# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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

**UNITED STATES, Appellee**
**v.**
**Chief Warrant Officer Three RICHARD L. LIVINGSTON**
**United States Army, Appellant**

ARMY 20190587

Headquarters, Fort Bliss
Michael S. Devine, Military Judge
Colonel Sean T. McGarry, Staff Judge Advocate

For Appellant: Captain Joseph A. Seaton, Jr., JA; William E. Cassara, Esquire (on brief and reply brief).

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

8 March 2022

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MEMORANDUM OPINION

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***This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.***

BROOKHART, Senior Judge:

A military judge sitting alone as a general court-martial found appellant guilty, in accordance with his pleas, of one specification of willful disobedience of a superior commissioned officer, one specification of making a false official statement, one specification of conduct unbecoming of an officer and a gentleman; and one specification of obstructing justice, in violation of Articles 90, 107, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 907, 933, 934 [UCMJ]. Appellant also pleaded guilty to three specifications of assault consummated by a battery, each as a lesser-included offense of three charged

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[1] Judge Arguelles decided this case while on active duty.

specifications of assault upon a commissioned officer, in violation of Article 128, UCMJ. The military judge did not enter findings on appellant's plea to the Article 128, UCMJ, offenses because the government moved forward with the greater charged offense.

Contrary to his pleas, a panel of officers sitting as a general court-martial convicted appellant of one specification of rape, two specifications of sexual assault, one specification of aggravated sexual contact, two specifications of assault consummated by battery, six specifications of assault upon a commissioned officer (including the three to which appellant pleaded guilty to assault consummated by a battery), three specifications of conduct unbecoming an officer and a gentleman, and one specification of obstruction of justice, in violation of Articles 120, 128, 133, and 134, UCMJ. The military judge conditionally dismissed one specification of sexual assault which had been charged in the alternative. The panel sentenced appellant to a dismissal from the service, seventeen years confinement, forfeiture of all pay and allowances, and a reprimand. The convening authority approved the adjudged sentence.

Appellant raises eight assignments of error, only two of which merit discussion and only one relief.[2]

## BACKGROUND

Appellant, a helicopter pilot, was married to the first victim ("V1") in 2006. V1 was a commissioned officer and also a pilot. They had two children, both under the age of 10 years during the relevant timeframe. In August of 2014, at Fort Rucker, Alabama, appellant physically assaulted V1 during a verbal argument over information on appellant's cell phone which escalated to the point the two were engaged in wrestling type physical contact in their living room. At one point, V1 moved into the bedroom and took a firearm from the nightstand which she pointed at appellant, who was close behind. Appellant disarmed V1, threw her on the bed, where he then kneed her ribs and punched her in the chest multiple times. V1 did not report the assaults. She did seek medical treatment for her bruised ribs a few days after the assault but claimed she slipped and fell onto a bannister in the home.

Appellant and V1 divorced in October of 2014. However, they resumed their relationship sometime in 2016. In November of 2016, appellant and V1 had another argument which turned physical with appellant choking V1 until she blacked out

[2] We have given full and fair consideration to appellant's other assignments of error, to include matters submitted personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they lack merit and warrant neither discussion nor relief.

momentarily. After V1 regained consciousness, appellant insisted on having sex. V1 did not want to have sex but gave in out of fear that appellant would cause her further harm. V1 did not report these assaults.

Despite the assault in 2016, appellant and V1 remarried in 2017. However, V1 was deployed for much of the time they were married for the second time. In January of 2018, V1 returned from her deployment and appellant again physically assaulted her by pushing her to the ground and punching her in the face. Again, V1 did not seek to report the assault; however, in this instance, a member of her unit reported the abuse based on V1's visible injuries. An investigation ensued. During the investigation, V1 revealed that sometime shortly before they divorced in 2014 she learned appellant was having a relationship with another officer that continued while they were divorced. V1 also revealed that she had discovered nude photos and videos of the other officer, identified as ("V2"), on a memory stick in appellant's night stand. V1 suggested investigators contact V2 because appellant had admitted that he once assaulted V2.

Investigators located V2, who was an Army captain and also a pilot. V2 revealed that she met appellant in 2014 while they were both deployed to Honduras and that they had a dating and sexual relationship that lasted into 2016. Appellant was still married when his relationship with V2 began and they were both reprimanded by their command for their inappropriate relationship. Nonetheless, after the deployment, they both ended up stationed at Fort Bliss, Texas and the relationship continued at that installation, although appellant was now divorced. In September of 2015, appellant and V2 went to an Oktoberfest event on post. When they returned, both were intoxicated. They then had an argument which turned physical. Appellant physically assaulted V2 by punching and choking her by the neck. He also pinned her to the floor and rubbed his knuckles into her bare sternum until he drew blood. At one point, appellant spread V2's legs and punched her in the genitals stating words to the effect of "[y]ou probably liked that." Appellant then pulled off V2's pants and raped her before passing out.

V2 escaped the house and hid for a time by the trashcans alongside the house. Appellant had taken her cell phone and car keys so she did not believe she could go any further. Appellant eventually found her outside his house and brought her back in where he continued to physically assault her. During the assaults, appellant threatened to ruin V2's career by sending nude photos to the unit if she reported the assault. He also took a video of her balled up on the floor crying during the assault and threatened to send that as well. The next morning appellant indicated he had blacked out and claimed he did not recall harming V2.

After the encounter, V2 continued the dating and sexual relationship with appellant into 2016. During this timeframe, V2 sent appellant numerous nude photos of herself and made a sex tape with appellant in which she is seen putting his

hand on her throat while they engage in intercourse. In May of 2016, appellant again physically and sexually assaulted V2. In this instance, after taking her cell phone, appellant punched V2, and choked her until she lost consciousness. After she woke up, appellant penetrated her vagina with his penis while she was in fear. After appellant sexually assaulted V2, he returned her phone and she contacted police to escort her from appellant's home. No arrest was made and no charges were filed. V2 ended the relationship after the second violent encounter and eventually took an assignment at another post. She did not further report either assault and appellant reunited with V1.

During the investigation which followed, appellant disobeyed an order from his command regarding contacting V1. He also made false statements about his assaults on V1 and obstructed justice by encouraging V1 to do the same. Appellant was eventually charged with a litany of offenses including rape, sexual assault,[3] aggravated assault, assault consummated by a battery, false official statement, obstruction of justice, and conduct unbecoming an officer.

At trial, both V1 and V2 testified. Although other witnesses testified at trial on various ancillary matters, no witness other than the victims were present during any of the physical or sexual assaults. Therefore, their testimony constituted the primary evidence of appellant's guilt as to those offenses. During the defense case, appellant called several character type witnesses in his defense but elected not to testify himself. As such, the credibility of the victims was a dominant issue in the court-martial.

## LAW AND DISCUSSION

### *Self-Defense*

In his fourth assignment of error, appellant complains that the military judge erred by failing to instruct the panel on the defense of self-defense with regard to Specification 1 of Additional Charge II. That specification alleges that in August of 2014, appellant assaulted V1, a commissioned officer, by punching her in the chest with his fist. We agree with appellant that a self-defense instruction was required and will grant appropriate relief in our decretal paragraph.

We review allegations that a military judge failed to provide a mandatory instruction de novo. *See United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). The failure to give correct and complete instructions may constitute an error of constitutional magnitude. *Id.* (citing *United States v. Wolford*,

[3] The sexual assaults described by V1 were not charged. However, evidence of those incidents was admitted pursuant to Military Rule of Evidence 413.

62 M.J. 418, 420 (C.A.A.F. 2006)). When a properly preserved instructional error raises constitutional concerns, we test for prejudice using the "harmless beyond a reasonable doubt standard." *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007); *see also Dearing*, 63 M.J. at 484, n.25 (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)). An instructional error is harmless under this standard when the error did not contribute to the findings or sentence. *United States v. Kruetzer*, 61 M.J. 293, 298 (C.A.A.F. 2006) (quoting *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003)).

Self-Defense is a special defense whose elements are found in Rule for Courts-Martial (R.C.M.) 916. With respect to a charge of assault consummated by a battery, the elements of self-defense are that the accused: A) apprehended upon reasonable grounds that bodily harm was about to be inflicted wrongfully on the accused; and B) believed that the force that the accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm. R.C.M. 916(e)(3); *see also United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008). An accused who is an aggressor is generally not entitled to claim self-defense. R.C.M. 916(e)(4). However, self-defense is a fluid concept and the applicability of the defense may shift over the course of an affray. *See generally United States v. Smith*, 13 U.S.C.M.A. 471, 33 C.M.R. 3 (1963). For example, an aggressor may regain the right to self-defense by withdrawing and indicating a desire for peace. *See United States v. Behenna*, 71 M.J. 228, 233 (C.A.A.F. 2012) (citing *Lewis*, 65 M.J. at 88); *see also* R.C.M. 916(e)(4). Moreover, even without withdrawing, an accused who wrongfully engages in an assault or a mutual affray may still claim self-defense where the initial victim escalates the encounter by using deadly force. *See, e.g., United States v. Cardwell*, 15 M.J. 124, 126 (C.M.A. 1983) ("[I]f A strikes B a light blow with his fist and B retaliates with a knife thrust, A is entitled to use reasonable force in defending himself against such an attack, even though he was originally the aggressor."); *Dearing*, 63 M.J. at 483; *Lewis*, 65 M.J. at 85.[4] The right to self-defense terminates when the threat is removed.

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[4] "Generally speaking, a person is not entitled to use a dangerous weapon in self-defense where the attacking party is unarmed and commits a battery by means of his fists." *United States v. Richards*, 63 M.J. 622, 627 (Army Ct. Crim. App. 2006) (citing *United States v. Bransford*, 44 M.J. 736, 738 (Army Ct. Crim. App. 1996); *United States v. Bradford*, 29 M.J. 829, 832–33 (A.C.M.R. 1989). However, adding further nuance to such an exchange, R.C.M. 916(e)(2) allows a person who reasonably apprehends that "bodily harm" is about to be "wrongfully" inflicted upon them to offer, but not use, a means of force likely to produce death or grievous bodily harm to ward off such an attack. *Richards*, at 627–28 (stating appellant had right to offer knife to deter attackers using only fists).

In accordance with R.C.M. 920, the military judge must instruct on any special defense, such as self-defense, reasonably raised by the evidence. R.C.M. 920; *see also Dearing*, 63 M.J. at 482. A defense is reasonably raised when there is some evidence supporting each element of the defense to which members of the panel could attach credit if they so desired. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). As long as there is "some evidence" of a possible defense, regardless of whether it is "compelling or convincing beyond a reasonable doubt," the military judge must provide an instruction on the defense even if it was not requested by either party. *Wolford*, 62 M.J. at 422 (citing *United States v. Jackson*, 12 M.J. 163, 166–67 (C.M.A. 1981)); *see also United States v. Brooks*, 25 M.J. 175, 178 (C.A.A.F. 2003) (holding the military judge does not weigh the credibility of the defense evidence, but rather only determines whether the defense was reasonably raised); *United States v. Thomas*, 20 U.S.C.M.A. 249, 254, 43 C.M.R. 89, 94 (1971) (stating generally that the reasonableness of the evidence is irrelevant to the military judge's determination of whether an instruction should be given). Moreover, there is no requirement for the accused to testify in order to earn an instruction on a special defense, only that there be some evidence, circumstantial or direct supporting the defense. *United States v. Curtis*, 1 M.J. 297, 298, n.1 (C.M.A. 1976); *see also United States v. Rose*, 28 M.J. 132, 135 (C.M.A. 1989). However, an instruction is not required if the evidence is wholly incredible or not worthy of belief. *United States v. Brown*, 6 U.S.C.M.A. 237, 19 C.M.R. 363 (1955); *United States v. Franklin*, 4 M.J. 635 (A.F.C.M.R. 1977).

*Application of Self-Defense to the Charges at Issue*

The facts supporting Specification 1 of Additional Charge II derived from the testimony of the V1. She testified that she suspected appellant of having an affair and wanted to see his phone. Appellant would not allow V1 to see the phone and they argued. According to V1, the argument then turned physical:

> We wrestled around in the living room and then we ended up going to the bedroom and I just wanted him to leave me alone. He was still coming at me so I went to the nightstand and I grabbed a pistol in self-defense and pointed it at him. At that point he quickly took it away from me and pushed me on the bed. And at that point knee[d] me on the side and he punched me in the chest.

The trial counsel and V1 then had the following exchange:

> Trial Counsel: Do you know how many times he punched you in the chest?
>
> V1: Multiple times. . . .

> V1: Just wanted him to go away and leave me alone and I was scared of him.
>
> Trial Counsel: What about what he was doing made you scared of him?
>
> V1: He was very aggressive and yelling and just red and his eyes get this icey-blue color when he gets really mad.
>
> Trial Counsel: Did you fear that he was going to kill you at that time?
>
> V1: I felt that he was going to hurt me.

On cross-examination, V1 testified that appellant was about three feet away from her and approaching when she grabbed the gun. She also admitted she was not sure if the gun was loaded but insisted that she did not place her finger on the trigger when she pointed it at appellant. On redirect V1 testified that she and appellant were already in a hostile interaction at the time she grabbed the gun. Aside from some medical evidence as to V1's injuries, there was no further testimony or evidence about the April 2014 assault.

At the conclusion of the case on the merits, appellant's civilian defense counsel requested a self-defense defense instruction for the specification in question. The military judge declined to give an instruction stating, "I do not believe there was any testimony about the accused honestly believing the amount of force he used was necessary to protect himself." Defense counsel never followed up and when the final version of the instructions was submitted for their review, neither counsel lodged any objection or requested any further instructions. However, during closing argument, civilian defense counsel did briefly argue self-defense with regard to Specification 1 of Additional Charge II.

*Prong 1 of Self-Defense: Reasonable Apprehension of Harm*

In this case, we find that self-defense was raised by the evidence to the minimal standard required for instructions on special defenses. V1's testimony about events leading up to the charged assault was that they argued and then "wrestled around in the living room." The overall tenor of V1's testimony was that appellant was the aggressor in the conflict. As such, the limited facts available suggest that V1 was arguably within her rights to point the firearm at appellant to ward off further bodily harm as described by R.C.M. 916(e)(2). However, another possible interpretation of the facts was that V1 and appellant engaged in a mutual affray while wrestling around, an affray from which V1 successfully extracted herself and then escalated by brandishing a deadly weapon. Based on the rapidly

evolving situation as described by V1, we find there was at least some evidence from which the panel might have concluded that appellant reasonably apprehended that he was in danger of wrongful death or grievous bodily harm, thus potentially satisfying the first element of self-defense.

*Prong 2 of Self-Defense: Use of Force Necessary for Protection*

Although a much closer call, we further find that there was at least some circumstantial evidence supporting the second element of self-defense. V1 testified that she was quickly disarmed and then thrown on the bed before being repeatedly punched in the chest. There was no testimony as to how long the entire sequence took, nor was there any evidence of where the weapon went immediately after appellant disarmed V1. On these facts, a panel might have found appellant honestly believed he used only the amount of force necessary to disarm V1 and then ensure she could not retrieve the firearm. With regard to this element of self-defense, we are also concerned that the military judge seemed to have incorrectly believed appellant was required to testify. This is not the case. *See Rose*, 28 M.J. at 135.

We acknowledge that evidence supporting either element of self-defense is not particularly compelling nor convincing, however, that is not the standard. *See Wolford*, 62 M.J. at 422. The only question for the military judge was whether there was some evidence on which a panel could have found all elements of the defense if they were so inclined. *Brooks*, 25 M.J. at 178. In making that determination, military judges are expected to err on the side of providing the requested instruction. "Any doubt whether an instruction should be given should be resolved in favor of the accused." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981)).

Here, we find that the military judge erred in declining to instruct on self-defense. We also conclude that the error was not harmless beyond a reasonable doubt. Had the instruction been provided, the burden would have rested with the government to prove beyond a reasonable doubt the defense did not exist. R.C.M. 916. Given the limited evidence surrounding the assault in question, it is not entirely clear the government could have done so. As such, we cannot say with confidence that the instructional error did not contribute to appellant's conviction for the offense in question. The government notes that civilian defense counsel ultimately argued self-defense in her closing statement, however, we find that fact does not mitigate the error because the panel lacked any guidance from the court on how they might apply counsel's argument to the facts of the case, much less on whether they were even allowed to do so. *See Wolford*, 62 M.J. at 419 ("Failure to provide correct and complete instructions to the panel before deliberations begin may amount to a denial of due process.") (citing *United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979)).

Accordingly, finding error that was not harmless beyond a reasonable doubt, and in the interest of judicial economy, we set aside and dismiss Specification I of Additional Charge II. We will reassess appellant's sentence in our decretal paragraph.

*Prior Consistent Statements*

In his third assignment of error, appellant argues that the military judge abused his discretion by admitting V2's statements to a friend, CB, about the assault in September 2015 under Military Rule of Evidence (Mil. R. Evid.) 801(d)(1)(B). We disagree.

Prior to trial, appellant filed a motion under Mil. R. Evid. 412 seeking to admit a number nude photos and one sexually explicit video which V2 provided to, or consensually created with, appellant over the course of several months following the physical and sexual assault in September of 2015. Appellant also sought to admit evidence that V2 continued her sexual relationship with appellant after the events in September 2015. According to that motion, the photos and the video were constitutionally necessary to support the defense theory that V2 was not assaulted as alleged, was not in fear of appellant as she alleged, and that her accusations of physical and sexual assault were not credible. *See* Mil. R. Evid. 412. The military judge granted the motion in part, allowing appellant to introduce only one nude photo but allowing cross-examination on all of the photos, the video, and V2's on-going sexual relationship with appellant.

At an Article 39(a), UCMJ, session following V2's testimony, the government indicated they would soon call CB as a witness and she would testify that V2 told her about being physically and sexually assaulted by appellant. According to CB, the conversation with V2 took place sometime shortly after the assaults occurred in September of 2015. Civilian defense counsel objected, arguing that allowing CB to testify was contrary to the purpose of Mil. R. Evid. 801(d)(B)(ii) and went beyond the intent of that rule. Civilian defense counsel did not explain how the testimony was contrary to the purposes of the rule, nor did she make any argument with regard to her intent in pursing the photos, video, and sexual relationship in cross-examination. The government countered that civilian defense counsel attacked V2's credibility on other grounds when she questioned V2 extensively about the nude photos, the video and her continued sexual relationship with appellant. The government argued that the clear import of civilian defense counsel's line of questioning was that V2 did not act like a victim of a physical and sexual assault and therefore, she must not be a victim of sexual assault.

After hearing argument from the parties, the military judge ruled that appellant's line of questioning on V2's counter-intuitive behavior was an attack on her credibility on "another ground" as contemplated by Mil. R. Evid. 801(d)(1)(B)(ii). He further found that the statements made to CB were proper

rehabilitation under the rule. The military judge also conducted a Mil. R. Evid. 403 balancing test and found no basis to exclude CD's testimony.

When CB was called as a witness, defense counsel again objected, this time arguing that CB's testimony was not relevant to rehabilitate anything that was asked on cross-examination of V2. The military judge again overruled the objection finding CB's testimony was relevant as a "prior consistent statement with the declarant's testimony and is offered to rehabilitate the witness' testimony on other grounds." CB then testified that sometime shortly after the September assault and definitely prior to when she visited V2 in February of 2016, she spoke with V2 on the telephone and V2 told her appellant had physically and sexually assaulted her. CB did not offer any further detail on their conversation.

We review a military judge's decision to admit evidence under Mil. R. Evid. 801(d)(1)(B) for an abuse of discretion. *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020) (citing *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019)). Even where a military judge errs in admitting a prior consistent statement, we will not provide relief unless the error materially prejudiced a substantial right of appellant. *Id.* at 391.

In accordance with Mil. R. Evid. 801(d)(1)(B), a prior statement by a witness is not hearsay when the declarant testifies at trial and is subject to cross-examination about the statement, provided the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication, or an improper influence or motive. Mil. R. Evid. 801(d)(1)(B)(i). Further, such statements are not hearsay if offered to rehabilitate the declarant's testimony when it has been attacked on a ground not listed in Mil. R. Evid. 801(d)(1)(B)(i). Mil. R. Evid. 801(d)(1)(B)(ii); *Finch*, 79 M.J. at 396. The two prongs of Mil. R. Evid. 801(d)(1)(B) are mutually exclusive, therefore, a single statement may not be admitted under both sections. *United States v. Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021) ("[P]rior consistent statements may be eligible for admission under either (B)(i) or (B)(ii) but not both.") (citing *Finch*, 79 M.J. at 396).

There are three key points of analysis for a military judge assessing the admissibility of a prior statement that otherwise meets the rule's predicate requirements of testimony and cross-examination. First, the military judge must determine whether the witness has been attacked on one of the grounds listed in Mil. R. Evid. 801(d)(1)(B). *See Finch*, 79 M.J. at 396; *see also United States v. Campbell*, ARMY 20180107, 2020 CCA LEXIS 74 (Army Ct. Crim. App. 6 Mar. 2020) (mem. op.). Second, the judge must determine that the prior statement offered is relevant to rebut the attack made under either (B)(i) or (B)(ii). A prior statement is relevant under the rule if it is mostly consistent with the declarant's testimony and sufficiently specific to respond only to the grounds upon which the declarant was attacked. *See Finch*, 79 M.J. at 395–96 (citing *United States v Muhammad*, 512 F.

App'x 154, 166 (3rd Cir. 2013)); *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001). Third, with regard to (B)(i), the military judge must determine whether the consistent statement offered was in fact prior to whatever evidence constituted the attack on the witness. *Frost*, 79 M.J. at 110 (holding the prior statement must precede the motive to fabricate it is offered to rebut but need not precede all alleged motives to fabricate) (citing *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F.1998)). While (B)(ii) does not specifically require that a prior statement predate the predicate impeachment evidence, the timing of a statement offered under this section remains "highly relevant" and "will often be key to determining" its admissibility. *United States v. Finch*, 78 M.J. 781, 787 (Army Ct. Crim. App. 2019).

In this case, V2 testified and was subject to cross-examination. The record shows that appellant questioned V2 about her continued sexual relationship with appellant after the physical and sexual assaults in September 2015. Appellant also questioned V2 extensively about the sexually explicit digital media that she either provided appellant, or consented to him creating, after the September 2015 physical and sexual assaults. The military judge found that this line of questioning was an attack on V2's character on "another ground." However, we find that conclusion by the military judge was in error because the witness was not attacked on "other grounds" but rather on grounds specified in Mil. R. Evid. 801(d)(1)(B)(i).

We find that the clear import of civilian defense counsel's cross-examination, as proffered in appellant's pre-trial Mil. R. Evid. 412 motion and argued to the panel in closing, was that V2's counter-intuitive behaviors demonstrated the physical and sexual assaults she testified to on direct did not take place and thus her testimony was fabricated. As such, we find this line of questioning of V2 opened the door for the government to introduce prior consistent statements by V2. Because the testimony was properly admissible under Mil. R. Evid. 801(d)(1)(B)(i), any error by the military judge in applying the wrong section of the rule was harmless. *See United States v. Norwood*, 81 M.J. 12, 18 (C.A.A.F. 2021) ("[W]e affirm a military judge's ruling when 'the military judge reached the correct result, albeit for the wrong reason.'") (quoting *United States v Bess*, 80 M.J. 1, 12 (C.A.A.F. 2020).

Next, we find that V2 told CB about appellant's physical and sexual assault sometime shortly after they occurred. This would have been prior to the creation of the bulk of the sexually explicit digital media, as well as the on-going sexual relationship. Therefore, the military judge correctly concluded V2's statement to CB was prior to the conduct attacked on cross-examination as evidence of recent fabrication.

Finally, CB testified that V2 told her that appellant physically and sexually assaulted her in September of 2015. Although lacking detail, this testimony was consistent with V2's testimony on direct that she had been physically and sexually assaulted by appellant at that time. The prior consistent statement also directly

rebutted the implication that V2 had fabricated the September 2015 physical and sexual assaults at some point after they occurred. As such, we find the prior consistent statement offered through CB was relevant and fit squarely within the intent of Mil. R. Evid. 801(d)(1)(B)(i). Accordingly, we find the military judge did not abuse his discretion in admitting the statements of CB as a prior consistent statement.

## CONCLUSION

Specification 1 of Additional Charge II is SET ASIDE and DISMISSED. The remaining findings of guilty are AFFIRMED.

Having considered the entire record, we conclude we are able to reassess the sentence and do so in accordance with the principles articulated by our superior court in *United States v. Sales*, 22 M.J. 305, 307–08 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). We also find the totality of the *Winckelmann* factors to favor reassessment by this court. 73 M.J. at 14–15. Therefore, only so much of the sentence as provides for a dismissal, confinement for sixteen years and 11 months, a reprimand, and total forfeiture of all pay and allowances, are AFFIRMED.

Judge PENLAND and Judge ARGUELLES concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court