IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

CHRISTOPHER K. WILLS
Captain, Judge Advocate
Appellate Government Counsel
Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0761
christopher.k.wills2.mil@mail.mil
U.S.C.A.A.F. Bar No. 37217

CRAIG SCHAPIRA
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37218

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

Index of Brief

Table of Authorities

United States Supreme Court

United States Court of Appeals for the Armed Forces

Other Military Courts of Criminal Appeals

Other Federal Courts

State Courts

Uniform Code of Military Justice

Secondary Resources and Other Authorities

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Issue Presented

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

Statement of Statutory Jurisdiction

This Court exercises jurisdiction over appellant's case pursuant to Article 67(a)(3), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 867(a)(3). On 21 January 2020, this Court granted appellant's petition for review. *United States v. Ayala*, 79 M.J. 428 (C.A.A.F. 2020).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of aggravated sexual contact, in

violation of Article 120, UCMJ, 10 U.S.C. § 920. (JA 251). The military judge sentenced appellant to confinement for eight months and a bad-conduct discharge. (JA 252). The military judge credited appellant with sixty days of confinement credit. (JA 252). The convening authority approved the sentence as adjudged and ordered the sixty-day confinement credit. (JA 20). On 18 July 2019, the Army Court of Criminal Appeals [Army Court], exercising its Article 66, UCMJ, jurisdiction, affirmed the findings and the sentence. *United States v. Ayala*, 2019 CCA LEXIS 301, at *9 (A. Ct. Crim. App. 18 July 2019) (summ. disp.).

Statement of Facts

A. Appellant's aggravated sexual contact of Specialist AN.

On 16 April 2016, while deployed to Camp Lemonnier, Djibouti, Specialist (SPC) AN went with a friend to "11-D, which is a recreational place in Africa." (JA 42–43). Specialist AN returned to her room "[a]round 1130 or 12" and was sitting outside when appellant approached her. (JA 43–44). Appellant asked SPC AN if she knew "Corporal Garcia" because he needed to return her phone. (JA 45). Specialist AN accompanied appellant to return the phone, and afterwards they returned to SPC AN's room and talked outside for about "15 to 20 minutes." (JA 46–48). Appellant told SPC AN that she "was pretty . . . and that he'd been watching [her]," but SPC AN described him as "[j]ust an acquaintance." (JA 47).

As their conversation ended, appellant stood up, and SPC AN "thought he was leaving." (JA 48). Instead, he asked, "[y]ou want to come back to my room?" (JA 48). Specialist AN was noncommittal, and appellant said, "[n]o, come on," and then "pulled [her] hand." (JA 48). Specialist AN said "[n]o" and that it was muddy, but appellant "picked [her] up like a baby . . . and sat [her] down on the sidewalk . . . and then guided [her] to his room with his hand on [her] back." (JA 48).

Once they arrived at appellant's room, SPC AN noticed that his roommate was there "[f]acetiming his daughter." (JA 49). Specialist AN sat on appellant's bed, and after a couple of minutes, appellant started trying to kiss her. (JA 50). She told appellant "'no,' and kind of just like pushed him off a little bit." (JA 50). Specialist AN did not kiss appellant back. (JA 50).

After appellant's roommate left the room, appellant continued his attempts to kiss SPC AN, but she "was just saying 'no.'" (JA 51–52). Appellant "tried taking off [her] shirt and [she] would just kind of wiggle away." (JA 52). Despite being told no, appellant kept trying to kiss SPC AN and take off her shirt. (JA 53). Appellant "held [SPC AN's] arms down over [her] head" in an attempt to take off her shirt. (JA 53–54). Appellant "asked if [she] felt uncomfortable," and SPC AN told him "[y]es." (JA 54–55). At one point, appellant unhooked SPC AN's bra and touched her breasts. (JA 55–57). Specialist AN said she wanted to leave, but

appellant, a noncommissioned officer, told her "'[y]ou're not leaving until I say you're leaving.'" (JA 56).

Five to ten minutes later, SPC AN finally succeeded in leaving and appellant left with her. (JA 59). As they walked to SPC AN's room, appellant told her, "you didn't even get me that hard." (JA 59, 62). He then "grabbed [her] hand and he put it on the outside of his pants on his dick." (JA 62). Specialist AN "moved [her] hand quickly" and returned to her room. (JA 62–63).

B. Specialist AN's disclosure of appellant's aggravated sexual contact.

When SPC AN returned to her room, she "was confused" and "really didn't know what had happened." (JA 63). She "was just upset" and "was very uncomfortable." (JA 63). Specialist AN began to talk to her friend, Sergeant Rolf. (JA 63). They communicated over Facebook messenger. (JA 64). During their conversation, SPC AN felt "vulnerable and ashamed just because [she] was . . . talking and admitting that something did happen." (JA 64). Specialist AN also "talked to [her] mom" that morning "[o]ver text." (JA 65).

After she spoke to her mom, SPC AN reported appellant's assault. (JA 65, 67). She first spoke to "Chief Taylor," and then "he took [her] to NCIS and [she] talked to them." (JA 67). Naval Criminal Investigative Service (NCIS) agents recorded their interview with Specialist AN. (JA 67).

C. Appellant's consciousness of guilt and admissions to SPC AN.

Appellant and SPC AN exchanged email messages concerning the night appellant assaulted her. (JA 68–71, 307–08). After the assault, appellant went to SPC AN's room and said that "he heard that there was a rape or sexual assault at 11-D, and . . . he was wondering . . . if [she] knew anything." (JA 68). Later that week, SPC AN emailed him and asked, "why do you keep bringing up rape[?]" (JA 307). Appellant replied, "[i]ts a career ender," and then stated that he "didn't know if [he] crossed the line with [her] the other night." (JA 307). When SPC AN asked appellant if he thought he "crossed the line," he replied, "[y]ea," "[y]ea I think I did," and "I'm sorry if I did." (JA 308).

Appellant also made statements about his interactions with SPC AN during an interview with law enforcement. (Pros. Ex. 1). When the agent questioned him about what happened with SPC AN, "[a]ppellant replied, 'Shit. After returning [CPL JG's] phone, we came back to my CLU. Shit. Aw, fuck. I'm kind of nervous because she's still talking to me today. Holy fuck.'" (JA 6; Pros. Ex. 1 at 28:53–29:20).

In April 2016, appellant approached another soldier and said "that he needed to talk." (JA 153). Appellant "seemed to be a little distressed." (JA 154). Appellant said that "he went out with [SPC AN] and they were drinking . . . and that there may have been a mistake one night." (JA 154).

D. Appellant's theory of the case and attacks on SPC AN's credibility at trial.

At trial, the defense counsel began his cross-examination of SPC AN by asking her about being "offered an SVC either by NCIS or CID." (JA 73). The trial counsel objected, and the defense counsel stated that he wanted to question SPC AN about "her preparation for trial with the trial counsel and bringing the trial counsel into [the defense] interview." (JA 73). The defense counsel explained that "all of this is going to lead up to me asking, you know, '[d]id you then talk about the questions the defense asked during the interview and prepare for how to answer those questions?'" (JA 73). Defense counsel continued with the following line of questioning during cross-examination:

> Q. And isn't it true that [trial counsel] came to you and asked if you wanted him in our defense interview, correct?
> A. Correct.
> Q. And so he came over and you two were in during the interview, correct?
> A. Yes, sir.
> Q. And you already had a plan at that point to then do more preparation after our interview, correct?
> A. Yes.
> Q. And at that point, you had done four or five interviews with trial counsel, correct?
> A. About; yes.
> Q. And you had also, prior to our interview, come into this courtroom and prepared for testimony with you sitting on the witness stand, correct?
> A. Yes.

(JA 74).

The defense counsel also cross-examined SPC AN about volunteering "to be a Victim Advocate" and if she had training on how "alleged victims react to these events." (JA 76). Defense questioned SPC AN about her "concerns about [her] reputation around camp," and about being arrested for "stealing a ring" from a store when she was fifteen-years old. (JA 80, 112).

Defense counsel highlighted perceived inconsistencies in SPC AN's answers about whether appellant told her that he was interested in her. (JA 85). Defense counsel asked if SPC AN told the defense counsel in their pretrial interview that appellant did not express interest in her. (JA 85). Defense counsel then stated, "[b]ut according to your sworn statement, [appellant] told you he thought you were pretty, correct?" (JA 85). Defense counsel reiterated, "yesterday you said you still weren't sure that [appellant] was expressing interested [sic]. Would you now agree that he was expressing interest in you at that point?" (JA 86). The defense counsel brought up SPC AN's prior statements about the walk back to her room after appellant assaulted her. (JA 94). Defense counsel asked if SPC AN replied "[s]ure" in her sworn statement when appellant asked if they could walk back between the housing units so no one would see them. (JA 94–95). Specialist AN testified that she did not know if she said anything, and defense counsel responded, "[w]hat I'm asking you is in your sworn written statement, 3 days after the event at issue, isn't it true that your response was, 'Sure?'" (JA 95–96). Defense counsel

highlighted a perceived inconsistency regarding whether SPC AN sent text messages to SGT Rolf that appellant "forced [SPC AN] into his room." (JA 100). Defense counsel asserted that SPC AN's messages to SGT Rolf were "at least not consistent with [her] explanation [at trial]." (JA 102).

E. Admission of SPC AN's messages to her mother, her messages to Sergeant Rolf, and her NCIS interview.

1. Admission of Pros. Ex. 4—SPC AN's messages to her mother.

During re-direct examination of SPC AN, the government offered Pros. Ex. 4. (JA 118, 253). Prosecution Exhibit 4 depicts the messages "that [SPC AN] and [her] mom exchanged on the morning [of] 17 April 2016." (JA 118). The defense counsel objected "on the grounds of hearsay and improper character evidence." (JA 118). The prosecution argued that the messages were prior consistent statements and admissible because the defense had "alleged a motive to fabricate or an improper motive based on [trial] preparation of [SPC AN] in the last couple of days." (JA 119). The military judge found that "there was an implication, a fairly bald implication . . . that [trial counsel] were somehow manipulating . . . what [SPC AN] was going to say here in court . . . in the day or days leading up to her testimony." (JA 123). The military judge went through the exhibit page by page to determine which portions were admissible. (JA 123–30). The military judge explicitly cited Military Rule of Evidence [Mil. R. Evid.] 801(d)(1)(B)(i) at

various points while he reviewed Pros. Ex. 4 on the record. (JA 124–26, 128). The military judge then admitted the exhibit under Mil. R. Evid. 801(d)(1)(B)(i) after the parties went through it page by page and excised the irrelevant portions. (JA 124–30).

2. Admission of Pros. Ex. 6—SPC AN's sworn statement to law enforcement.

After the military judge admitted Pros. Ex. 4, the government offered Pros. Ex. 6, "[t]he sworn statement [SPC AN] gave to NCIS," under Mil. R. Evid. 801(d)(1)(B)(i) and (ii). (JA 131–32). The government argued that the sworn statement was admissible "[u]nder (i) . . . to rebut the implied improper motive that defense raised regarding her testimony [at trial] based on the fact that she prepared with trial counsel beforehand." (JA 132). The defense counsel argued that "just because the prosecution characterizes that we're raising their preparation as motive; that's not correct." (JA 132). The military judge stated that counsel had implied "that certain parts of [SPC AN's] testimony ha[d] changed," and that the "implication was because of preparation with trial counsel." (JA 133). The military judge reiterated that defense counsel's questioning suggested that SPC AN's testimony "was different because she has had . . . multiple opportunities to talk to the trial counsel." (JA 134). The military judge pointed out that during

cross-examination, defense counsel highlighted that SPC AN was "'interviewed by trial counsel four or five times prior to trial.'" (JA 133).

The defense counsel responded that the questions about trial preparation were "to show that just because you repeat a lie over and over and over again doesn't make it the truth," but that it "makes you be able to tell the story better." (JA 133–34). The defense counsel stated, "if you've prepped over and over again . . . it makes you sound more credible . . . because you've practiced over and over and over." (JA 134). The military judge initially withheld his ruling on Pros. Ex. 6, and later the parties went through it again to "discuss the sections that would be [admissible] under (i) versus (ii)." (JA 136, 156).

During a later discussion about Pros. Ex. 6, the trial counsel again argued that defense counsel had "insinuated or implied that [SPC AN's] recount of the sexual assault [at trial] was somehow coached or influenced or changed by preparation with the trial counsel yesterday and in prior phone calls . . . with trial counsel since her report." (JA 159). The defense counsel responded that the purpose of his questions was "to counter any explicit or implicit argument by the government that, because [SPC AN was] giving details, it must be a truthful statement." (JA 160). The defense argued that "if you go over details . . . with the prosecution and you prep and you get your—just because you still are saying details doesn't mean they're true." (JA 160). The trial counsel reiterated that the

exhibit rebutted the implication that it was "the influence of the trial counsel that caused [SPC AN's] testimony [at trial] to be consistent with what she said before." (JA 161).

The parties also discussed admission of Pros. Ex. 6 under Mil. R. Evid. 801(d)(1)(B)(ii), and the government argued that defense attacked SPC AN's credibility "by bringing up past arrests for petty theft; by bringing up [a] past counseling statement for alcohol use." (JA 163–64). The military judge stated, "the rule says, if you attack [SPC AN's] credibility, they get to rehabilitate her . . . credibility as a witness when it's attacked on another ground," and he asked if defense counsel had attacked her credibility. (JA 167). The defense counsel responded, "[a]bsolutely." (JA 168).

During a subsequent discussion, defense counsel agreed that they were indeed trying to show that trial preparation influenced SPC AN's testimony. (JA 172). The defense counsel stated, "I don't disagree that we're saying the testimony was influenced by preparation but not to change it, to keep it consistent." (JA 172). The military judge stated, "and that's what you implied," referring to the defense counsel's charge of the improper influence from pretrial preparation. (JA 172). The military judge reiterated, "[the defense] implication was that [SPC AN's testimony] was influenced to stay consistent with her prior statement." (JA 172). Defense counsel stated, "Yes. And I agree with that. Certainly." (JA 172).

The military judge then asked the government how the prior statement proved "that [SPC AN] wasn't influenced to testify consistent with [the prior statement]?" (JA 173). The military judge stated, "I don't think it comes in under (i)." (JA 174). The military judge ultimately admitted Pros. Ex. 6 under Mil. R. Evid. 801(d)(1)(B)(ii). (JA 176).

3. Admission of Pros. Ex. 14—an edited version of SPC AN's video-recorded NCIS interview.

Following the admission of Pros. Ex. 6, the government sought to admit Pros. Ex. 10, SPC AN's videotaped "interview with NCIS" on 17 April 2016. (JA 137, 176). The defense counsel initially objected to the video as "hearsay," and the military judge ultimately sustained an objection to Pros. Ex. 10 as "cumulative" with Pros. Ex. 6. (JA 138, 176). The government then requested to admit Pros. Ex. 10 instead of Pros. Ex. 6. (JA 176–77). Prosecution Exhibit 6 was withdrawn, and the military judge directed the parties to review Pros. Ex. 10 and take out the portions that were not relevant. (JA 177). The military judge acknowledged that the defense had not waived their hearsay objection, but directed the parties to ensure that Pros. Ex. 10 did not contain anything that was "absolutely irrelevant to the purpose that [it was] being admitted for." (JA 177).

After the parties reviewed Pros. Ex. 10, the new "edited version" became Pros. Ex. 14. (JA 219). The defense counsel reiterated their hearsay objection to

the video. (JA 220–22). The military judge stated, "if you have particular parsed out chunks that you want me to not consider, I can certainly not look at those," and stated that he was only going to consider the portions that were relevant as consistent statements. (JA 222). The military judge further stated that he had the ability "to not consider the stuff that [he] shouldn't consider." (JA 223).

The defense counsel provided specific "time hacks" of portions of Pros. Ex. 14 that they objected to, and the government did not oppose their objections. (JA 223–24). The military judge stated he would not consider "any of those time hacks that the defense ha[d] objected to." (JA 224). The document listing the excluded portions was marked as "Appellate Exhibit Number XXII." (JA 224, 310). The military judge then admitted Pros. Ex. 14 "with those exceptions." (JA 224).

4. Admission of Pros. Ex. 5—SPC AN's messages to Sergeant Rolf.

The government offered the messages "between [SPC AN] and Sergeant Rolf" from their 17 April 2016 text conversation as Pros. Ex. 5. (JA 116–17). The defense counsel stated, "[n]o objection," and the military judge admitted all forty pages of the exhibit. (JA 117).

F. Defense counsel's closing argument.

During closing, defense counsel argued that the prosecution had "co-opted a false story and retelling of a false story does not then, somehow, make it true." (JA 225). He continued by stating that "the false sexual assault allegation made by

[SPC AN] shielded her from damaging implications to her reputation." (JA 226). Defense counsel argued that because SPC AN "was a trained Victim Advocate . . . [s]he knew the narratives of a complainant," that she "had significant concerns for her reputation," and that she "had already received . . . a formal counseling for her drinking behavior," but the "sexual assault allegation that she made up shielded her; it erased the consequences of her behavior." (JA 226–27). He argued against SPC AN's credibility by first discussing "her theft from a store as a civilian . . . that she admitted to, was arrested, and punished for." (JA 229). Defense counsel asserted that SPC AN had "at best, a causal [sic] relationship with the truth or with the obligations of the oath." (JA 230). Defense counsel stated that they "went after her credibility from the very first thing" in this case, and they "continued to go after her credibility throughout the case." (JA 231–32).

Defense counsel also mentioned SPC AN's pretrial preparation. (JA 246). With regard to SPC AN's "detailed story," the defense counsel argued, "we know about her preparation for trial . . . if she tells details on more than one occasion, that doesn't mean, therefore, they must be true." (JA 247).

Standard of Review

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

Summary of Argument

The military judge did not abuse his discretion in admitting Pros. Exs. 4 and 14 as prior consistent statements. Defense counsel argued that SPC AN's pretrial preparation with trial counsel influenced her testimony at trial. Defense counsel contended that SPC AN rehearsed the lines from her prior statements and practiced with the trial counsel in order to present a more credible lie to the military judge. The defense averred that SPC AN made up the sexual assault allegation from the beginning and also alleged several motives that predated her prior statements, such as potentially getting in trouble for alcohol consumption.

Defense counsel's allegations that SPC AN's pretrial preparation improperly influenced her testimony opened the door to the admission of SPC AN's prior consistent statements under Mil. R. Evid. 801(d)(1)(B)(i). Additionally, by repeatedly attacking SPC AN's credibility and asserting that she was a self-serving liar and that she made prior inconsistent statements, defense counsel opened the door for admission of her consistent statements under Mil. R. Evid. 801(d)(1)(B)(ii). The military judge did not abuse his discretion by admitting the exhibits because his decision was within the range of choices reasonably raised by the facts and law. Even if this Court determines otherwise, it should affirm nonetheless because the admission of the prosecution exhibits did not have a substantial influence on the military judge's findings.

Argument

"'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.'" *Frost*, 79 M.J. at 109 (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)). "This standard requires more than just [this Court's] disagreement with the military judge's decision." *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)).

Although hearsay is generally not admissible, a prior consistent statement is "not hearsay." Mil. R. Evid. 801(d)(1)(B). Provided (1) the declarant testifies and is subject to cross-examination about a prior statement; and (2) the prior statement is consistent with the declarant's testimony, the statement is admissible as substantive evidence under two scenarios. Mil. R. Evid. 801(d)(1)(B).

The first scenario is when the prior statement is offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." Mil. R. Evid. 801(d)(1)(B)(i). In *Frost*, this court noted "two additional guiding principles" from case law: "(1) the prior statement . . . must precede any motive to fabricate or improper influence that it is offered to rebut; and (2) 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." 79 M.J. at 110 (citing *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998)).

Under the second scenario, the prior statement must be offered "to rehabilitate the declarant's credibility as a witness when attacked on another ground." Mil. R. Evid. 801(d)(1)(B)(ii). In *United States v. Finch*, this court stated that "'another ground' refers to one other than the grounds listed in M.R.E. 801(d)(1)(B)(i)." 79 M.J. 389, 395 (C.A.A.F. 2020). "The rule itself does not specify what types of attacks a prior consistent statement under M.R.E. 801(d)(1)(B)(ii) is admissible to rebut, but the Drafters' Analysis lists 'charges of inconsistency or faulty memory' as two examples." *Id.* (quoting *Manual for Courts-Martial*, Analysis of the Military Rules of Evidence [Drafters' Analysis] app. 22 at A22-61 (2016 ed.)). As to the credibility attacks covered by this scenario, this court cited to federal circuit courts that have applied the rule "by ascertaining the type of impeachment that has been attempted, and then evaluating whether the prior consistent statements offered for admission would actually rehabilitate the declarant's credibility as a witness." *Id.* at 396. This court outlined five criteria that must be met for a statement to be admissible under this scenario: (1) the declarant must testify and (2) be subject to cross-examination about the prior statement, (3) the prior statement must be consistent, (4) the declarant's

credibility must have been attacked "on another ground," and (5) "the prior consistent statement must actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." *Id.*

A. Prosecution Exhibits 4 and 14 met the threshold admissibility requirements of Mil. R. Evid. 801(d)(1)(B).

The threshold admissibility requirements are easily satisfied in this case for Pros. Exs. 4 (SPC AN's statements to her mother) and 14 (SPC AN's recorded NCIS interview). Specialist AN testified and was cross-examined about her text messages to her mother and her NCIS interview. (JA 75, 98). Additionally, SPC AN's statements were "generally consistent" with her trial testimony. *Finch*, 79 M.J. at 398 (quoting *United States v. Muhammad*, 512 F. App'x 154, 166 (3d Cir. 2013)). The statements do not need to be identical, but "[r]ather, the prior statement need only be 'for the most part consistent' and in particular, be 'consistent with respect to . . . fact[s] of central importance to the trial.'" *Id.* at 395 (quoting *United States v. Vest*, 842 F.2d 1319, 1329 (1st Cir. 1988)) (alteration in original). For Pros. Ex. 14, appellant does not contest the consistency of SPC AN's NCIS interview with her trial testimony, (Appellant's Br. 20–24), and a comparison of the two shows that Pros. Ex. 14 is "generally consistent" with SPC AN's testimony with regard to the facts of central importance at trial. *Compare* Pros. Ex. 14 *with* JA 50–67. For Pros. Ex. 4, appellant agrees that "the prior

statements were generally consistent," but argues that the military judge erroneously admitted some statements from SPC AN's mother. (Appellant's Br. 15, 19–20). However, a review of the record demonstrates that the military judge did not consider the substance of SPC AN's mother's statements, and they were only admitted to put SPC AN's statements in context.[1]

Therefore, the only matters in dispute relevant to this Court's determination of the admissibility of the evidence under Mil. R. Evid. 801(d)(1)(B) are (1) whether there was an implied or express charge of improper influence on SPC AN's testimony or an attack on SPC AN's credibility on another ground, and (2) if

[1] After the military judge reviewed Pros. Ex. 4 and excluded several pages, the resulting exhibit contained only a few statements that are at issue. (JA 127, 130). Specialist AN's statements generally consist of the following: "I was sexually assaulted," "I got out," "I tried stopping him," "I didn't like scream or hit him," and SPC AN's response "I know" after her mother said "[y]ou know what happened was wrong," and "I don't know who to tell." (JA 253–66). However, it is clear from the record that SPC AN's mother's statements were not offered for their truth, but instead to provide context for evaluating SPC AN's statements. (JA 119–20, 125). When discussing some messages from SPC AN's mother, the trial counsel stated that those statements went "to the state of mind of [SPC AN], not to the truth." (JA 119–20). During another discussion about SPC AN's mother's statements, the trial counsel stated "[t]hose would just be there for the effect on [SPC AN]." (JA 125). When the military judge excluded some of the messages from SPC AN's mother, he stated "[t]hat doesn't give me any context; so I'm not going to consider that." (JA 125).

so, whether the prior consistent statements rebutted the charge of improper influence or rehabilitated SPC AN's credibility as a witness.[2]

B. Application of Mil. R. Evid. 801(d)(1)(B)(i)—Defense counsel opened the door to the admission of Pros. Exs. 4 and 14 by charging SPC AN with testifying under an improper influence that postdated her prior statements.

Assembling the line of attack employed by defense counsel presents a straightforward application of Mil. R. Evid. 801(d)(1)(B)(i). Because defense counsel conceded that he questioned SPC AN about her trial preparation to show that it influenced her testimony, (JA 172), the government was legally permitted to offer consistent statements that preceded the alleged improper influence to rebut that particular charge. Mil. R. Evid. 801(d)(1)(B)(i). Specialist AN's statements in Pros. Exs. 4 and 14 were admissible because they were consistent with her trial testimony and preceded the asserted improper influence. *See United States v. Morgan*, 31 M.J. 43, 46 (C.M.A. 1990) (although the defense alleged that the accusations were false from the beginning but charged fabrication since the testimony of the witness at the Article 32, UCMJ, hearing, a videotaped interview that occurred prior to the hearing was properly admitted to rebut "the implication of the most recent fabrication and influence").

---

[2] As the Army Court noted, appellant was the one who first brought up SPC AN's prior statements. (JA 7). The government should have been allowed to introduce the underlying statements to provide context for the trier of fact once the defense counsel discussed the prior statements. (JA 41, 73–75, 85).

1. Defense counsel's allegation that SPC AN's pretrial preparation improperly influenced her testimony opened the door for the government to introduce her prior consistent statements under Mil. R. Evid. 801(d)(1)(B)(i).

Defense counsel implied that but for SPC AN's pretrial preparation with trial counsel, her testimony at trial would have been different. This was not a novel line of attack, as military courts have repeatedly recognized that defense counsel may argue that a witness acted from an improper influence in testifying because of trial preparation with government counsel. *See United States v. Faison*, 49 M.J. 59, 61 (C.A.A.F. 1998) ("On several occasions, counsel also suggested to the victim that her testimony had been shaped -- after her initial accusation of appellant following the February 18 argument -- by government counsel and a friend of the victim's mother."); *United States v. Allison*, 49 M.J. 54, 55 (C.A.A.F. 1998) ("At one point defense counsel suggested that [the victim] had been influenced by trial counsel's pretrial interview."); *United States v. Heath*, 76 M.J. 576, 578 (A. Ct. Crim. App. 2017) ("During cross-examination, defense counsel asked numerous questions about [the victim's] preparation for trial . . . [t]hese questions were designed to imply that [the victim's] testimony at trial had been influenced."); *United States v. Norwood*, 79 M.J. 644, 656 (N.M. Ct. Crim. App. 2019) (disagreeing with appellant and holding that the victim's prior consistent statements were "clearly

admissible under [Mil. R. Evid.] 801(d)(1)(B)(i) to rebut the implied charge that [the victim's] testimony was coached").

However, when defense counsel expressly stated that SPC AN's testimony was influenced by her pretrial preparation and interactions with the government counsel, he opened the door to the government's rebuttal evidence. Here, when asked about the purpose behind his questions, defense counsel stated that he was going to ask about "her preparation for trial with the trial counsel and bringing the trial counsel into [the defense] interview," and that "all of this is going to lead up to me asking, you know, '[d]id you then talk about the questions the defense asked during the interview and prepare for how to answer those questions?'" (JA 73). He then asked her a series of questions about her pretrial preparation with trial counsel, to include preparation that included "[her] sitting on the witness stand."[3] (JA 74–75). Allegations of improper influence can be made both through express statements and cross-examination of the victim. *See Faison*, 49 M.J. at 61–62 ("[C]harges were made both expressly by counsel to the judge and implicitly by counsel through cross-examination of the victim and others.").

[3] Defense counsel maintained this theory through closing argument: "[W]e know how many times she met with trial counsel. She--we know about her preparation for trial both before and after the defense interview. We know how many things she reviewed. So, if she tells the same story on more than one occasion, if she tells details on more than one occasion, that doesn't mean, therefore, they must be true." (JA 246–47).

When the government explained why Pros. Ex. 4 was admissible, trial counsel observed that defense counsel had asserted that "preparation with trial counsel, and following the meeting with defense yesterday" had improperly influenced her trial testimony. (JA 123). The military judge agreed with the trial counsel and stated that "there was an implication, a fairly bald implication that they were—that [the trial counsel was] somehow manipulating, you know, what [SPC AN] was going to say here in court – leading in the day or days leading up to her testimony." (JA 123). The defense counsel's intent to show an improper influence on SPC AN's testimony was made clear when the defense counsel stated, "I don't disagree that we're saying the testimony was influenced by preparation but not to change it, to keep it consistent." (JA 172).[4] Given defense's theory, the government was entitled to admit her prior statements so that the military judge could compare them with her testimony and determine if it was actually influenced by preparation.

This case is similar to *Faison*, where this Court stated, "[i]n the course of its impeachment of the victim, the defense counsel implied, among other things, that [the victim's] testimony had been improperly shaped after her initial report of the

[4] The government acknowledges that some of the defense counsel's statements to the military judge were made while discussing Pros. Ex. 6 after the military judge admitted Pros. Ex. 4. (JA 130–31, 172). These statements are offered to further illustrate defense's theory that SPC AN's pretrial preparation was an improper influence on her testimony.

offenses." 49 M.J. at 62. Once defense counsel brought up SPC AN's prior statements and argued that her testimony was consistent with those statements only because of pretrial preparation, the government was allowed to admit her prior statements and put them in context in order to rebut defense counsel's charges of improper influence.

Defense counsel's later claims that he had not implied that the government influenced SPC AN's testimony are unavailing. Although the defense counsel argued that there was no implication that government counsel improperly influenced SPC AN to change her testimony, defense counsel agreed that the implication was that SPC AN's testimony "was influenced by preparation . . . to keep it consistent." (JA 132–34, 172). Additionally, defense counsel's argument that "the influence has to be to change the testimony" misunderstands Mil. R. Evid. 801(d)(1)(B)(i). (JA 172). The rule does not require an allegation that the testimony changed, but rather an allegation that the declarant "acted from a recent improper influence . . . in so testifying." Mil. R. Evid. 801(d)(1)(B)(i).

Simply put, throughout the trial, the defense counsel implied that SPC AN's testimony was only consistent with her prior statements because of her trial preparation. Defense counsel asserted that the military judge should discount SPC AN's testimony, as the questions about trial preparation were intended "to counter any . . . argument by the government that, because she [was] giving details, it must

be a truthful statement." (JA 160). Defense counsel's strategy to discredit the "details" in SPC AN's testimony was to allege that her pretrial preparation influenced her testimony. (JA 160). Prosecution Exhibits 4 and 14[5] rebutted this argument because they showed SPC AN's unrehearsed statements when she first reported appellant's assault, *over a year* before she allegedly practiced and rehearsed for trial. As the statements predated the charge of improper influence, the statements were properly admitted. *See Allison*, 49 M.J. at 57–58.

2. This case is easily distinguishable from the facts in *United States v. Frost*.

Contrary to appellant's assertions, the present case is easily distinguishable from *Frost*. (Appellant's Br. 17–18). In *Frost*, this Court determined that defense counsel's "sole theory and line of approach during opening statement, questioning, and closing argument" was linked to a singular improper influence exerted on the witness preceding the prior consistent statement at issue. 79 M.J. at 111. This Court reversed the lower court because it determined defense counsel tailored the case along that singular theory. *Id.* at 112.

In contrast, the defense counsel in this case clearly and repeatedly advanced a theory that SPC AN's testimony was influenced by her trial preparation, which

---

[5] While the military judge admitted Pros. Ex. 14 under Mil. R. Evid. 801(d)(1)(B)(ii), the government asserts that this Court can affirm the military judge's decision pursuant to the "Tipsy Coachman" doctrine if this Court finds that the exhibit was admissible under Mil. R. Evid. 801(d)(1)(B)(i). *See infra* Part D.

occurred well after her prior consistent statements. By repeatedly adducing evidence of SPC AN's recent pretrial preparation, defense counsel implied that she crafted her testimony to fit a narrative, rather than testifying truthfully. *See Frost*, 79 M.J. at 114 (Maggs, J., dissenting) (noting the importance of affording deference to trial judge's rulings on prior consistent statement rulings given that assertions of improper influences and motives are "not always made directly and expressly" and sometimes rely on "implication and innuendo").

3. Defense counsel introduced motives to fabricate that would not have triggered the application of Mil. R. Evid. 801(d)(1)(B)(i), but he made a deliberate choice to attack SPC AN's pretrial preparation with trial counsel and must reap what he sowed.

Some of the motives to fabricate charged by defense counsel pre-dated SPC AN's prior consistent statements.[6] But a consistent statement need not precede all motives or influences to be admissible; it merely must precede the influence it is offered to rebut. *See Allison*, 49 M.J. at 57 ("Where . . . multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut."). Accordingly, because the defense alleged that SPC AN's pretrial preparation was one of the reasons she

[6] Some of the reasons appellant highlights in his brief are SPC AN's previous counseling for an alcohol-related offense, purchasing more alcohol than allowed on the night of the assault, and concerns about her reputation on Camp Lemmonier. (Appellant's Br. 17).

testified as she did, her statements made prior to this influence were admissible. (JA 74–75, 133–34, 160–61, 172).

Defense counsel could have limited his cross-examination to the alleged motives pre-dating SPC AN's prior statements, but he did not. This Court has long recognized that defense counsel is the gatekeeper to the admission of prior consistent statements. *See Morgan*, 31 M.J. at 46 ("[A]dmissibility of such declarations is a matter of choice by the party opposed to the witness, who may open the door to the use of such statements by engaging in a particular kind of impeachment, or leave the door shut by refraining.") (citation and internal quotation marks omitted). Here, defense counsel opened the door by repeatedly asserting that SPC AN acted from an influence when testifying at trial that post-dated her prior consistent statements. As in *Morgan*, there are "few media more effective than videotape for allowing" the military judge to determine if SPC AN's testimony was the product of pretrial preparation. 31 M.J. at 46, n.6. Consequently, the government properly rebutted this charge through SPC AN's prior consistent statements under Mil. R. Evid. 801(d)(1)(B)(i).

C. Application of Mil. R. Evid. 801(d)(1)(B)(ii)—When he impeached SPC AN through prior inconsistent statements, defense counsel opened the door for the government to admit the prior consistent statements in Pros. Ex. 14 to rebut these attacks on her credibility.

As discussed above, SPC AN testified, was subject to cross-examination, and appellant does not assert any inconsistencies between Pros. Ex. 14 and her trial

testimony. Therefore, the two remaining questions are whether defense counsel attacked SPC AN's credibility "on another ground," and if Pros. Ex. 14 was "relevant to rehabilitate [SPC AN's] credibility on the basis on which [she] was attacked." *Finch*, 79 M.J. at 396.

1. Defense counsel attacked SPC AN's credibility "on another ground."

When defense counsel attacked SPC AN's credibility by asserting everything she said was a lie and introducing prior inconsistent statements, he attacked SPC AN's credibility "on another ground." Mil. R. Evid. 801(d)(1)(B)(ii). "The rule itself does not specify what types of attacks a prior consistent statement under M.R.E. 801(d)(1)(B)(ii) is admissible to rebut, but the Drafters' Analysis lists 'charges of inconsistency or faulty memory' as two examples." *Finch*, 79 M.J. at 395 (quoting Drafters' Analysis at A22-61).

Defense counsel's broadside attacks on SPC AN's credibility opened the door for the government to introduce her prior statements under Mil. R. Evid. 801(d)(1)(B)(ii). The defense counsel asserted from the outset that SPC AN fabricated her allegations against appellant and that her testimony was false. (JA 35). When the military judge asked if defense counsel attacked SPC AN's credibility, the defense counsel responded, "[a]bsolutely." (JA 168). In closing, defense counsel argued that the prosecution "co-opted a false story," that SPC AN had "at best, a causal [sic] relationship with the truth or with the obligations of the

oath," and stated that they "went after her credibility from the very first thing" in the case. (JA 225, 230–32). Appellant maintains the assertion that SPC AN continuously lied on appeal and argues that defense counsel's cross-examination of SPC AN "went to the narrative that she was a liar," and that her victim advocate training made her "skillfully adept at successfully propagating her lies." (Appellant's Br. 3, 22). Consequently, it is clear from the record that defense counsel attacked SPC AN's credibility "on another ground." Mil. R. Evid. 801(d)(1)(B)(ii).

Additionally, when defense counsel cross-examined SPC AN about prior inconsistent statements she made, it opened the door for the government to introduce her prior consistent statements under Mil. R. Evid. 801(d)(1)(B)(ii). *See United States v. J.A.S.*, 862 F.3d 543, 545 (6th Cir. 2017) (finding that the victim's prior consistent statements were admissible under Federal Rule of Evidence 801(d)(1)(B)(ii) to rebut the appellant's attacks on her credibility using prior inconsistent statements). At trial, defense counsel brought up perceived inconsistencies in SPC AN's answers regarding whether appellant told her that he was interested in her, as well as inconsistencies in SPC AN's prior statements about the walk back to her room after appellant assaulted her. (JA 85, 94–96). Defense counsel also highlighted a perceived inconsistency regarding whether SPC AN sent text messages to SGT Rolf that appellant "forced [her] in his room" after

SPC AN testified at trial that she "went willingly." (JA 86, 100–02). Defense counsel got SPC AN to agree that her messages to SGT Rolf were "at least not consistent with [her] explanation [at trial]." (JA 102).

2. Prosecution Exhibit 14 was relevant to rehabilitate SPC AN's credibility.

Specialist AN's prior consistent statements were relevant to rehabilitate her credibility as they had a tendency to put the alleged inconsistencies regarding how she got to appellant's room and her perceptions of appellant's romantic interest in her into context. *See United States v. Rubin*, 609 F.2d 51, 70 (2d Cir. 1979) (Friendly, J., concurring) (arguing that use of prior consistent statements for rehabilitation should be generously allowed "since they bear on whether, looking at the whole picture, there was any real inconsistency"). As a matter of simple logic and fairness, one is able to meet claims of inconsistency with evidence of consistency. Although SPC AN's prior consistent statements did not prove that she testified truthfully at trial,[7] the rule only requires that the prior statements

[7] The government concurs with appellant that repetition of a statement does not make it true, (Appellant's Br. 16, 24), but notes that there is no form of evidence that can unequivocally prove the truth of a witness's testimony in a contested trial, which is a determination for the finder of fact. *See United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016) (noting that "[h]uman lie detector evidence is inadmissible at a court-martial . . . because it is a 'fundamental premise of our criminal trial system [that] "the [panel] is the lie detector" and "determines the weight and credibility of witness testimony"') (quoting *United States v. Scheffer*, 523 U.S. 303, 313 (1998)) (internal citations omitted) (alterations in original).

"rehabilitate the declarant's credibility as a witness." Mil. R. Evid. 801(d)(1)(B)(ii). Again, consistency rebuts allegations of inconsistency.

Just as prior inconsistent statements might be used to attack a witness's credibility, as defense counsel did in this case, (JA 41, 85, 95), prior consistent statements have a logical connection to rehabilitating a witness's credibility after an assertion of complete fabrication. (JA 226–27). Rehabilitation means the "restoration of a witness's credibility after the witness has been impeached." *Black's Law Dictionary* 604 (3rd Pocket ed. 2006). The fact that SPC AN's prior statements were consistent with her trial testimony, which as appellant notes were made "thirteen months *prior* to the beginning of appellant's trial," had some tendency to restore her credibility as a witness after repeated insinuations that she was a liar. (Appellant's Br. 17) (emphasis in original). Defense counsel told the military judge that he would have an opportunity to judge SPC AN's credibility "against other versions of the story that [SPC AN] told during [the] case." (JA 41). Defense counsel argued that "throughout this case, we've attacked [SPC AN's] credibility." (JA 232). Defense counsel went as far as to claim that SPC AN perjured herself, arguing "I know [SPC AN] flat-out lied to me about [SGT Rolf], I know it." (JA 248–49). Defense counsel argued that the government had not proven its case because of SPC AN's "credibility, to include her perjury about

[SGT Rolf]." (JA 249). The rule allows rehabilitation after a credibility attack, which is exactly how the statements were used in this case.

While repeating a statement does not make the statement true, the rule does not require the trier of fact to believe the witness's testimony once a prior consistent statement is admitted. Rather, a prior consistent statement merely permits a trier of fact to determine that a witness who has maintained a consistent version of events is more likely to be testifying truthfully when defense counsel asserts that everything was always a lie. *See United States v. Ellis*, 121 F.3d 908, 920 (4th Cir. 1997) ("[C]ourts employ a more relaxed standard to determine 'whether the particular consistent statement sought to be used has some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with her trial testimony.'") (quoting *United States v. Castillo*, 14 F.3d 802, 806 (2d Cir. 1994)). Additionally, this Court has stated that "[t]he relevance standard is a low threshold." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citing *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987)).

If this Court deems that a witness's credibility cannot be rehabilitated through prior consistent statements following an assertion that the entire allegation was made up from the beginning, this court will be writing a limitation into Mil. R. Evid. 801(d)(1)(B)(ii) that is not found in its text. This Court's new rule would be that a prior consistent statement can rehabilitate a witness's credibility when

attacked "on another ground," unless that other ground is that the witness is a liar and thus lacks credibility. The flaw in this circular logic is apparent.

Abuse of discretion "is a stringent standard of review." *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018). It requires more than a disagreement with the military judge's decision. *Bess*, 75 M.J. at 73. Assessing defense counsel's theory and lines of approach advanced in "opening statement, questioning, and closing argument," the military judge did not abuse his discretion in admitting Pros. Exs. 4 and 14. *Frost*, 79 M.J. at 111.

D. If this court finds that Pros. Ex. 4 or 14 were admissible under a different rule than the one cited by the military judge, this court should apply the "Tipsy Coachman" doctrine.

The "tipsy coachman" doctrine stands for the proposition that appellate courts can "affirm a trial court that 'reaches the right result but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'" *United States v. Carista*, 76 M.J. 511, 515 (A. Ct. Crim. App. 2017) (quoting *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002)). This court has previously analyzed appellate issues in a similar fashion. *See United States v. Robinson*, 58 M.J. 429, 433–34 (C.A.A.F. 2003) (holding that while "the military judge erroneously concluded that [the police officer] had probable cause to stop the Appellant . . . the military judge's error was harmless, because the military judge reached the correct result, albeit for the wrong reason"); *United States v. Leiffer*, 13

M.J. 337, 345 n.10 (C.M.A. 1982) (holding that the military judge's decision to permit a witness to testify was correct even though the military judge did not state the reason, as "'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)).

Because the military judge reached the correct conclusion—that Pros. Exs. 4 and 14 were admissible under Mil. R. Evid. 801(d)(1)(B)—this court should affirm the Army Court's decision. Of note, the military judge's ruling is entitled to deference because he conducted a detailed review of Pros. Ex. 4 prior to admitting the exhibit. (JA 123–30). "While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted." *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014) (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)). Although the military judge admitted Pros. Ex. 14—SPC AN's video interview—prior to viewing it, the military judge did not admit the entire videotaped interview and clearly stated which portions he would consider, with acquiescence of counsel. (JA 223–24). After defense counsel objected to specific, time-stamped portions from the video, the military judge sustained the objection and said he would not consider those portions. (JA 223–24, 310).

After admitting Pros. Ex. 4 under Mil. R. Evid. 801(d)(1)(B)(i), the military judge admitted Pros. Ex. 14 under part (ii). (JA 173–74, 176–77). However, when discussing the basis for admitting both exhibits, the military judge thoroughly developed the record, outlining how the defense counsel charged an improper influence from pretrial preparation that affected SPC AN's testimony. (JA 123, 172). The military judge stated that the defense counsel's implication "was that [SPC AN's testimony] was influenced to stay consistent with her prior statement," and the defense counsel responded, "Yes. And I agree with that. Certainly." (JA 172). This court should affirm the Army Court's decision on the basis of part (i), even though the military judge reached a different conclusion, because Pros. Ex. 14 properly rebutted the defense's charge that SPC AN's testimony was improperly influenced.

Additionally, the military judge's question to the government about how Pros. Ex. 6 proved that SPC AN was not influenced "to testify consistent with [Pros. Ex. 6]?", (JA 172–73), conflates the purpose of Mil. R. Evid. 801(d)(1)(B) and is contrary to this court's holding in *Faison*. This Court stated that "[t]he focus of Mil. R. Evid. 801(d)(1)(B) . . . is not **when** or even **if** a[n] . . . improper influence . . . occurred. The rule is concerned with rebutting the 'express or implied charge.'" *Faison*, 49 M.J. at 61 (bold in original). This Court further stated that "the very fact of improper motive, etc., will be vigorously disputed . . .

[t]hus, the point in time to be ascertained for the purposes of rebuttal is the fair implication of the **charge**, not the arguable underlying event." *Id*. (bold in original).

The defense counsel clearly charged an improper influence from trial preparation and acknowledged as much to the military judge. (JA 172). The prior statements properly rebutted this charge as the statements were made before the rise of the alleged improper influence. Therefore, even if the statements did not disprove the underlying assertion, they did rebut the defense's charge.

E. Even assuming the military judge erred, appellant was not prejudiced.

This Court reviews "the prejudicial effect of an erroneous evidentiary ruling de novo." *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011) (quoting *United States v. Toohey*, 63 M.J. 353, 358 (C.A.A.F. 2006)). Appellate courts will not reverse a conviction for an error of law "unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ; *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998). The government has the burden of demonstrating that the error from erroneously admitted evidence is harmless. *See Frost*, 79 M.J. at 111. "'For [preserved] nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings.'" *Id*. (quoting *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019)) (brackets in original). When reviewing prejudice, this court balances: "(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." *Frost*, 79 M.J. at 111 (quoting *Kohlbek*, 78 M.J. at 334).

The government's case was strong. The strength of the government's case was the in-court testimony of SPC AN, who credibly recalled appellant's aggravated sexual contact. The military judge, as trier of fact, saw and heard her testimony and was able to determine her credibility in the face of defense counsel's attacks. The military judge was "best situated to assess the defense efforts to impeach [SPC AN] and concluded those efforts were insufficient" in light of the government's stronger case. *Id.* at 113 (Sparks, J., concurring in part and dissenting in part). Further, unlike the child victim in *Frost*, who was six-years old at the time of the offenses and under the influence of her motivated mother, SPC AN did not repeatedly deny or recant her allegations. *Id.* at 111–12.

Additionally, appellant's own incriminating statements corroborated SPC AN's testimony. The government introduced email messages between SPC AN and appellant where appellant acknowledged that he thought he "crossed the line" and apologized to her. (JA 307–08). Appellant also demonstrated his consciousness of guilt in his interview with law enforcement when he said, "Shit. Aw, fuck. I'm kind of nervous because she's still talking to me today." (JA 6; Pros. Ex. 1). After reviewing appellant's emails and statements to law

enforcement, the Army court concluded, "[i]n light of his email to SPC AN the day prior, we view appellant's statements to CID as highly probative of his awareness that he had made a damning admission to her, and ultimately, of his guilt." (JA 6). Appellant further demonstrated his consciousness of guilt through his admission to SPC Larkin that "there may have been a mistake one night" when "he went out with [SPC AN]." (JA 153–54). The government agrees with appellant that a mistake was made; that mistake was his criminal behavior.

The defense's case was weak. The defense relied on a theory that SPC AN fabricated an allegation that "shielded her from damaging implications to her reputation . . . [and] potential disciplinary fallout for her behavior that night," and that the government "co-opted a false story." (JA 225–26). However, SPC AN readily admitted her past transgressions and gave no indication that she would fabricate an allegation about appellant to get out of trouble. (JA 43, 77).

Defense focus on the testimony of appellant's roommate, Staff Sergeant (SSG) Cavanaugh is unavailing. While he "walk[ed] past on two separate occasions" during the timeframe that appellant and SPC AN were in appellant's bed, he was admittedly preoccupied and nonobservant of what was happening in the room. (JA 201, 233). Accordingly, SSG Cavanaugh's testimony was not as helpful to appellant's case as he argues. (Appellant's Br. 26). Staff Sergeant Cavanaugh agreed that on the night of the assault, he was focused on his

conversation with his daughter, a wall separated his bed from appellant's bed that prevented him from seeing appellant and SPC AN, and he left the room multiple times. (JA 201–05).

Prosecution Exhibits 4 and 14 "added insignificant detail beyond the unobjected-to" prior consistent statements in SPC AN's messages to SGT Rolf (Pros. Ex. 5) and SPC AN's in-court testimony. *Frost*, 79 M.J. at 113. (Sparks, J., concurring in part and dissenting in part). *See also United States v. Lovett*, 59 M.J. 230, 234–35 (C.A.A.F. 2004) (noting this Court is reluctant to find reversible error from the erroneous admission of hearsay evidence when the "challenged information is simply cumulative of the victim's own in-court testimony") (citing *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001)). The defense counsel's decision to not object to Pros. Ex. 5 appears to be tactical, not mere oversight, as defense argued during closing that one reason for SPC AN's allegation was her potential interest in SGT Rolf. (JA 117, 226).

In SPC AN's unobjected-to statements to SGT Rolf, she started by saying, "[s]omething just almost happened." (JA 268). Sergeant Rolf repeatedly asked what she was referring to, and finally asked "raped?" (JA 268–76). Specialist AN replied "[i]t was close," and then wrote:

> I was sitting outside my room with my headphones in[.] He came up to me . . . [w]e were just talking outside. He said he liked me and I was cute . . . he grabbed my [h]and

> and pulled me . . . I tried turning around and walking the other way but he kinda forced me in his room. I sat there and he got on top of me. . . . He's [sic] roommate left. I told him I wasn't staying and he said yes I was[.] I just laid there. . . He kissed my neck. Then it cooled down for a lil then he tried taking off my shirt and I said no.. He didn't listen. I pulled it back on.. He undid my bra. And held my arms down.. I turned over. He tried taking off my pants. He kept saying I'm not leaving until he said I was. I kept trying to leave without being awkward.

(JA 276–80).

While Pros. Exs. 4 and 14 demonstrated how SPC AN's testimony was consistent with her prior statements, they did not add anything new that was not also addressed by admissible evidence that came in without objection. *See Finch*, 79 M.J. at 400 (**"**[P]erhaps most importantly, independent evidence in the same vein as [the victim's] statement about sleepovers in the videotaped interview was admitted at the court-martial without defense objection.")

As an additional consideration, the admission of Pros. Exs. 4 and 14 could not have been prejudicial because their admission actually supported one of defense's theories at trial. Defense counsel agreed with the military judge that his "implication was that [SPC AN's testimony] was influenced to stay consistent with her prior statement." (JA 172). "I don't disagree that we're saying the testimony was influenced by preparation but not to change it, to keep it consistent." (JA 172). The only way for defense to show that her in-court testimony was consistent

with her prior statements was to admit those statements so that the finder of fact could compare the two. Thus, the admission of Pros. Exs. 4 and 14—which were consistent with her in-court testimony—bolstered defense's argument that she "practiced" her testimony to match her prior statements. (JA 134). If evidence tends to support a defense theory at trial, it cannot be prejudicial to the defense.

Finally, "this was a military judge alone trial." *United States v. Hamilton*, 78 M.J. 335, 343 (C.A.A.F. 2019) (finding the quality of improperly admitted evidence relatively low in part because of the judge-alone forum and the military judge's reiteration that he would give evidence only the weight it deserves). Here, the military judge stated that he would only "consider the portions of the [prior consistent statement] that are relevant as a consistent statement," and that he had "the ability to not consider the stuff that [he] shouldn't consider." (JA 222–23). Based on the relative strength of the parties' cases and the admission of similar evidence, even if the military judge erred, the admission of SPC AN's prior consistent statements did not substantially influence his findings. Accordingly, assuming error, the government satisfies its burden of demonstrating the admission of Pros. Exs. 4 and 14 did not substantially influence the military judge's findings.

Conclusion

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

CHRISTOPHER K. WILLS
Captain, Judge Advocate
Appellate Government
Counsel
U.S.C.A.A.F. Bar No. 37217

CRAIG SCHAPIRA
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37218

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 11,178 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

Christopher K. Wills
CHRISTOPHER K. WILLS
Captain, Judge Advocate
Attorney for Appellee
July 29, 2020

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 July 29, 2020.

DANIEL L. MANN
Senior Paralegal Specialist
Office of The Judge Advocate
General, United States Army
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822