UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KRIMBILL, BROOKHART, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist ROBERTSON H. MOORE
United States Army, Appellant

ARMY 20190764

Headquarters, U.S. Army Aviation Center of Excellence
Wendy P. Daknis, Military Judge
Lieutenant Colonel Larry A. Babin, Jr., Staff Judge Advocate

For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Paul T. Shirk, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Paul T. Shirk, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain R. Tristan C. De Vega, JA (on brief).

25 January 2021

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b (2016) [UCMJ].[2] The military judge sentenced appellant to a dishonorable discharge, confinement for

[1] Chief Judge (IMA) Krimbill and Judge Arguelles decided this case while on active duty.

[2] Appellant was acquitted of one specification of obstruction of justice, in violation of Article 134, UCMJ.

four years, and reduction to the grade of E-1. The convening authority took no action on the findings and sentence.

On appeal, appellant argues that the military judge committed prejudicial error by admitting hearsay statements, specifically the testimony of the victim's mother and the victim's prior recorded interview. We agree and provide relief in our decretal paragraph.[3]

BACKGROUND

While living in St. Thomas, Virgin Islands, appellant and Ms. (b) (6) were in an on-again-off-again relationship for five years which produced two children, including the alleged victim in this case, Miss (b) (6) Appellant ultimately married another woman in October of 2016, Ms. IM. The marriage further fractured the relationship between appellant and Ms. (b) (6)

In 2017, appellant entered active duty and moved to Fort Rucker, Alabama. In July of 2017, Miss (b) (6) who at the time was (b) (6) years-old, and her younger brother visited appellant and Ms. IM at their home at Fort Rucker. Although the children were only supposed to stay for the summer, after hurricanes destroyed their school in St. Thomas, appellant and Ms. (b) (6) agreed that it would be best for the children to stay with appellant for the entire 2017–18 school year.

In May of 2018, Ms. (b) (6) moved from St. Thomas to Atlanta, and shortly thereafter her children joined her in Georgia. On 20 June 2018, Miss (b) (6) told her mother that appellant forced her to masturbate his penis, which Ms. (b) (6) reported to law enforcement the next day. On 26 July 2018, Miss (b) (6) met with a forensic interviewer for the Forsyth County Child Advocacy Center. During the recorded interview, Miss (b) (6) described three separate sexual interactions with appellant; the first occurring at St. Thomas and the other two occurring at Fort Rucker. The incidents at Fort Rucker included appellant exposing himself to Miss (b) (6) directing her to masturbate him, and touching her genitals. Miss (b) (6) also told the interviewer

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[3] In his second assignment of error, appellant points out that although recorded, the entire government closing argument and a portion of the defense argument were not transcribed. While we question how the military judge, court reporter, and counsel all missed this omission in their certifications, we have remedied this error by ordering the government to produce a certified verbatim transcript. *United States v. Moore*, ARMY 20190764 (Army Ct. Crim. App. 31 Dec. 2020) (order). In light of our ruling below, we need not further address this issue or the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

that she wanted to tell Ms. IM (appellant's wife) but was afraid that appellant would "yell at her" or "beat" her. Miss (b) (6) also described two separate, prior instances when appellant beat her with a belt.

Miss (b) (6) trial testimony was generally consistent with her recorded interview, although there were some inconsistencies. As is described in greater detail below, the military judge allowed Ms. (b) (6) to testify about how Miss (b) (6) initially disclosed the alleged abuse to her and permitted the government to introduce Miss (b) (6) videotaped interview on rebuttal.

In its case-in-chief, the defense called Miss (b) (6) step-sister, Miss (b) (6). Miss (b) (6) testified that she overheard an exchange between Miss (b) (6) and her mother, in which Ms. (b) (6) asked "[d]id your dad touch you," to which Miss (b) (6) responded "[n]o, my dad would never do that. He's not that kind of person." Miss (b) (6) also testified that "[i]f [Miss (b) (6) mom told [Miss (b) (6)] to do something, even over the phone," Miss (b) (6) would do it. In addition, although Ms. IM testified that appellant has a distinctive birthmark on his penis and a bulge on the right side of his pelvis, Miss (b) (6) did not mention either of these features in her testimony. Ms. (b) (6) likewise testified that she did not recall ever seeing such distinguishing marks. Photographic evidence, however, confirmed the existence of both the birthmark and the bulge.

With respect to Ms. (b) (6) motive, appellant's sister testified that Ms. (b) (6) was angry when appellant decided to marry Ms. IM instead of her, and that Ms. (b) (6) retaliated by "put[ting] him on child support" and denying him access to the children. Finally, appellant testified that Ms. (b) (6) was aware and upset that he and Ms. IM were looking into obtaining custody of Miss (b) (6) and her brother.

LAW AND DISCUSSION

A. Miss (b) (6) disclosure to her mother, Ms. (b) (6)

Immediately after Miss (b) (6) testified, the government called Ms. (b) (6) to testify about Miss (b) (6) initial disclosure to her. The government initially sought to introduce both the testimony, and a video Ms. (b) (6) made of her daughter's outcry, as prior consistent statements under Military Rule of Evidence [Mil. R. Evid.] 801(d)(1)(B)(ii). Specifically, Mil. R. Evid. 801(d)(1)(B) provides that a statement that meets the following conditions is not hearsay:

> The declarant testifies and is subject to cross examination about a prior statement and the statement is consistent with the declarant's testimony and is offered: (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper motive in so

> testifying; or (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground.

After the military judge sustained the defense objection as to the video, the government changed its proposed basis for the admission of Miss (b) (6) outcry to her mother, claiming that the statements were admissible for the effect on the listener and not for the truth of the matter asserted. Agreeing with the government, the military judge overruled the defense hearsay and relevancy objections. She provided the following ruling:

> The circumstances of the report the court finds are relevant. *They do make a fact more or less likely.* Understanding how allegations came to light, when they came to light, how an investigation was done, when it was done, understanding the process, those are facts that the factfinder should be able to evaluate in determining whether or not the charged offenses occurred.
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> Statements that her father made her put her hand on his "thing" and move it up and down and white stuff came out is a very generalized statement that does go to show the effect on the listener. The probative value of that is medium to high, as the court indicated. *That is a very relevant factor in determining whether or not the event happened.* (emphasis added).

As such, the military judge allowed Ms. (b) (6) to testify that Miss (b) (6) "told me that her father made her put her hand on his thing," "move it up and down, and white stuff is coming out," and to demonstrate how Miss (b) (6) showed her the pumping motion she used.

We review a military judge's decision to admit evidence for abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013) (citation omitted) (internal quotation marks omitted). Findings of fact are "clearly erroneous" when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001). In *United States v. Swift*, ARMY 20101096, 2016 CCA LEXIS 26, *7 (16 Jan. 2016) (mem. op.), we recognized that an out-of-court statement admitted for its effect on the listener does not constitute hearsay if not offered for the truth of the matter asserted.

As an initial matter, although the timing of Miss (b) (6) disclosure was likely relevant, it would have been more appropriate for the military judge to allow Ms. (b) (6) to testify as to when her daughter made her initial disclosure, without getting into the particulars of the disclosure. *Cf. People v. Brown*, 883 P.2d 949, 957–58 (Cal. 1994) (citation omitted) ("Of course, only the fact that a complaint was made, and the circumstances surrounding its making, ordinarily are admissible; admission of evidence concerning details of the statements themselves, to prove the truth of the matter asserted, would violate the hearsay rule.").

More significantly, in ruling that Miss (b) (6) disclosure to her mother was "a very relevant factor in determining whether or not the event happened" and that it made "a fact more or less likely," the military judge clearly signaled that she was also considering Miss (b) (6) testimony as substantive evidence that the alleged sexual assaults occurred. As appellant points out in his brief, a statement offered solely for its effect on the listener simply cannot be a "very relevant factor" in determining the truth of an allegation. Accordingly, because she improperly considered hearsay statements for the truth of their matter, the military judge abused her discretion in admitting the substance of Miss (b) (6) disclosure to her mother. *Cf. United States v. Barnes*, 2016 CCA LEXIS 267, *16 (A.F. Ct. Crim. App. 27 Apr. 2016) (unpublished) (finding no abuse of discretion in the military judge's decision to admit a statement for the effect it had on the listener because the military judge made a clear record that he was not considering the statement "as substantive evidence, [but rather] merely to show what steps were taken by the testifying witness").

B. Miss (b) (6) forensic interview

In its rebuttal case, the government called the forensic interviewer for the purpose of laying the foundation to admit Miss (b) (6) prior videotaped interview. After an initial discussion about whether the video rebutted evidence of Miss (b) (6) motive to fabricate (Mil. R. Evid. 801(d)(1)(B)(i)), the military judge stated that she would have to view the video in order to rule on the defense hearsay objection.

In response to the military judge's question about whether the government intended to admit the whole video or just a portion of it, trial counsel responded that "the first 15 minutes of it is perfunctory meet and greet with the forensic examiner; we don't think that necessarily has to come in." At the military judge's prompting to "start [the video] at whatever it is that you're seeking to admit," trial counsel started the video at 10:12:27 and played it until 10:45:47.

From approximately 10:45:52 to 10:48:10 of the interview, Miss (b) (6) explains how she wanted to tell Ms. IM about the abuse but was afraid appellant would beat her, and then goes on to describe two prior occasions in which appellant hit her with a belt in response to her rude or disobedient behavior. Miss (b) (6) did not testify at

trial about appellant beating her or hitting her with a belt. Although the government first stated it was not going to offer the next three minutes after stopping the video at 10:45:47, following a discussion with defense counsel, the government continued to play the video until 10:46:17. Although not entirely clear, it appears from the record of trial that the government then continued to play the video until 10:55:28 (to include Miss (b) (6) claims about being beat with the belt), and finally concluded by playing the portion from 11:04:35 to 11:21:03 wherein Miss (b) (6) makes diagrams of the rooms where the alleged assaults occurred.[4]

After the video concluded, the military judge noted that during cross-examination the defense counsel highlighted "many instances" in which Miss (b) (6) made statements in her forensic interview that differed from her testimony in court.[5] The military judge correctly ruled that Miss (b) (6) inconsistent statements at trial "aren't rebutted with statements that are consistent with her in court testimony with respect to those areas. Those inconsistencies remain inconsistencies. She did not say those things in the forensic interview at Prosecution Exhibit 6 for identification." The military judge also rejected the government's contention that the interview rebutted any motive to fabricate, finding that such a "motive would have existed from the very beginning, even prior to this interview."

But, even though the government did not seek to admit the interview under Mil. R. Evid. 801(d)(1)(B)(ii), the military judge sua sponte made the following ruling:

> However, the bulk of what she said in the interview was wholly consistent with her in court testimony.
>
> What this video does is it does rehabilitate [Miss (b) (6)] credibility, because the cross-examination attacks her credibility on these inconsistencies. Inconsistency, upon inconsistency, upon inconsistency, indicating that [Miss

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[4] Although the government now claims trial counsel fast-forwarded through the portion of the video containing Miss (b) (6) descriptions of the beating and the belt, there is nothing in the actual record supporting this assertion.

[5] Based on our review of the record, it appears that although questioned about fourteen different inconsistencies between the interview and her trial testimony, Miss (b) (6) only actually admitted to six specific inconsistencies. *See United States v. White*, 33 M.J. 555, 558 (A.C.M.R. 1991) (quoting Saltzburg, Schinasi & Schlueter, *Military Rules of Evidence Manual* (2d ed. 1986) 382 ("[I]nformation contained in the questions is not evidence.")).

> [redacted] story has changed in court from what she said previously. And what the forensic interview at Prosecution Exhibit 6 shows is that her story has remained wholly consistent; that there are minor discrepancies, but the statement when you in whole and in context [sic] puts those inconsistencies into context and allows the court to evaluate the materiality of that.
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> Prosecution Exhibit 6 for identification does rehabilitate [Miss [redacted]] credibility under M.R.E. 806; and I'm going to get the number wrong if I look, but it appears to be 806 – I'm sorry, 801(d)(B)(ii) [sic]. And that is to rehabilitate her credibility as a witness when attacked on another ground, the other ground was all of the prior inconsistent statements.

The military judge then placed her Mil. R. Evid. 403 analysis on the record, concluding that the interview was "not an unfair bolstering, like other evidence might be. In this particular case the danger of unfair prejudice is low, because the court can put it in the proper context and evaluate it as it should be evaluated."

After further discussion, the military judge stated that she would exclude the portion at the end of the interview starting around 10:55 in which Miss [redacted] made diagrams "because it didn't seem particularly relevant." At this point, the military judge overruled the defense objection to the video but deferred making a ruling about its admissibility pending the forensic interviewer being able to lay a foundation. Following the forensic interviewer's testimony, trial counsel stated "Your honor, the government offers Prosecution Exhibit 6 for identification into evidence as Prosecution Exhibit 6." After confirming that the defense had no further objections, the military judge stated that "Prosecution Exhibit 6 is admitted." Likewise, just prior to closing the court, the military judge stated that she was taking "Prosecution Exhibits 4, 6 and 10 . . ." with her for deliberations.

As noted above, we review a military judge's decision to admit evidence for abuse of discretion. In *United States v. Finch*, 79 M.J. 389, 396 (C.A.A.F. 2020), the Court of Appeals for the Armed Forces [CAAF] held that in order for a prior statement to be admissible under Mil. R. Evid. 801(d)(1)(B)(ii): (1) the declarant must testify; (2) the declarant must be subject to cross-examination; (3) the statement must be consistent with the declarant's testimony; (4) the declarant's testimony must have been attacked on a ground other than recent fabrication or improper influence/motive; 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.

Although "charges of inconsistency or faulty memory" may constitute sufficient "other grounds" on which a witness's credibility is attacked, "only those portions of a witness's prior statement that are consistent with the witness's courtroom testimony may be deemed admissible at trial." *Id.* at 391, 395. Further explaining, the CAAF held that "the military judge must make a determination that each prior consistent statement is relevant to rehabilitate the witness on one of the grounds cited in M.R.E. 801(d)(1)," and clarified that:

> [T]he party moving to introduce a prior statement has a duty to identify those portions of the statement that are consistent with the witness's testimony, and then to demonstrate the relevancy link between the prior consistent statement and how it will rehabilitate the witness's credibility. This mandate does not require counsel to remove every single inconsistency in a statement, since "a prior consistent statement need not be identical in every detail to the declarant's . . . testimony at trial." Rather the moving party must omit the inconsistent parts of the statement that pertain to "facts of central importance to the trial."

Id. at 396, 398 (citations omitted).

Like the military judge in this case, the military judge in *Finch* admitted the prior videotaped statement of the child victim after she testified, which the CAAF held was error for the following reasons: (1) the military judge failed to put his findings of fact on the record; (2) the military judge failed to review the video before admitting it; and (3) the military judge admitted the entire video rather than limiting the evidence to those portions of the interview that actually contained prior consistent statements. *Id.* at 396–97.

First, with respect to her findings, as described above the military judge initially appeared to rule that Miss (b) (6) inconsistent statements at trial were *not* rebutted by what she said in the interview:

> And those are just some of the inconsistencies that the defense counsel highlighted. Those aren't rebutted with statements that are consistent with her in court testimony with respect to those areas. Those inconsistencies remain inconsistencies. She did not say those things in the forensic interview at Prosecution Exhibit 6 for identification.

The military judge then held that because the defense cross-examination attacked Miss (b) (6) credibility on "inconsistency, upon inconsistency, upon inconsistency,"[6] the forensic interview was admissible to show "that her story has remained wholly consistent . . . [and] the court can put [the interview] in the proper context and evaluate it as it should be evaluated." This broad-brush ruling fails to meet *Finch*'s requirement that the military judge put her findings on the record. *See id.* at 397–98 (declining to defer to the military judge's "perfunctory" Mil. R. Evid. 801 ruling that he would "give all evidence the weight it—that it deserves").

Second, while the military judge in this case reviewed at least part of the video before admitting it, she never made a record that she considered anything other than the entirety of the interview during her deliberations, nor did she make any ruling about the beating or belt comments.[7] We have no trouble, however, finding that Miss (b) (6) claims about being beat or hit with a belt were both irrelevant and highly prejudicial.[8]

In sum, even setting aside the belt evidence, the military judge nevertheless: (1) failed to make a determination as to which particular consistent statements on the video were relevant to rehabilitate Miss (b) (6) credibility;[9] (2) failed to sufficiently

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[6] As noted above, on cross-examination Miss (b) (6) only admitted to six inconsistencies between her trial testimony and the interview.

[7] As noted above, at one point the military judge indicated she would not consider anything on the video after 10:55, but then subsequently admitted the entire video. Because the portions of the video after 10:55 only depict Miss (b) (6) drawing diagrams and engaging in inconsequential discussion with the interviewer, whether or not the military judge viewed this portion of the video during her deliberations is immaterial to our inquiry.

[8] Given that Miss (b) (6) did not testify at trial about the beating or belt, her recorded statements to that effect were also not "consistent" with her trial testimony and served little purpose other than to bolster her testimony by painting appellant in a bad light. *See Finch*, 79 M.J. at 398 (noting a prior statement that is not consistent with trial testimony and tends to bolster the declarant's credibility is "flatly inadmissible under M.R.E. 801(d)(1)(B)").

[9] We recognize that in *United States v. Ayala*, ARMY 20170336, 2019 CCA LEXIS 301, *5–6 (Army Ct. Crim. App. 18 Jul. 2019) (summ. disp.), *rev. granted* 79 M.J. 428 (C.A.A.F. 2020), a panel of this court held that where a prior video recorded statement is admissible under both Mil. R. Evid. 801(d)(1)(B)(i) to rebut improper influence *and* (ii) to rehabilitate the witness's credibility after being attacked by

(continued . . .)

explain the link between how the interview statements she did consider were relevant to rehabilitate Miss (b) (6) credibility; and (3) failed to omit the inconsistent parts of Miss (b) (6) interview that pertained to facts of central importance to the trial. *See id.* at 394 ("[T]he military judge never came back on the record after watching the videotape to explain which aspects of it he would be considering for which evidentiary purposes.").

As such, the military judge abused her discretion in admitting the videotape of Miss (b) (6) prior interview under Mil. R. Evid. 801(d)(1)(B)(ii).

C. Prejudice

When a military judge abuses her discretion by erroneously admitting hearsay evidence, the government bears the burden to demonstrate that the error was harmless such that it did not have "a substantial influence on the findings." *Finch*, 79 M.J. at 398 (citations omitted). In determining whether the government has met its burden, we weigh the strength of the prosecution's case, the strength of the defense case, the materiality of the evidence in question, and the quality of the evidence. *Id.* at 398–99 (citations omitted).

First, the government's case was not particularly strong. Other than the testimony of Miss (b) (6), there was no corroborating forensic evidence, physical evidence, or eyewitness testimony about the alleged sexual assaults. Moreover, while we recognize that she is a child, when she was questioned by the government Miss (b) (6) had little difficulty remembering specific details of the events in question. Cross-examination, however, was a different matter. Miss (b) (6) purported not to remember a note she had written to Ms. IM even after being shown the actual note to refresh her recollection. Likewise, Miss (b) (6) testified that she did not recall some of her statements in the forensic interview, even after listening to the relevant portions. Indeed, at one point during the cross-examination Miss (b) (6) made a blanket statement that watching the video would not help her to remember anything she had said previously. Finally, other than Miss (b) (6) the only witness called by the government in its case-in-chief was Ms. (b) (6) whose testimony consisted primarily of inadmissible hearsay.

(. . . continued)
prior inconsistent statements, the military judge need not parse the video "statement-by-statement" to clarify which statements are admissible under which exception. Given that *Ayala* preceded the CAAF's decision in *Finch*, combined with the fact that the military judge's ruling in this case concerns only Mil. R. Evid. 801(d)(1)(B)(ii), *Ayala* is easily distinguishable.

Second, the defense made significant inroads in advancing its theory that Miss (b) (6) was fabricating the allegations in collaboration with her mother. For example, Miss (b) (6) testified that she overheard Miss (b) (6) tell her mother that appellant would never touch her inappropriately, and that Miss (b) (6) would do whatever her mother told her. Likewise, notwithstanding photographic evidence to the contrary, Miss (b) (6) was not able to describe significant distinguishing marks on appellant's penis and pelvic area, and her mother (who had two children with appellant) also claimed that she never saw such features. Finally, there was evidence that Ms. (b) (6) was upset with appellant for marrying Ms. IM, and was worried that appellant and his new wife might seek custody of Miss (b) (6) and her brother.

Third, even if we were to assume that the military judge either did not view Miss (b) (6) prejudicial belt statements or that she recognized their inadmissibility and did not consider them, the materiality and quality of the other bolstering statements during the interview raise significant concerns. Indeed, other than Ms. (b) (6) impermissible hearsay statements, the videotaped interview was the only evidence in the case corroborating Miss (b) (6) trial testimony. In other words, and unlike *Finch*, there was no properly admitted "independent evidence in the same vein" in this case to blunt the prejudicial impact of the improperly admitted evidence. *See* 79 M.J. at 400 (discussing a standalone government exhibit admitted without defense objection that contained evidence from which the military judge "could have drawn . . . the same information and the same inference that he could have drawn from the improperly admitted video").

Given the facts and circumstances of this case, we are not convinced that the military judge would have rendered the same verdict had she not admitted all of this impermissible bolstering evidence. Accordingly, the government has not met its burden to demonstrate that the evidence admitted through the military judge's erroneous rulings did not substantially influence the findings.

CONCLUSION

The findings of guilty and the sentence are SET ASIDE. A rehearing may be ordered by the same or different convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings and sentence set aside by this decision are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

Chief Judge (IMA) KRIMBILL and Senior Judge BROOKHART concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court