before the alleged improper influence. *Id*. Both Ms. Moore and Mr. Casey witnessed Ms. D.F.'s outcry, which occurred years before Dr. Landry met Ms. D.F. The 2013 outcry rebuts the charge that Dr. Landry had an improper influence over Ms. D.F.'s trial testimony that appellant implied in his cross-examination of Ms. D.F. and expressed in his MRE 803(4) objection. Moreover, similar to the appellant in *United States v. Morgan*, "defense counsel threw down the gauntlet at the outset and charged that the accusations were deliberately falsified from the beginning and that the Government's most damning witness was coached throughout." 31 M.J. 43, 46 (C.M.A. 1990) (allowing a prior consistent

statement). "Appellant should not now be allowed to retreat from that strategy because it was unsuccessful. Nor should appellant now be allowed to fault the military judge for that lack of success." *United States v. Anderson*, 51 M.J. 145, 153 (C.A.A.F. 1999). Accordingly, the military judge did not abuse his discretion in admitting the testimony of Ms. D.F.'s outcry under MRE 801(d)(1)(B)(i).

Appellant dedicates a large portion of his brief trying to establish that Ms. Moore improperly influenced Ms. D.F. (Appellant's Br. 3-4, 9-13). Appellant's focus is understandable given the Army Court's assertion that the outcry was admissible as a prior consistent statement because "appellant alleged at trial that Ms. D.F.'s mother fabricated and coached Ms. D.F." *United States v. Frost*, 2018 CCA Lexis 263, *17 n.6 (Army Ct. Crim. App. 2018). However, trial counsel sought to admit the outcry testimony on the basis that it "pre-dated the potential motive to fabricate involving Dr. Landry." (JA 126). Trial counsel never intimated that the court-martial should receive the outcry witnesses' testimony to rebut Ms. Moore's influence. Thus, the Army Court reached "the correct result, albeit for the wrong reason." *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003) (affirming notwithstanding the faulty reasoning of the lower court); *see also United States v. Leiffer*, 13 M.J. 337, 345 n.10 (C.M.A. 1982) ("'in the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason'") (quoting *Helvering v. Gowran*, 302 U.S. 238, 245

(1937)).[5] In *Allison*, this Court made clear that where an accused asserts "multiple improper influences . . . , the statement need not precede all such motives or inferences, but only the one it is offered to rebut." 49 M.J. at 57. The improper influence that the outcry testimony sought to rebut was that of Dr. Landry's effect on Ms. D.F.'s testimony. The Army Court's decision should be affirmed notwithstanding its incorrect reasoning because the correct result – admission of the outcry testimony – was proper.

In a civil rights lawsuit in Federal District Court, the plaintiff contacted a witness three times in the thirty days leading up to the deposition of that witness. *Therrien v. Town of Jay*, 489 F. Supp. 2d 108, 109 (D. Me. 2007). In those conversations, the plaintiff indicated that he would make a significant amount of money from the lawsuit. *Id*. Two years prior to the deposition, however, the witness gave an interview in which he described the incident in a manner consistent with his deposition testimony. *Id.* at 108-109. The District Court found that the questioning of the pre-deposition contacts implied a claim of improper influence and that "[e]ven if the defendant does not expressly make the argument, a jury could well conclude that [plaintiff] successfully influenced [the witness], thereby discounting [the witness]'s testimony." *Id.* at 110. The District Court

[5] The "tipsy coachman doctrine" permits appellate courts "to affirm a decision from a lower tribunal that reaches the right result for the wrong reasons so long as there is any basis which would support the judgment in the record." *State Farm v. Levine*, 837 So. 2d 363, 365 (Fla. 2002) (internal quotation marks and citation omitted).

therefore allowed evidence of the interview to be presented to the jury under Federal Rule of Evidence 801(d)(1)(B) to rebut the claim of improper influence. *Id.* at 110-111.

Appellant implied that Dr. Landry presented an improper influence on Ms. D.F.'s trial testimony by highlighting pre-counseling instances where Ms. D.F. did not disclose that appellant raped her. After emphasizing pre-counseling non-disclosures, appellant noted that Ms. D.F. met with Dr. Landry shortly before the trial date and then consistently disclosed the abuse. When coupled with appellant's assertion that Dr. Landry merely served as an aid to trial preparations, the natural implication of the structure of appellant's cross-examination is that the sessions with Dr. Landry influenced Ms. D.F. to consistently disclose the abuse. As with *Therrien*, the factfinder "could well conclude that [Dr. Landry] successfully influenced [Ms. D.F.], thereby discounting [Ms. D.F.]'s testimony." 489 Fed. Supp. 2d at 110. The military judge properly allowed the outcry testimony as prior consistent statement to rebut this assertion.

Appellant misplaces his faith on *United States v. Gunkle*, a two-decade-old, unpublished, memorandum opinion that has never been relied upon by any court for the propositions that appellant cites. 1999 CCA Lexis 356 (Army Ct. Crim. App. 1999). Appellant asserts that *Gunkle* holds that a "defense counsel alleges improper influence from a forensic interviewer only when he alleges suggestive interview techniques" and that an "allegation of forensic, instead of medical,

purpose of an interview is not an allegation of an improper influence on the interviewee." (Appellant's Br. 14). *Gunkle* holds nothing of the sort. Rather, the Army Court simply said that "defense counsel consistently pursued the most logical tactic for his client by claiming that the girls' memories were inaccurate . . . , and their testimony failed to prove [an element of a crime]. . . . Thus, we find the military judge abused his discretion when he admitted statements 'to rebut any implied assertion of suggestive interview techniques.'" *Gunkle*, *supra* at *7. Appellant only asserts that Ms. D.F. provided false testimony, not that she had faulty memory. Accordingly, *Gunkle* provides no support to appellant.

Appellant's opening statement primed the military judge to pay attention to Ms. D.F.'s inconsistencies. His cross-examination of Ms. D.F. highlighted pre-counseling denials of abuse, implying that the counseling with Dr. Landry influenced Ms. D.F. to testify falsely. Appellant then explicitly indicated what he previously implied: that Dr. Landry is the reason why Ms. D.F. testified that appellant raped her. Under these circumstances, the military judge admitted the outcry witnesses' testimony as a prior consistent statement. This Court should affirm the Army Court because the record does not demonstrate that the military judge abused his discretion allowing the outcry testimony.

B. The Military Judge's findings of fact were not clearly erroneous.

An abuse of discretion can also occur when a military judge's findings of fact are clearly erroneous. *Stellato*, 74 M.J. at 480. A finding of fact "'is clearly

erroneous when although there is evidence to support it, the reviewing court on the entire record 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) (quoting *United States v. U.S. Gypsum Co.*, 33 U.S. 364, 395 (1948)).

Trial counsel offered the outcry witnesses' testimony because it "pre-dated the potential motive to fabricate involving Dr. Landry." (JA 126). Trial counsel only attempted to offer the testimony after appellant cross-examined Ms. D.F. on the times she did not disclose abuse before counseling and cast Dr. Landry as an aid to trial preparation. (JA 41-43, 74, 84). The military judge permitted Ms. Moore to testify about Ms. D.F.'s outcry "to rebut the express or implied charge that the declarant fabricated or acted from some other recent improper influence . . . as of September – or, excuse me, August." (JA 129). August and September of 2015, the months specifically mentioned by the military judge, correspond with Ms. D.F.'s first and second sessions with Dr. Landry. (JA 61, 105). By referring to August and September as the beginning date of purported improper influence, the military judge found that defense in fact asserted the alleged improper influence that trial counsel sought to rebut: Ms. D.F.'s counseling sessions with Dr. Landry.

Although defense asserted that Ms. Moore improperly influenced Ms. D.F., the prosecution did not offer the outcry witnesses' testimony to rebut that asserted influence. Rather, the prosecution only offered the outcry witnesses to rebut the

assertion – both implied and expressed by appellant – that Dr. Landry improperly influenced Ms. D.F.'s testimony. Because "multiple improper influences [were] asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut." *Allison*, 49 M.J. at 57. The military judge did not abuse his discretion by finding that defense asserted that Dr. Landry improperly influenced Ms. D.F.'s trial testimony.

C. Any error did not prejudice the defendant.

Even if the Court finds that the military judge abused his discretion in admitting the prior consistent statements, that error caused no prejudice. This Court must affirm the findings "unless the error materially prejudices the substantial rights of the accused." Article 59(a), U.C.M.J., 10 U.S.C. § 859(a). In order for error to affect one's substantial rights, "the error *must* have been prejudicial: it *must* have affected the outcome of the" trial. *United States v. Olano*, 507 U.S. 725, 734 (1993) (emphasis added). This Court evaluates "prejudice from an erroneous 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).

1. Strength of the prosecution's case.

In the absence of the prior consistent statements, the prosecution's case still had the twin pillars of Ms. D.F.'s in-court testimony as well as her disclosure to

Dr. Landry.[6] The terror that Ms. D.F. experienced at being in the same room as appellant was so palpable that the court reporter noted that she "hesitated to enter the courtroom" and "bec[a]m[e] emotional," and trial counsel's summation remarked upon "her terror when she first tried to come into the courtroom." (JA 26, 32, 182). Ms. D.F. testified that her father raped her, and Dr. Landry testified that Ms. D.F. disclosed this abuse. Moreover, Dr. Landry listed some of Ms. D.F.'s symptoms: bed-wetting, nightmares, oppositional behavior, tantrums, and sleep issues, and anxiety at the thought of seeing appellant again. (JA 64, 96). This Court previously recognized the probative value of hearing about a rape victim's symptoms. *See United States v. Houser*, 36 M.J. 392 (C.M.A. 1992). The prosecution's case remains strong, even in the absence of the outcry witnesses' testimony.

2. Strength of the defense case.

The defense case consisted of cross-examination and stipulations of expected testimony. The cross-examination of Ms. D.F. obtained concessions that she did not consistently tell strangers that her father raped her. The cross-examination of Ms. Moore led the Army Court to determine that she testified incredibly with respect to certain matters. The stipulations of expected testimony

[6] In order for the Court to reach a prejudice analysis, it necessarily must find that Dr. Landry did not exert an improper influence upon Ms. D.F. Therefore, the testimony of each becomes more credible.

largely corroborated Ms. D.F.'s concession that she did not consistently disclose the most horrific event of her life to strangers.

3. Materiality of the evidence in question.

The outcry witnesses' testimony did not materially impact the trial. Ms. D.F. testified, without objection, that she told Ms. Moore and Mr. Casey that appellant raped her. (JA 36-37). Therefore, the fact that she made a prior consistent statement would be before the finder of fact even if the military judge had precluded Ms. Moore and Mr. Casey from testifying about the prior consistent statement. Moreover, appellant did not object to trial counsel's reference to the outcry in his opening statement, and that reference relates to Ms. D.F.'s unobjected-to testimony about the outcry as equally as it does to the outcry witnesses' testimony. Similarly, the discussion of outcry in the rebuttal argument could be understood to apply to Ms. D.F.'s unobjected-to testimony. The reference to the outcry in the main closing argument was minimal.

Additionally, the outcry witnesses' testimony added no detail beyond what Ms. D.F. testified to at trial. Its only use was to rebut the express and implied assertion that Dr. Landry improperly influenced Ms. D.F. The outcry witnesses' testimony "concerned matter that was cumulative of other evidence introduced at trial, and most importantly, the finders of fact had an opportunity to view and hear from the most critical witness, the victim herself." *Morgan*, 40 M.J. at 411 (affirming notwithstanding the military judge's erroneous admission of hearsay);

see also United States v. Bercier, 506 F.3d 625, (8th Cir. 2007) (where "prior statements merely bolstered a witness's credibility by repeating testimony already in evidence, . . . the error in admitting the prior statements, standing alone, may be harmless").

4. Quality of the evidence in question.

The outcry witnesses' testimony was "of no better quality than that which was already before the finder of fact . . . ." *United States v. Roberson*, 65 M.J. 43, 48 (C.A.A.F. 2007). Throughout the trial and appellate process, appellant has relentlessly attacked Ms. Moore's credibility, and he successfully convinced the Army Court that part of her testimony was incredible. Moreover, appellant argued at trial and on appeal that Ms. Moore implanted the idea of the rape in Ms. D.F.'s head prior to the outcry. (JA 127 ["Ms. Moore has put this idea in {D.F.}'s head preceding the date of the statements for which she is going to testify"]; Appellant's Br. 10 ["Ms. Moore's motive to coach D.F. was firmly established when she realized that she would need to share custody, . . . well before D.F. ever alleged any misconduct on the part of the appellant."]). Thus, the outcry witnesses' testimony had minimal effect on the defense theory of the case.

If the Court determines that the military judge abused his discretion in permitting Ms. Moore and Mr. Casey to testify about the outcry, the Court should still affirm the Army Court because any alleged error did not affect the outcome of the trial. *See Olano*, 507 U.S. at 734.

Conclusion

The United States respectfully requests that this Honorable Court affirm the findings and sentence as adjudged.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (***efiling@armfor.uscourts.gov***) and contemporaneously served electronically on appellate defense counsel, on February 21, 2019.

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