IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20230136
Specialist (E-4) **ROMARIO R. LALOR,** United States Army, Appellant	Tried at Fort Hood, Texas, on 23 September 2022 and 27 February 2023, before a general court-martial convened by Commander, III Corps and Fort Hood, Lieutenant Colonel Scott Z. Hughes and Lieutenant Colonel Thomas Calhoun-Lopez, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error[1]

WHETHER THE MILITARY JUDGE ERRED IN, OVER DEFENSE OBJECTION, ALLOWING EXTRINSIC IMPEACHMENT EVIDENCE ON COLLATERAL ISSUES DURING THE GOVERNMENT'S SENTENCING REBUTTAL.

Statement of the Case

On 27 February 2023, a military judge sitting as a general court-martial convicted appellant, pursuant to his plea, of one specification of sexual assault of a

[1] The government reviewed the matter submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that it lacks merit. Should this court consider the matter meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

child, in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b (2019) [UCMJ]. (R. at 19, 30, 53). The military judge sentenced appellant to reduction to the grade of E-1, confinement for 18 months, and a dishonorable discharge. (R. at 179). On 6 March 2023, the convening authority took no action on the adjudged sentence. (Action). On 10 March 2023, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant preyed upon and sexually assaulted [redacted] while being in the same bed at the same time as his wife, and appellant's crime negatively impacted his victim.

Appellant is married to [redacted]. (Pros. Ex. 1, para. 3). At the time of the offense in January 2022, [redacted] had a [redacted]. (Pros. Ex. 1, para. 3). Appellant knew that [redacted], was an underage minor as he first met her "when she was around 12 years old." (Pros. Ex. 1, para. 3). Prior to the offense, [redacted] and [redacted] experienced a "very close relationship" while [redacted] "had a positive relationship with [appellant.]" (Pros. Ex. 1, para. 3). In fact, [redacted] trusted appellant like he was her brother. (R. at 57).

On 1 January 2022, [redacted] and [redacted]'s mother was hospitalized after contracting COVID-19. (Pros. Ex. 1, para. 4). After visiting their mother in the hospital, [redacted] asked [redacted] to spend the night with her, which [redacted] agreed to do because she "was worried and anxious about her mother being in the hospital." (Pros. Ex. 1, para. 4).

The two arrived at [redacted]'s "multi-bedroom residence located on Fort Hood, Texas around 0200 on 2 January 2022." (Pros. Ex. 1, para. 5). [redacted], [redacted], and appellant then began playing a drinking game and consumed alcohol. (Pros. Ex. 1, para. 5). After consuming "at least 3 alcoholic drinks, [redacted] vomited . . . in the living room." (Pros. Ex. 1, para. 6). She "cleaned herself up and continued playing the [drinking] game until she vomited again." (Pros. Ex. 1, para. 6). At this point, [redacted] "took [redacted] to the bathroom to clean up the vomit," where [redacted] vomited again. (Pros. Ex. 1, para. 6). After [redacted] helped clean up [redacted], appellant provided her "with a white tank top and boxers for her to wear" since her clothes were covered in vomit. (Pros. Ex. 1, para. 6).

Subsequently, appellant "and [redacted] had [redacted] lay down on their queen-sized bed." (Pros. Ex. 1, para. 7). Appellant and [redacted] ultimately joined [redacted] in the bed. (Pros. Ex. 1, para. 7). The bed rested against one wall, and initially, appellant "was against the wall, [redacted] was in the middle, and [redacted] was on the external edge of the bed." (Pros. Ex. 1, para. 7). [redacted] was on the edge of the bed "in case she needed to throw up again" as appellant had placed a garbage can on the floor near her in the event she needed it. (Pros. Ex. 1, para. 7). However, [redacted] ultimately switched with [redacted] in case [redacted] needed to get up and attend to [redacted] and appellant's infant baby. (Pros. Ex. 1, para. 8). Thus, appellant "remained against the wall while . . . [redacted]

laid] in the middle of the bed between [appellant] and [.]" (Pros. Ex. 1, para. 8).

While lying in bed in this arrangement, appellant texted that he wanted her "to suck [his] dick." (Pros. Ex. 1, para. 9). responded that she would "suck [his] dick tomorrow morning once [ ] goes home." (Pros. Ex. 1, para. 9). Appellant also texted his wife that he was "paying attention" to because he did not want "to get vomit[ed] on." (Pros. Ex. 1, para. 9). also suggested that they put on an air mattress instead of all cramming into the bed. (Pros. Ex. 1, para. 9). However, appellant pointed out that was asleep and that he "just don't wanna blow up no mattress." (Pros. Ex. 1, para. 9). Eventually, "fell asleep and began to snore." (Pros. Ex. 1, para. 10).

"Once [ ] began to snore, [appellant] started poking [ ] to see if she was awake." (Pros. Ex. 1, para. 10). Appellant "waited several seconds between each poke," and appellant "knew that he was poking [ ] and not [.]" (Pros. Ex. 1, para. 10). "was awake but did not move or respond." (Pros. Ex. 1, para. 10). Appellant next "touched ['s] bare skin on her leg and then her arm about four times." (Pros. Ex. 1, para. 10). Appellant "then touched] lips with his fingers multiple times and . . . waited several seconds between each touch of [ ] lips." (Pros. Ex. 1, para. 10). "was awake, but did not open her eyes or move" because "she was confused and scared and did not want to wake up

[redacted].” (Pros. Ex. 1, para. 10). In [redacted]’s mind, “she was scared [appellant] would hurt [redacted] or [redacted]” (Pros. Ex. 1, para. 10).

By this point, appellant believed [redacted] was asleep. (Pros. Ex. 1, para. 11). Consequently, he “lifted [[redacted]’s] leg and placed it over his legs.” (Pros. Ex. 1, para. 11). At the time, [redacted] “was laying on her side with her back to [appellant.]” (Pros. Ex. 1, para. 11). Appellant “was laying on his side with his front toward [redacted].]” (Pros. Ex. 1, para. 11). “Once [appellant] moved [[redacted]’s] leg on top of his, [appellant] moved his hand toward [her] vagina.” (Pros. Ex. 1, para. 11). Appellant “put his hand through the loose front opening in the boxer shorts he had lent to [[redacted]] and touched her vulva with his hand and fingers.” (Pros. Ex. 1, para. 11). Appellant’s “bare hand touched [redacted]’s] bare skin on her vulva.” (Pros. Ex. 1, para. 11). Appellant “then moved the boxers on [redacted]] to the side and touched his erect penis to [[redacted]’s] vagina, attempting to penetrate her vagina with his penis.” (Pros. Ex. 1, para. 11). At this point, [redacted] “moved and tried to scoot away from [appellant] and [he] immediately pulled away from her when she moved.” (Pros. Ex. 1, para. 11). After waiting a few moments, appellant “removed [[redacted]’s] leg from on top of his legs, got up, and left the room.” (Pros. Ex. 1, para. 11). Appellant admitted that he “touched [[redacted]’s] genitalia with his hand and penis . . . with the intent to arouse and gratify his sexual desire.” (Pros. Ex. 1, para. 11; R. at 32–33).

Appellant texted [redacted] afterwards that he "went to go sleep in [his] room [because he] was uncomfortable." (Pros. Ex. 1, para. 12). Appellant avoided [redacted] the next morning and did not interact with her after 2 January 2022. (Pros. Ex. 1, para. 14). Ultimately, [redacted] stopped talking to [redacted] after she reported appellant's sexual assault to authorities. (R. at 60). [redacted] has also not seen [redacted], [redacted]'s infant son with appellant, since the assault, which made [redacted] "[p]retty sad." (R. at 60–61).

Appellant's sexual assault of [redacted] had a negative impact on her in several ways. First, [redacted] felt "uncomfortable" around people since appellant's sexual assault and did not trust anyone anymore. (R. at 63). Further, [redacted] got upset and felt sick whenever she saw a soldier in uniform and started doing very poorly in school after appellant's sexual assault. (R. at 63–64, 72, 75–76, 80). [redacted] also began engaging in risky behaviors such as drinking and driving since the assault. (R. at 64–65). While [redacted] wanted to attend college and become a veterinarian before the assault, she simply wanted to sleep as much as she could and not do anything else now. (R. at 65–66). Finally, [redacted] experienced anxiety, would go days without eating, and ultimately attempted suicide.[2] (R. at 66–67, 86).

[2] [redacted] clarified that "[t]here were a lot of factors" that went into her decision to attempt suicide and that "[n]ot all of it" was solely related to appellant's sexual assault, although she never had suicidal ideations before appellant's sexual assault. (R. at 67–69, 86–87).

B. Appellant presented extensive evidence that he never emotionally or verbally abused [redacted], which the government rebutted and the military judge consistently emphasized that he would not consider as evidence in aggravation.

Appellant called [redacted] as a witness during the presentencing phase of his court-martial. (R. at 92–103). During direct examination, [redacted] identified appellant as her husband, confirmed that the couple had a two-year-old son together, and acknowledged that appellant was the primary source of income for the family. (R. at 92). [redacted] identified [redacted] as [redacted] and confirmed that she loved her. (R. at 93). [redacted] testified that appellant was not a sexual predator, and that he had never physically, emotionally, or verbally abused her. (R. at 94–95). [redacted] characterized appellant as a good father. (R. at 95).

During cross-examination, the government confronted [redacted] that she called her mother multiple times throughout her relationship with appellant to discuss appellant's emotional and verbal abuse. (R. at 99). [redacted] denied that appellant heaped emotional or verbal abuse upon her and instead characterized it as "two [] young, married couple who had a new baby arguing, stressed out, worried about life." (R. at 100). [redacted] acknowledged that she increased the number of calls she made to her mother after her son was born, but stated it was "simply from the stress." (R. at 100). During the phone calls with her mother, [redacted] admitted that she complained to her mother and that appellant called her a "drunk," but denied that he called her a "whore" or "slut." (R. at 100–01). Finally, [redacted] admitted that she

and appellant got into an argument around Thanksgiving 2021. (R. at 101). This happened in the early morning hours as [redacted] handed her son to her mother to take him inside while she talked to appellant outside of the house. (R. at 101–02). [redacted] denied that appellant screamed at her during this argument. (R. at 101–02).

After [redacted] testified, the military judge ultimately made the following comment:

> During the government's cross-examination of [redacted], facts were elicited regarding other uncharged acts that could potentially be construed as misconduct. I will consider that cross-examination to the extent that it is impeachment, but I will not consider . . . those acts as substantive evidence against [appellant].

(R. at 109).

Appellant called additional family members as witnesses during the presentencing phase of his court-martial. This included his (1) father-in-law, [redacted]; (2) his grandmother, [redacted]; and (3) his stepfather, [redacted], among others. (R. at 103–04, 109–110, 121–22). All three testified that they never witnessed appellant physically, emotionally, or verbally abuse [redacted]. (R. at 105, 112, 124). Further, [redacted] testified that appellant was "super sweet to my daughter and grandson all the time, far as [he] could tell." (R. at 105).

After appellant presented his presentencing case, the government called [redacted], [redacted] and [redacted]'s mother, as a rebuttal witness. (R. at 79, 84, 151–55). Prior to [redacted]'s rebuttal testimony, the government sought clarification from the military judge on

his earlier comment after [redacted]'s testimony. (R. at 149). Specifically, the government informed the military judge that they intended to rebut the testimony from several witnesses that appellant had never been verbally or emotionally abusive to his wife. (R. at 149). In response, the military judge reiterated that he would not construe the evidence as substantive evidence in aggravation but only use the evidence for impeachment purposes. (R. at 149–50). The government then asked if the military judge considered the evidence that appellant had never verbally or emotionally abused his wife as mitigation evidence. (R. at 150). The military judge responded with the following:

> Well, . . . to the extent that there was testimony, . . . I think that testimony stands. I think . . . there is also impeachment that has been offered. So, I think that . . . it can be considered substantively, and it also could be dismissed as having been impeached effectively.

(R. at 150). The government indicated that it understood the military judge's position, and appellant agreed that the military judge "addressed . . . the issues that [he] would have." (R. at 150). The military judge then once again reiterated his position that he would not consider improper evidence as aggravation. (R. at 150).

During [redacted]'s rebuttal testimony, appellant objected before the trial counsel could finish a question about any verbal or emotional abuse [redacted] may have noticed between appellant and [redacted]. (R. at 151). The government maintained that they could provide extrinsic evidence to further impeach [redacted]'s claim that appellant had

never emotionally or verbally abused her. (R. at 152). After identifying that Rule for Courts-Martial (R.C.M.) 1001(b)(4) "limits evidence in aggravation to circumstances directly relating to, or resulting from, the offense of which [appellant] has been found guilty[,]" the military judge stated that "we're straying a little bit far from that." (R. at 153). The military judge further identified a concern under Military Rule of Evidence (Mil. R. Evid.) 403, but ultimately permitted the government to proceed because he was "able to distinguish between limited use evidence and evidence without those limitations" and that he would only "consider it for impeachment" purposes. (R. at 153).

[redacted] then testified to two topics on rebuttal. First, [redacted] testified that [redacted] and appellant were screaming at each other during an argument they had around Thanksgiving. (R. at 153–54). Second, [redacted] stated that [redacted] called her during her relationship with appellant, and [redacted] confided in her mother that appellant called her a "whore," "slut," "a drunk," "a bad mom," and other "inappropriate things . . . that you don't say to your wife." (R. at 154).

After [redacted] testified in rebuttal, the government clarified that it did not seek [redacted]'s testimony to be in aggravation but as rebuttal to appellant's extensive evidence that he never verbally or emotionally abused his wife. (R. at 155). The military judge maintained that [redacted]'s testimony did not constitute aggravation

evidence but that he would "consider it for impeachment and to rebut any . . . evidence that the defense has presented in this case." (R. at 155–56).

Summary of the Argument

During presentencing proceedings, appellant presented the testimony of [redacted] and three additional witnesses that he never emotionally or verbally abused his wife and was "super sweet" to her. (R. at 94–95, 105, 112, 124). The military judge did not abuse his discretion in permitting the government to rebut this specific contention, which was also admissible as a prior inconsistent statement of [redacted] under Mil. R. Evid. 613(b). The military judge identified Mil. R. Evid. 403 concerns with the government's rebuttal evidence, and he never considered the rebuttal testimony as aggravation evidence under R.C.M. 1001(b)(4). Even if the military judge erred, any error did not materially prejudice appellant's substantial rights because the rebuttal testimony at issue was less than one page in the record, never referred to during sentencing arguments, and not considered beyond impeachment and rebuttal purposes.

Assignment of Error

WHETHER THE MILITARY JUDGE ERRED IN, OVER DEFENSE OBJECTION, ALLOWING EXTRINSIC IMPEACHMENT EVIDENCE ON COLLATERAL ISSUES DURING THE GOVERNMENT'S SENTENCING REBUTTAL.

Standard of Review

"A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion." *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citation omitted). "The abuse of discretion standard calls for more than a difference of opinion [as] [t]he challenged action must be arbitrary, fanciful, clearly unreasonable or clearly erroneous." *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (cleaned up).

"The Military Rules of Evidence are applicable to sentencing[,] . . . providing procedural safeguards to ensure the reliability of evidence admitted during sentencing." *United States v. Saferite*, 59 M.J. 270, 273 (C.A.A.F. 2004) (cleaned up). Like other evidence, sentencing evidence "is subject to the balancing test of Mil. R. Evid. 403." *Manns*, 54 M.J. at 166 (citations omitted). "A military judge enjoys wide discretion in applying Mil. R. Evid. 403[,]" and courts typically "exercise great restraint in reviewing a judge's decisions under Rule 403." *Id*. (cleaned up). A reviewing court "gives military judges less deference if they fail to

articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing." *Id*. (citation omitted).

Law and Argument

The government "may rebut matters presented by the defense" during presentencing proceedings. *See* Rule for Courts-Martial (R.C.M.) 1001(e). The function of rebuttal evidence is "to explain, repel, counteract or disprove the evidence introduced by the opposing party." *Saferite*, 59 M.J. at 274. A witness may be impeached in several ways, including by "specific contradiction." *United States v. Soifer*, 47 M.J. 425, 427 (C.A.A.F. 1998). "Impeachment by contradiction is a common law theory recognized by [the Court of Appeals for the Armed Forces] and other federal courts." *United States v. Montgomery*, 56 M.J. 660, 668 (Army Ct. Crim. App. 2001) (citations omitted). It "involves showing the tribunal the contrary of a witnesses' asserted fact, so as to raise an inference of a general defective trustworthiness." *United States v. Banker*, 15 M.J. 207, 210 (C.M.A. 1983). "Impeachment by contradiction . . . allows a party to introduce extrinsic evidence to contradict the testimony of a witness." *United States v. Langhorne*, 77 M.J. 547, 556 (A.F. Ct. Crim. App. 2017).

"The normal rule of impeachment by contradiction is that a witness may not be contradicted by extrinsic evidence on a collateral matter." *Banker*, 15 M.J. at 211. "However, an exception to that rule allows for the introduction of extrinsic

evidence to impeach by contradiction a collateral matter raised during *direct* examination." *Langhorne*, 77 M.J. at 556 (citations omitted and emphasis in original); *United States v. Solomon*, ARMY 20160456, 2019 CCA Lexis 149, at *19 (3 Apr. 2019) (Mem. Op.). Finally, [e]xtrinsic evidence of a witness' prior inconsistent statement is admissible . . . if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." Mil. R. Evid. 613(b).

If this court determines that the military judge abused his discretion in admitting the rebuttal evidence at issue, appellant's sentence may not be held incorrect unless the error materially prejudiced appellant's substantial rights. Article 59(a), UCMJ; 10 U.S.C. § 859(a) (2019). In evaluating the prejudice from an erroneous admission of evidence, the court weighs: "(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. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

A. The military judge did not abuse his discretion because [redacted]'s rebuttal testimony (1) refuted the extensive evidence appellant presented that he did not emotionally or verbally abuse [redacted]; (2) impeached [redacted] with prior inconsistent statements admissible under Mil. R. Evid. 613(b); and (3) was not substantially outweighed by a danger of unfair prejudice, confusing the issues, or wasting time.

1. [redacted]'s rebuttal testimony refuted the extensive evidence appellant presented that he did not emotionally or verbally abuse [redacted] and impeached [redacted] with prior inconsistent statements that were admissible under Mil. R. Evid. 613(b).

Evidentiary rules "are not applied in a factual vacuum" as the "context in which evidence is offered is often determinative of its admissibility." *Saferite*, 59 M.J. at 274. Here, [redacted] testified on direct examination that appellant never emotionally or verbally abused her. (R. at 94–95). Appellant also presented additional extensive evidence that he never emotionally or verbally abused [redacted] and that he was otherwise "super sweet" to her. (R. at 105, 112, 124). Thus, appellant's treatment of [redacted] was not at issue in this case until appellant affirmatively put it in issue by presenting the testimony of four witnesses as to it, which the military judge properly recognized as mitigation evidence that he could consider. (R. at 150).

Consequently, the government was entitled to appropriately rebut the impression that appellant created during his direct examinations of multiple presentencing witnesses that he never emotionally or verbally abused [redacted]. While the testimony of [redacted], [redacted], and [redacted] on this point could be dismissed since they were

not always around appellant and [redacted], [redacted]'s testimony on this point rested on her credibility. "During sentencing, as at every other moment of trial testimony, the credibility of a witness is an omnipresent issue." *Saferite*, 59 M.J. at 273. Since appellant injected the issue of not emotionally or verbally abusing [redacted] in his presentencing case-in-chief during [redacted]'s direct examination, the military judge was within his discretion to permit inquiry on it during rebuttal in accordance with *Langhorne* and *Solomon*. *See also Manns*, 54 M.J. at 165–167 (holding appellant's admissions he had used marijuana, committed adultery, used prostitutes, and was obsessed with sex rebutted his claim during his unsworn statement that he had "tried throughout [his] life . . . to stay within the laws and regulations of this country").

Appellant asserts that [redacted] "never testified that she told her mother that appellant called her" "slut" or "whore" and that "[t]he government failed to understand the difference between what appellant called [redacted] and what [redacted] told [redacted] appellant called her." (Appellant's Br. 14). Appellant did not cite the record in making this assertion, and the record contradicts appellant's claim. After establishing that [redacted] called her mother to discuss the "stress" of a new baby, the government specifically confronted [redacted] that [redacted] called her mother "because [appellant] would call [redacted] a whore[,]" which [redacted] denied. (R. at 100). The context of the additional follow-up questions where appellant had called [redacted] a

"slut" and "drunk" also indicate that [redacted] told her mother about these names, as shown by the question that [redacted] "call[ed] [her] mother and [told] her these things and how they were verbally abusive?" (R. at 100–01).

Accordingly, the government was additionally entitled to impeach [redacted] with the prior inconsistent statements she made to her mother pursuant to Mil. R. Evid. 613(b) to attack [redacted]'s credibility, as the government articulated on the record. (R. at 152). Military Rule of Evidence 613(b) explicitly permits the introduction of extrinsic evidence of a prior inconsistent statement to attack a witness's credibility. *See United States v. Harrow*, 65 M.J. 190, 199 (C.A.A.F. 2007) (identifying that "[t]he process of impeachment by prior inconsistent statement is a tool to attack the credibility . . . of a witness" and "[i]f the inconsistency is not admitted, or the witness equivocates, extrinsic evidence may be admitted, but only for impeachment"); *United States v. Trimper*, 28 M.J. 460, 467 (C.M.A. 1989) (recognizing that "if a witness makes a broad collateral assertion on direct examination that he has never engaged in a certain type of misconduct . . . he may be impeached by extrinsic evidence of the misconduct"); *United States v. Higa*, 55 F.3d 448, 452 (9th Cir. 1995) (recognizing Federal Rule of Evidence [Fed. R. Evid.] "613(b) contains no bar, beyond foundation requirements, to extrinsic evidence of prior inconsistent statements").

Here, the military judge correctly identified that [redacted]'s testimony on the

topic of appellant's emotional or verbal abuse was inconsistent with the information that she confided to her mother regarding the names that he called her and the manner in which he screamed at her during the Thanksgiving 2021 argument. *See also United States v. Rodko*, 34 M.J. 980, 983 (A.C.M.R. 1992) (holding that the military judge erred by refusing to permit appellant to present extrinsic evidence of a witness's prior inconsistent statement to law enforcement since it would have properly impeached the witness's credibility in accordance with Mil. R. Evid. 613(b)); *Higa*, 55 F.3d at 452–53 (holding there was no abuse of discretion in admitting extrinsic evidence of prior inconsistent statements since judges have "broad discretion over whether to admit extrinsic evidence to rebut a witness' direct testimony, particularly on a matter collateral to the case") (citation omitted).[3]

[3] Appellant notes that there is a "limited exception" to permit cross-examination about a collateral issue when the accused makes a broad general denial. (Appellant's Br. 11, n.3). In support of this proposition, appellant cited *United States v. Fleming*, 19 F.3d 1325, 1331 (10th Cir. 1994) and *Solomon*. However, *Fleming* discussed this proposition in the context of Fed. R. Evid. 608(b), as opposed to Mil. R. Evid. 613(b), and *Solomon* found that "the military judge abused his discretion in precluding defense counsel from questioning [the complaining witness] about [her] affair as a means of impeachment by contradiction." *Solomon*, 2019 CCA Lexis 149, at *20–21. *See also Higa*, 55 F.3d at 452 (observing that "[Fed. R. Evid.] 608(b) does not address whether extrinsic evidence is admissible under the theory of impeachment by contradiction") (citation omitted).

2. The probative value of [redacted]'s rebuttal testimony was not substantially outweighed by a danger of unfair prejudice, confusing the issues, or wasting time.

"Rebuttal evidence, like all other evidence, may be excluded pursuant to [Mil. R. Evid. 403] if its probative value is substantially outweighed by the danger of unfair prejudice." *Saferite*, 59 M.J. at 274 (citation omitted). Here, the military judge did identify a "concern" under Mil. R. Evid. 403, as he correctly identified that the parties were "straying" away from the matter at hand, which was appellant's sexual assault of a child. (R. at 153). Further, the military judge articulated that he could differentiate the "limited use evidence" of [redacted]'s impeachment and would "consider it for impeachment only." (R. at 153).

As a result, the military judge is entitled to a level of deference because he did identify a concern under Mil. R. Evid. 403 and acted accordingly. *See Manns*, 54 M.J. at 166 (noting that a judge will receive "less deference if they fail to articulate their balancing analysis on the record"). Besides, [redacted]'s substantive rebuttal testimony consisted of roughly one page in the record where she detailed how appellant and [redacted] were "screaming at each other" during the Thanksgiving argument and how [redacted] confided in [redacted] that appellant called her inappropriate names like "whore" and "slut." (R. at 154). This hardly constituted unfair prejudice, confusion of the issues, or wasted time, especially since the military judge reiterated that he would consider such evidence only for impeachment and to

rebut appellant's mitigating evidence that he never emotionally or verbally abused his wife. (R. at 155–56). Contrary to appellant's claim that the military judge "factored [appellant's alleged emotional and verbal abuse of [redacted]] into his sentencing" (Appellant's Br. 16), the military judge did the opposite and explicitly maintained throughout presentencing proceedings that he would not consider this evidence in aggravation pursuant to R.C.M. 1001(b)(4). (R. at 109, 149–50, 156).

Thus, Mil. R. Evid. 403 did not preclude [redacted]'s short rebuttal testimony impeaching [redacted] as to two points and rebutting four witnesses who testified that appellant never verbally abused [redacted]. *See, e.g., Manns*, 54 M.J. at 167 (observing that "[b]ecause this was a bench trial, the potential for unfair prejudice was substantially less than it would be in a trial with members" and noting "[w]e are satisfied that the military judge was able to sort through the evidence, weigh it, and give it appropriate weight"); *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999) (finding that the military judge did not abuse his discretion in permitting the government to introduce letters of reprimand for child neglect and spousal abuse to rebut "[t]he picture of concern for the welfare of his family" that appellant presented during sentencing).

3. The rebuttal testimony at issue in this case is distinguishable from the rebuttal testimony in *United States v. Henson*, 58 M.J. 529 (Army Ct. Crim. App. 2003), and this Court should re-examine *Henson* as one service court has criticized it and subsequently declined to follow it.

Appellant relies upon *Henson* for the proposition that "extraneous evidence

of misconduct is not a proper method to impeach reputation/opinion evidence, especially during sentencing." (Appellant's Br. 9). However, appellant's case is distinguishable from *Henson*, and the Coast Guard Court of Criminal Appeals criticized *Henson* before declining to follow it in *United States v. Bridges*, 65 M.J. 531 (C.G. Ct. Crim. App. 2007).

As an initial matter, [redacted]'s limited rebuttal testimony was not admitted to impeach appellant's general reputation or opinion evidence, as was the case during the presentencing proceedings in *Henson* where the judge permitted "the government to rebut opinion or reputation evidence of good character with extrinsic evidence of specific instances of misconduct by appellant." *Henson*, 58 M.J. at 531–32. Instead, the military judge in appellant's case admitted the testimony both to rebut appellant's specific and extensive testimony that he never emotionally or verbally abused his wife and as a prior inconsistent statement to impeach [redacted]'s credibility under Mil. R. Evid. 613(b). (R. at 152, 155–56). Thus, *Henson* is distinguishable since the government in this case did not rebut general opinion or reputation evidence of good military character with extrinsic evidence of specific instances of misconduct by appellant.

Further, this Court's continued reliance on *Henson* should be questioned in light of *Bridges*. Like *Henson*, the appellant in *Bridges* maintained that the military judge abused his discretion when he allowed the government to rebut

opinion evidence of good character with extrinsic evidence of specific instances of misconduct. *Bridges*, 65 M.J. at 533. To support his argument, the appellant in *Bridges* cited *United States v. Pruitt*, 46 M.J. 148, 151 (C.A.A.F. 1997) and *Henson*. *Bridges*, 65 M.J. at 533. However, the court found *Pruitt* "inapplicable" because it concerned evidence before findings, "and the prohibition of [Mil. R. Evid.] 404(b) do[es] not obviously apply after the accused has been convicted, since there is no longer a danger of conviction on the basis of prior misdeeds or any possibility of using bad character to show action in conformity therewith." *Id*. Next, the court found *Henson* "unpersuasive because it [leapt] from the pre-findings context of *Pruitt* to the presentencing context without explanation." *Id*.

Instead, the court turned to the Rules for Courts-Martial to reject appellant's position that "extrinsic evidence . . . should be *per se* inadmissible to rebut" good character opinion evidence. *Id*. at 534 (emphasis in original). First, R.C.M. 1001(d) permits the government to rebut "matters presented by the defense." *Id*. at 533 (cleaned up). Next, "[t]he plain language of R.C.M. 1001 does not support [a]ppellant's contention and [the court] . . . found no binding authority supporting it." *Id*.[4] Ultimately, the court found that the military judge did not error in

[4] If anything, *United States v. Hursey*, 55 M.J. 34 (C.A.A.F. 2001), seemed to support the *Bridges* court. *Hursey* "seemed to assume that extrinsic evidence was admissible to rebut opinion evidence of character in presentencing proceedings, but held the proffered evidence at issue not admissible because it did not survive [Mil. R. Evid.] 403 balancing." *Bridges*, 65 M.J. at 533, n.5.

admitting extrinsic evidence rebutting appellant's good character opinion evidence after examining the purpose of rebuttal evidence and weighing the relevant considerations identified in Mil. R. Evid. 403. *Id*. at 534.

B. Even if the military judge erred, any error did not materially prejudice appellant's substantial rights because the rebuttal testimony at issue was less than one page in the record, was not considered beyond impeachment and rebuttal purposes, and never referred to during sentencing arguments.

As an initial consideration, the materiality and quality of the disputed evidence (i.e., whether appellant emotionally or verbally abused his wife, and whether she was credible given her prior inconsistent statements on the subject was relatively low in the grand scheme of things since appellant pleaded guilty to sexually assaulting a minor child. Given this lens and the fact that less than one page in the record was spent on these topics in rebuttal, this Court can be confident that the low materiality and quality of the evidence at issue did not impact appellant's sentence.

This is especially true since the military judge specifically stated that he would only consider the evidence for impeachment and rebuttal purposes (to rebut appellant's extensive mitigation evidence that he never emotionally or verbally abused his wife), and not as evidence in aggravation. *See United States v. Hays*, 62 M.J. 158, 165 (C.A.A.F. 2005) (citations omitted) (observing that "if evidence is admitted for a limited purpose, [this Court should] presume a military judge will consider it only for that purpose"). Thus, the record demonstrates that the military

judge only sentenced appellant for the crime that he pleaded guilty to, which was sexual assault of a child. *See United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009) (citation omitted) (recognizing that absent clear evidence to the contrary, a military judge is presumed to know the law and apply it correctly).

Moreover, the government never relied on the rebuttal evidence in argument. *Cf. Saferite*, 59 M.J. at 274 (holding that the government's rebuttal evidence during presentencing proceedings should have been excluded under Mil. R. Evid. 403 and that "trial counsel focused his argument on the uncharged misconduct" but that any error was harmless).

In the end, appellant pleaded guilty to sexually assaulting [redacted], all while she was in the same bed as his wife. Worse yet, appellant's [redacted] was extremely vulnerable at the time of the assault given the amount of alcohol she consumed and the worry she held for her mother, who laid sick in the hospital with COVID-19. Appellant's offense was extremely opportunistic and aggravating since he apparently believed his drunk underage [redacted] was passed out, and he could have sex with her without anybody being the wiser. Appellant's offense left [redacted] with devastating consequences, and whether appellant was verbally abusive to his wife or whether she lacked credibility was immaterial to the detrimental impact appellant's actions and crime had upon [redacted]. The military judge fashioned a sentence appropriate to appellant's

crime, and the military judge was clear that he was only sentencing appellant for sexually assaulting a child and nothing else. While appellant may also have been verbally abusive to [redacted], it was his admitted sexual assault of a minor relative that dictated the sentence he received.

Conclusion

WHEREFORE, the government respectfully requests that this honorable court affirm the findings and sentence.

[redacted]

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CERTIFICATE OF SERVICE U.S. v. LALOR (20230136)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on this 14th day of March 2024.

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