# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, HAYES, and PARKER
Appellate Military Judges

**UNITED STATES, Appellee**
**v.**
**Sergeant GEORGE E. ALSOBROOKS IV**
**United States Army, Appellant**

ARMY 20200598

Headquarters, U.S. Army Alaska
Joseph A. Keeler and Larry A. Babin, Jr., Military Judges
Lieutenant Colonel Meghan M. Poirier, Acting Staff Judge Advocate

For Appellant: Captain Sarah Bailey, JA (argued); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Christian E. DeLuke, JA; Captain David D. Hamstra, JA (on brief and reply brief).

For Appellee: Captain Lisa Limb, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Captain Andrew M. Hopkins, JA (on brief).

30 January 2023

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***This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.***

WALKER, Senior Judge:

Appellant asserts that the military judge erred in: (1) admitting the victim's statement to a male friend that appellant raped her as both an excited utterance and a prior consistent statement; and (2) by admitting the victim's description of the assault provided to a sexual assault nurse examiner.[1] We hold that the military judge

[1] We have also given full and fair consideration to the other assignment of error and the matters appellant personally submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). None of these issues warrant discussion or relief.

abused his discretion in admitting the victim's statement to a male friend as an excited utterance and in admitting the victim's statement about the sexual assault provided to the sexual assault nurse examiner, but find that these errors were harmless.

## BACKGROUND

Appellant's sexual assault of the victim unraveled his own romantic relationship with his girlfriend Ms. MS, as well as the victim's close bond with Ms. MS. By early 2019, the victim had developed a close friendship with Ms. MS to the point she frequently spent the night at Ms. MS's home. In April 2019, Ms. MS began dating appellant, at which point he was introduced to the victim. By June 2019, the three of them were all living in Ms. MS's home.

When the victim was not spending the night at Ms. MS's home, she was staying with SGT JK in his barracks room, a soldier with whom she had a non-exclusive romantic relationship. The victim and SGT JK began dating in January 2019. A few months later, SGT JK broke off the relationship so he could focus on his military career, but the two of them remained close friends that were emotionally and romantically involved with one another. While not in an exclusive dating relationship, SGT JK and the victim frequently spent time together. They also agreed that if either of them became interested in someone else then they would disclose that to one another. However, the victim admitted during her testimony that she was not always forthright with SGT JK when he inquired about her involvement with other men.

Over time, appellant and the victim's friendship grew closer. In the fall of 2019, appellant was gone for several weeks attending training. During that time, appellant and the victim began texting more frequently and they became good friends. Their communications would often focus on appellant's relationship with Ms. MS. The day before appellant was scheduled to return from training, the victim texted him and informed him that she had something important to tell him in person. The day after appellant returned from training, appellant texted the victim to confirm whether she was available to talk. When the victim indicated she was at Ms. MS's house, appellant arrived shortly thereafter at approximately 1400 as he was eager to find out what she needed to tell him. The victim then informed appellant that Ms. MS had been unfaithful while he was away at training. Enraged by this information, appellant turned red and ran out of the bedroom. When he returned to the bedroom, the victim disclosed more details about Ms. MS's activities while he was away. Appellant paced through the home and began punching walls. Upon returning to the bedroom, appellant demanded that the victim have sex with him as a means to exact revenge on Ms. MS and threatened to break everything in the home if she refused.

When the victim rejected appellant's demands to have sex, he forced himself on her. Appellant climbed into bed with the victim and tried touching and kissing her despite her continued protests and covering herself with a blanket. Appellant eventually physically overpowered the victim, removed her underwear, and penetrated her vagina with his penis. The victim placed her arms over her face so she didn't have to look at appellant while she was being sexually assaulted. Appellant then told the victim to put her arms down and that if she acted as if she liked it, then it would go faster. When it was over, appellant immediately apologized to the victim and offered to help her financially since she was unemployed at the time. After the victim showered, appellant pushed for more details about Ms. MS's activities while he was gone. Appellant left the home shortly thereafter, leaving the victim in disbelief that appellant had just assaulted her and confused about what to do about it. While the victim was alone in the home, a female friend of hers stopped by for a short time to pick up a car seat. The friend observed that the victim appeared shaken and solemn and appeared as if she had been crying. She also noticed that the victim's speech was sporadic and somewhat incoherent. The victim did not disclose that she had just been sexually assaulted.

After appellant left Ms. MS's home, he caught up with Ms. MS and the two of them drove around and discussed the state of their relationship. They returned to the home that evening. Upon their return, appellant, Ms. MS, and the victim went to the grocery store together and then returned to the house to make dinner. Ms. MS and the victim made dinner together during which time, Ms. MS expressed confusion about how appellant learned of her being unfaithful to him. The victim did not share with Ms. MS that she was the one who informed appellant about Ms. MS's activities while he was gone, because she did not want to reveal that she had broken Ms. MS's trust. The three of them ate dinner together after which the victim left and went to SGT JK's barracks room. At this point, several hours had passed since the sexual assault and SGT JK noticed that the victim was quiet and not her normal self when she arrived. Thinking that the victim likely had something she needed to discuss, he advised the victim that they would not go out as planned but could stay in his room and just talk. A few hours later, after encouragement from SGT JK, the victim became emotional, was physically shaking and sobbing and could barely get out the words when she disclosed to SGT JK that appellant had sexually assaulted her earlier that day. While hesitant at first, the following morning the victim went to the hospital because she "wanted to go make a report." At the emergency room, the victim reported the assault but did not identify appellant and refused to file a police report or submit to a sexual assault forensic examination.

Within forty-eight hours after the sexual assault, the victim reported the assault to law enforcement and underwent a sexual assault forensic examination. The evening after the incident, the victim disclosed the assault to Ms. MS. Furious, Ms. MS contacted appellant. Soon thereafter, appellant began calling and texting the victim. At that point, the victim went back to the hospital to report the sexual

assault. The victim testified at trial that she returned to the hospital because that was "what I needed to do was file a report and that's why [I] was there" and that she decided to complete a sexual assault examination because "I knew that was something that needed to be done, part of the process of a sexual assault" and so she could "get the process started." While at the hospital the second time, the victim submitted to a sexual assault forensic examination. During the examination, the victim described the details of the assault, which the nurse documented in a written report. The following day, the victim contacted civilian law enforcement and reported the sexual assault and thereafter provided a statement to Army Criminal Investigation Command (CID).

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of communicating a threat and one specification of sexual assault in violation of Articles 115 and 120, Uniform Code of Military Justice, 10 U.S.C. §§915, 920 (2018) [UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement for sixty-six months, reduction to the grade of E-1, forfeiture of all pay and allowances, and a reprimand.

## LAW AND DISCUSSION

### A. *The Victim's Disclosure to SGT JK Did Not Qualify As An Excited Utterance*

Appellant asserts that the military judge abused his discretion in admitting the victim's disclosure of the sexual assault to SGT JK as an excited utterance. We agree but find that appellant did not suffer any prejudice because the statement was properly admitted as a prior consistent statement.

"We review a 'military judge's ruling admitting or excluding an excited utterance [for] an abuse of discretion.'" *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2021) (quoting *United States v. Feltham*, 58 M.J. 470, 474-75 (C.A.A.F. 2003)). A military judge abuses his discretion if his findings of fact are clearly erroneous or if the military judge erroneously applies the law. *Id.*

Military Rule of Evidence [Mil. R. Evid.] 803(2) provides that a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused[,]" is not hearsay. Our superior court noted, "[t]he implicit premise [of the exception] is that a person who reacts 'to a startling event or condition' while 'under the stress of excitement caused' thereby will speak truthfully because of a lack of opportunity to fabricate." *Henry*, 81 M.J. at 96 (cleaned up). For a statement to qualify as an excited utterance: (1) the event prompting the statement must be startling; (2) the declarant makes the statement while under the stress of the excitement caused by the event; and, (3) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F 2003)

(cleaned up). In assessing the last two requirements, courts look to "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject-matter of the statement." *Donaldson*, 58 M.J. at 483 (cleaned up). It is the "totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance." *Henry*, 81 M.J. at 91 (cleaned up).

There is no dispute that the sexual assault was a startling event for the victim. Therefore, we will focus our analysis on the other two *Donaldson* factors. We find that the military judge did not abuse his discretion in finding that the victim's disclosure to SGT JK was made while under the stress of the excitement caused by the sexual assault. The victim testified that in the hours after the sexual assault she felt disgusted, violated, lost, and confused about what happened and conflicted about whether to report the sexual assault. She testified that she just "wanted to act normal and carry on like nothing happened." Given the victim's state of mind to act normal until she could process the trauma of what had occurred, it was not surprising that she did not disclose the sexual assault to her girlfriend when she stopped by the house soon after the assault to pick up a car seat. The girlfriend observed, however, that the victim looked defeated, her eyes were puffy as if she had been crying, she seemed shaken, and her speech was sporadic and incoherent.

The victim also testified that while driving to the grocery store with appellant and Ms. MS, her mind was focused on the sexual assault and she was "trying to figure out what to do." When the victim finally arrived at SGT JK's, several hours after the sexual assault, he noticed that she was "super quiet," "very upset," "crying" and not her normal energetic and happy self. It was immediately obvious to SGT JK that the victim was under stress and had something on her mind that she needed to discuss with him. When the victim finally disclosed to SGT JK that the appellant had sexually assaulted her, she was "shaking," "sobbing," and "could barely get her words out."

We acknowledge that, "[t]here is a difference between the stress or excitement caused by the original event and that caused by the trauma of having to retell what happened after initially calming down" and "[o]nly the former is admissible as an excited utterance." *United States v. Green*, 50 M.J. 835, 840 (Army Ct. Crim. App. 1999). In this case, however, it was clear that the victim was visibly upset and under stress when she arrived at SGT JK's and during the few hours she remained silent before disclosing the assault to SGT JK. This evidence supported the military judge's conclusion that the victim was still under the stress of excitement of the sexual assault prior to exhibiting the trauma of recounting the assault to SGT JK. Additionally, her extremely emotional demeanor as she was attempting to describe the event seemed indicative to the military judge that she was reacting to the

extreme stress of the event itself, not the retelling of it. Given the testimony of both the victim and SGT JK, the military judge's finding that the victim was still under the stress of the excitement of the sexual assault was well within his discretion, under the totality of the circumstances analysis that is required.

We do hold, however, that the military judge abused his discretion in determining that the victim's statement to SGT JK was spontaneous or impulsive. In fact, the military judge failed to even address this *Donaldson* factor in his ruling. Given the military judge's failure to place this analysis on the record, less deference will be accorded to him. *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014). The evidence elicited at trial demonstrated that the victim's statement was the product of reflection and thoughtful deliberation as opposed to being spontaneous and impulsive. First, we note that several hours passed between the sexual assault and the victim's disclosure to SGT JK. As appellant aptly asserts, "[a]s a general proposition, where a statement relating to a startling event does not immediately follow that event, there is a strong presumption against admissibility under M.R.E. 803(2)." *Donaldson*, 58 M.J. at 484 (citing *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990)). Indeed, the lapse of time coupled with the totality of the circumstances leads to the determination that the victim's statement was not spontaneous.

During the several hours that passed between the assault and the victim's disclosure to SGT JK, the victim met with a girlfriend to exchange a car seat, went grocery shopping with Ms. MS and appellant, and prepared dinner alone with Ms. MS. The facts demonstrate that the victim had multiple opportunities to disclose the sexual assault prior to her disclosure to SGT JK, and consciously chose not to do so upon deliberate reflection. Furthermore, the victim testified that she spent a significant amount of time reflecting on the assault and deliberating over whether to report it. She testified that there were many moments at various points in time prior to her disclosure to SGT JK in which she internally struggled with the trauma of the assault, whether she should report the sexual assault, and the impact her reporting would have on various relationships in her life. When she arrived at SGT JK's barracks, she did not disclose to him immediately. Rather, she remained quiet and introspective on whether she should just say nothing. SGT JK testified that he informed the victim that she could talk to him about anything and attempted to make her comfortable since she appeared distraught. It was only after a few hours of reflection and deliberation that the victim finally disclosed to SGT JK that appellant assaulted her.

Based upon the evidence elicited at trial, we find that the victim's disclosure to SGT JK was neither spontaneous nor impulsive and thereby fails the third *Donaldson* factor for qualifying as an excited utterance. Thus, the military judge erred in admitting the victim's statement to SGT JK that appellant had raped her as an excited utterance. Since we conclude that the victim's statement to SGT JK was

admissible on another basis, we will not evaluate whether this error prejudiced appellant.

*B. The Victim's Disclosure to SGT JK Qualified As A Prior Consistent Statement*

Appellant also asserts that the military judge abused his discretion in admitting the victim's disclosure of the sexual assault to SGT JK as a prior consistent statement because he misapplied the law. While we agree with appellant that the military judge erred as to the basis for the victim's statement qualifying as a prior consistent statement, we nonetheless find that the statement qualified as a prior consistent statement.

We review a military judge's decision to admit evidence under an abuse of discretion standard. *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020) (quoting *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (cleaned up)).

Generally, an out of court statement offered for its truth is inadmissible as hearsay. Mil. R. Evid. 802. Military Rule of Evidence 801(d)(1)(B) provides, however, that a prior consistent statement is not hearsay if: (1) the declarant testifies and is subject to cross-examination about the prior statement; (2) the prior statement is consistent with the declarant's testimony; and (3) the statement is either (i) offered to rebut a charge of recent fabrication or recent improper influence or motive or (ii) is offered to rehabilitate the declarant's credibility when it has been attacked on another ground. *Finch*, 70 M.J. at 394-95. In the case where the prior statement is offered to rebut a recent motive to fabricate or improper influence, then it "must precede any motive to fabricate or improper influence that it is offered to rebut. . . ." *Frost*, 79 M.J. at 110. In cases where there are multiple motives to fabricate or improper influences, the prior statement need only precede the one it is offered to rebut. *Id.*

Our superior court has held that the phrase "when attacked on another ground" refers to grounds other than recent fabrication or an improper influence or motive for testifying as specified in the preceding subpart, Mil. R. Evid. 801(d)(1)(B)(i). *Finch*, 70 M.J. at 395. Although the rule itself does not specify what types of attacks a prior consistent statement may be used to rebut under this provision, the Drafter's Analysis lists "charges of inconsistency or faulty memory" as two examples. *Id.* (citing Mil. R. Evid. 801(d)(1)(B) analysis at A22-61 (2016)). Further, our superior court also held that the prior consistent statement used to rehabilitate a witness's credibility attacked on "another ground" must "actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." *Finch*, 79 M.J. at 396.

The victim's disclosure to SGT JK was properly admitted as a prior consistent statement, although the military judge erred as to the grounds upon which the

statement qualified as a prior consistent statement. The victim's statement that appellant had raped her satisfied the first two threshold requirements for admissibility as a prior consistent statement in that the victim testified at trial and was subject to cross-examination and her statement to SGT JK was consistent with her testimony at trial. Our analysis thus focuses on whether the victim's statement either: (1) properly rebutted a charge of recent fabrication or recent improper influence; or (2) rehabilitated her credibility after she was "attacked on another ground." Mil. R. Evid. 801(d)(1)(B)(i),(ii). Trial defense counsel asked the victim several questions about SGT JK's involvement in her decision to go report the sexual assault both at the hospital and to law enforcement. These questions suggested that SGT JK pressured the victim to report the sexual assault. In his ruling, the military judge properly recognized that the defense cross-examined the victim about her hesitancy to report the sexual assault to law enforcement and SGT JK's role and influence in convincing the victim to do so. Yet, the military judge ruled that the victim's statement was admissible because her credibility had been "attacked on another ground" and thereby analyzed the statement's admissibility under the wrong prong of Mil. R. Evid. 801(d)(1)(B). The prior statement that she was assaulted was inadmissible under Mil. R. Evid. 801(d)(1)(B)(ii) because the military judge's stated "other ground" of attack was her lack of memory as to specific details of the assault, and her prior statement to SGT JK that she was assaulted is not relevant to rehabilitate her credibility on that basis.

Given the additional thrust of the victim's cross-examination in which the defense attempted to have the factfinder infer that the allegation was false and resulted from pressure by SGT JK, the military judge should have analyzed the admissibility of the statement as to whether it rebutted a charge of recent fabrication or recent improper influence. We find that the victim's statement to SGT JK was admissible under this prong of Mil. R. Evid. 801(d)(1)(B) given the defense's cross-examination of the victim and given that her statement to SGT JK that she was assaulted pre-dated his alleged improper influence to make a report. *Finch*, 79 M.J. at 395-96. Thus, while we find that the military judge erred as to the basis for which the victim's statement could be admitted as a prior consistent statement, we affirm the military judge's ruling because the statement was admissible as a prior consistent statement to rebut a charge of improper influence by SGT JK. *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.'") (cleaned up).

*C. The Victim's Description of the Sexual Assault to a Sexual Assault Nurse Examiner Was Improperly Admitted Under the Medical Exception to Hearsay*

At trial, the government presented the testimony of a sexual assault nurse examiner (SANE) who performed a sexual assault forensic examination on the victim. The SANE testified that after ensuring the victim was medically stable to

participate in the examination, she obtained a medical history from the victim for purposes of guiding the physical examination. The medical history included the victim providing details about the sexual assault which the SANE documented in a written report. Over defense objection, the military judge admitted the portion of the SANE's report that documented the victim's description of the sexual assault to the SANE during the sexual assault forensic examination. We agree with appellant that the military judge erred in admitting the victim's description of the sexual assault to the SANE because it did not satisfy the requirements for admission under the medical exception to hearsay in accordance with Mil R. Evid. 803(4).

"We review a military judge's decision to admit evidence for an abuse of discretion." *United States v. Cucuzzella*, 66 M.J. 57, 59 (C.A.A.F. 2008) (citation omitted). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *Donaldson*, 58 M.J. at 482 (citing *United States v. Humphreys*, 57 M.J. 83, 90 (C.A.A.F. 2002)).

Hearsay statements made to medical personnel for the purposes of medical diagnosis or treatment are admissible even though the declarant is available to testify. Mil. R. Evid. 803(4). Statements offered under Mil. R. Evid. 803(4) must be "made for the purposes of medical diagnosis or treatment" and "the patient must make the statement with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought." *Donaldson*, 58 M.J. at 485 (cleaned up). Whether a statement falls within this hearsay exception depends upon the subjective state of mind or motive of the patient coupled with the patient's expectation that providing truthful information will assist the patient in being healed. *Id.* (internal quotation marks and citations omitted). "A military judge's determination that a patient made a statement for the purpose of medical diagnosis or treatment out of an expectation of receiving medical benefit is a question of fact that we review for clear error." *Donaldson*, 58 M.J. at 485.

In this case, the military judge's factual finding that both the victim and the SANE testified that the victim "clearly went [to the hospital] for medical purposes, for medical treatment, and then, subsequent to that was the forensic exam" was clearly erroneous and not supported by the evidence at trial. The victim testified that she went to the hospital because she wanted to make a report and create a record that she had informed law enforcement about the sexual assault. She stated on the record that she initially went to the hospital because she "wanted to go make a report." At the emergency room, the victim reported the assault but did not identify appellant and refused to file a police report or submit to a sexual assault forensic examination. The victim testified that she returned to the hospital the following day because that was "what I needed to do was file a report and that's why I was there" and that she decided to complete a sexual assault examination because "I knew that was something that needed to be done, part of the process of a sexual assault" and so she could "get the process started." If the victim had wanted to obtain the benefit of

medical treatment, she would likely have sought that treatment the first time she visited the hospital, but she did not avail herself of a medical evaluation on either visit to the hospital. Rather, the victim's own testimony was that she went to the hospital and submitted to a forensic examination for purposes of reporting the sexual assault and starting the process.

The SANE testified that there is both a medical and a forensic aspect to the sexual assault forensic examination. While the SANE explained that her primary role in the examination is medical, it is not the SANE's state of mind that is at issue in evaluating whether the victim's statements satisfied the medical exception to hearsay. When asked about the victim's motive for agreeing to the examination, the SANE refused to speculate as to the victim's motive for wanting a forensic examination and stated the motive "would be patient-dependent." In fact, when pressed by the military judge as to the primary purpose of the victim's examination, the SANE replied "[w]ell, you'd have to ask her. I have patients choose to do a medical forensic exam for a variety of reasons . . . so, I can really only speak to what my role is in that." In determining whether statements to a medical provider are admissible under Mil. R. Evid. 803(4), the declarant's subjective state of mind is critical. Here, as appellant points out, the victim's motivation in requesting the forensic examination was for purposes of creating an official record of her allegation and preservation of evidence. Neither the testimony of the victim nor the SANE supported the military judge's finding that the victim's motive for submitting to the forensic examination was for purposes of medical diagnosis or treatment and thus, was clearly erroneous. Therefore, we find that the military judge abused his discretion in admitting the victim's description of the sexual assault provided to the SANE.

*D. Appellant Was Not Prejudiced*

When this court concludes that a military judge erroneously admitted evidence, then we must determine whether the government has satisfied its burden in demonstrating that the error was harmless. *Finch*, 79 M.J. at 398 (citations omitted). Nonconstitutional evidentiary errors, such as in this case, require that we evaluate "whether the error had a substantial influence on the findings." *Id.* (cleaned up). In analyzing whether the appellant suffered prejudice, we must weigh: "(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. Kohlbeck*, 78 M.J. 326, 334 (C.A.A.F. 2019) (cleaned up).

We hold that appellant was not prejudiced by the erroneous admission of the victim's statement to the SANE. The government's case was strong given the victim's testimony of the sexual assault. The victim provided credible and detailed testimony about the sexual assault. She also provided a reasonable explanation for not disclosing the assault to her best friend Ms. MS in the immediate aftermath,

because she knew the disclosure would reveal the victim's betrayal of her best friend by informing appellant that Ms. MS had cheated on him. A friend of the victim who stopped by the house only a few hours after the assault described her as looking "defeated" and her eyes appeared puffy as if she had been crying and her speech was initially incoherent. The testimony of SGT JK about the victim's emotional state when he saw her only hours after the assault, along with the victim's disclosure about the assault, further strengthened the government's case. The defense's cross-examination of the victim highlighted the defense theory that the victim lied about a consensual sexual encounter in order to protect her relationship with SGT JK. However, both the victim and SGT JK testified that they were not in an exclusive relationship at the time of the sexual assault and the victim testified that she was never romantically interested in appellant. The victim's description of the sexual assault to the SANE was not of central importance to the government case, but merely affirmed the testimony the victim had already provided. We also find that the one-page summary of the assault provided to the SANE was consistent with the victim's testimony and was not relied upon to provide details that were not otherwise provided by the victim herself at trial. Given the overall strength of the government's case and the lack of materiality of the victim's statement to the SANE, we find that the erroneous admission of the excerpt of the SANE report was harmless.

## CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Judge HAYES and Judge PARKER concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court