

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

W.L. RITTER

E.S. WHITE

J.F. FELTHAM

UNITED STATES

v.

**Jason J. ALMLOF
Midshipman First Class (MIDN 1/C), U.S. Navy**

NMCCA 200600198

Decided 9 July 2007

Sentence adjudged 15 July 2005. Military Judge: S.B. Jack.
Staff Judge Advocate's Recommendation: CAPT Michael A. Waters,
JAGC, USN. Review pursuant to Article 66(c), UCMJ, of General
Court-Martial convened by Superintendent, U.S. Naval Academy,
Annapolis, MD.

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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Judge:

Contrary to his pleas, a general court-martial convicted the appellant of indecent assault, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, and sentenced him to confinement for 1 year and dismissal. The convening authority approved the sentence as adjudged.

On appeal, the appellant assigns four errors: (1) that the military judge abused his discretion in various ways in instructing the members on findings; (2) that the evidence was factually insufficient; (3) that his sentence was unduly severe; and (4) that he has been, and is being, denied equal protection of the laws because the trial judge, and the judges of this court,

do not serve a fixed term, as do the judges of the United States Coast Guard and United States Army. We specified the additional question of whether the military judge erred to the substantial prejudice of the appellant when he admitted into evidence prior consistent statements by the victim under MILITARY RULE OF EVIDENCE 801(d)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed).

We have carefully considered the record of trial, the appellant's four assignments of error, the Government's answer, the appellant's reply, the appellant's supplemental brief on the assigned question, the Government's supplemental answer, and the appellant's supplemental reply. We conclude first that the Court may act on this appeal without violating the appellant's right to equal protection of the laws. We further conclude the military judge erred to the substantial prejudice of the appellant when he admitted into evidence prior consistent statements by the victim under MIL. R. EVID. 801(d)(1)(B). As a result, we set aside the findings and sentence. Arts. 59(a) and 66(c), UCMJ. Our resolution of this second issue makes it unnecessary to decide the remaining assignments of error.¹

I. Factual Background

The appellant was charged with indecently assaulting Midshipman Third Class (MIDN 3/C) [RN] on divers occasions. The Government attempted to prove the appellant twice rubbed MIDN 3/C RN's penis during the course of the early morning hours of Saturday, 12 March 2005.²

Spring break 2005 at the Naval Academy began at the end of the day on Friday, 11 March. That evening, MIDN 3/C RN and two classmates, MIDN 3/C John Modrak and MIDN 3/C Ryan Bohning, joined the appellant at his off-base apartment. Also at the apartment were the appellant's roommate and three other first class midshipmen. All eight spent the night at the apartment. The three third class midshipmen were traveling the next day from the nearby Baltimore-Washington International Airport, and the appellant had agreed to take them to the airport. The appellant and the underclassmen all drank alcohol to varying degrees. MIDN 3/C Bohning went to sleep in the appellant's bed shortly after midnight. Around 0319 Saturday morning, MIDN 3/C RN vomited, after drinking a significant amount of alcohol, and then also fell asleep in the appellant's bed. Later, the appellant also went to sleep in his bed. MIDN 3/C Modrak slept on the living room couch.

MIDN 3/C RN testified that sometime during the night he dreamed he was being masturbated, then awoke briefly just as he

¹ On 22 August 2006, the appellant moved for oral argument. That motion is hereby denied.

² The charge additionally alleged the appellant had also rubbed MIDN 3/C RN's buttocks and anus. The evidence at trial limited that touching to the second of the two alleged touchings.

ejaculated. He did not open his eyes, and quickly fell back to sleep. Around 0600, the appellant and MIDN 3/C Bohning got up and went to the airport. MIDN 3/C RN remained in bed. After returning from the airport, the appellant got back in his bed. Later, MIDN 3/C RN testified, he felt someone rubbing his penis. He did not open his eyes, but rolled over onto his side, facing the edge of the bed. He testified he then felt someone touching his anus and buttocks. Just as he was about to respond by striking out at the person touching him, the alarm went off. When the alarm went off, MIDN 3/C RN testified, he sat up, swung his legs out of the bed, looked back over his shoulder, and saw the appellant getting up from the other side of the bed.

Subsequently, MIDN 3/C RN got dressed, and the appellant drove him to the airport. As they arrived at the airport, MIDN 3/C RN confronted the appellant about the alleged indecent assault. The appellant denied he had touched MIDN 3/C RN. MIDN 3/C RN then entered the airport to catch a flight to Albany, New York, where he was to meet his girlfriend.

The Defense pursued two theories in their questioning of MIDN 3/C RN. First, the Defense attempted to imply MIDN 3/C RN had dreamt both instances of touching. Alternatively, the Defense implied he had fabricated the allegations against the appellant to make himself a sympathetic victim in the eyes of the Academy administration. MIDN 3/C RN was facing a hearing before the Commandant on an honor code violation at the time of the alleged indecent assault, and had learned just a few days before that his Company Officer and Senior Enlisted Leader intended to recommend his dismissal at that hearing.

In addition to MIDN 3/C RN, five Government witnesses testified to out-of-court statements made to them by MIDN 3/C RN, describing the appellant's alleged indecent assault on him. The first witness was MIDN 3/C Anne Jones, a friend and classmate of MIDN 3/C RN. The morning following the alleged assault, MIDN 3/C RN encountered MIDN 3/C Jones and MIDN 3/C Aaron Morrone at the airport. All three were traveling for Spring Break. By coincidence, MIDN 3/C Morrone was taking the same flight to Albany as MIDN 3/C RN, and was already at the departure gate, waiting there with MIDN 3/C Jones, who was headed to another destination from a nearby gate.

When Government counsel asked MIDN 3/C Jones what MIDN 3/C RN had told her about the incident, the civilian defense counsel objected on the grounds the answer called for hearsay.³ The Government argued MIDN 3/C RN's statements were not being offered for the truth of the matters asserted, and were admissible as a

³ The military judge had previously ruled that these statements (and similar statements to which the other four witnesses would testify) were not admissible as excited utterances under MIL. R. EVID. 803(2). Record at 331-32.

present sense impression.⁴ When the military judge overruled the objection, civilian defense counsel asked to be heard. The military judge replied, "You may be heard, but I've already ruled." Record at 375. The civilian defense counsel asserted the statement did not meet the test for present sense impression, and was, in fact, being offered for the truth of the matters asserted. The following exchange then took place:

MJ: And with regard to 801?

CDC: Excuse me, sir?

MJ: Is it being offered as a prior consistent state -- or a prior statement by the accused [sic] to rebut a recent or implied fabrication?

CDC: I did not hear that argument from counsel.

MJ: No, but the court can apply the law, Ms. Cluverius.

Id. at 375-76. MIDN 3/C Jones then testified concerning what MIDN 3/C RN had told her about what had happened to him.

The next witness was MIDN 3/C Morrone, who had been with MIDN 3/C Jones at the airport departure gate. He likewise was asked to tell the court what MIDN 3/C RN had said happened at the appellant's apartment, and he did so. Defense counsel did not object, but did cross-examine the witness about the statements. *Id.* at 400-04.

The third witness was MIDN 3/C RN's girlfriend, Ms. [H]. Ms. H met MIDN 3/C RN at the airport, and testified he was visibly upset. When the trial counsel asked her what MIDN 3/C RN had told her, defense counsel objected on the grounds the answer called for hearsay. The Government counsel responded that the statements were prior consistent statements, admissible under MIL. R. EVID. 801. The military judge overruled the objection. *Id.* at 417. Ms. H then testified to what MIDN 3/C RN had told her happened to him at the appellant's apartment. *Id.* at 418.

The final two witnesses to testify about statements by the victim were MIDN 3/C Modrak and MIDN 3/C Bohning. MIDN 3/C Modrak had spent the night at the appellant's apartment, and was still there, asleep on the couch, when MIDN 3/C RN and the appellant left for the airport. MIDN 3/C RN called MIDN 3/C Modrak on his cell phone later that Saturday morning. MIDN 3/C Modrak testified about what MIDN 3/C RN told him had happened. The defense did not object. *Id.* at 430-53.

⁴ Government counsel cited MIL. R. EVID. 803(3), which actually concerns statements about then existing mental, emotional, or physical condition. MIL. R. EVID. 803(1) is the rule that addresses present sense impressions.

Finally, MIDN 3/C Bohning testified. He had also been at the appellant's apartment, but had left the apartment before MIDN 3/C RN to catch an earlier flight. Later that day, he spoke to MIDN 3/C RN by telephone, and he testified to what MIDN 3/C RN had told him had happened. MIDN 3/C Bohning had slept in the same bed with MIDN 3/C RN and the appellant the previous night, but testified he did not know anything about the alleged assault. *Id.* at 465-87.

The members excepted the words "on divers occasions" from the specification in their findings, and convicted the appellant only of the second alleged touching, occurring between 0630 and 0745 Saturday morning.

II. Equal Protection of the Laws

The appellant alleges that the Equal Protection component of the Fifth Amendment to the United States Constitution was violated at trial, and is being further violated now, because the military judge and the judges of this court serve without fixed terms of office. He argues that, as a result, this court "cannot act on his case." Appellants Brief and Assignment of Errors at 42. Because this alleged error calls into question the court's ability to decide this appeal at all, we turn first to that issue.

We reject the appellant's contention that his right to equal protection of the laws under the Due Process clause of the Fifth Amendment was violated by the lack of fixed terms for military judges in the Navy and Marine Corps, or that it is violated by the lack of fixed terms for the judges of this court. *United States v. Gaines*, 61 M.J. 689, 692 (N.M.Ct.Crim.App. 2005), *aff'd*, 64 M.J. 176 (C.A.A.F. 2006), *cert. denied*, 127 S.Ct. 1141 (2007). Cf. *Weiss v. United States*, 510 U.S. 163, 176-81 (1994) (lack of fixed terms for military judges does not violate Due Process clause of Fifth Amendment).

III. Admission of Prior Consistent Statements

A. Principles of Law

A military judge's evidentiary decisions are reviewed for an abuse of discretion. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006); *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

Hearsay is not admissible, except as provided by the Military Rules of Evidence. MIL. R. EVID. 802. A prior statement by a witness is not hearsay, however, if the declarant testifies at trial, is subject to cross examination, and the statement is consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. MIL. R. EVID. 801(d)

(1)(B). If those criteria are met, the prior statement is not hearsay, and may be admitted as substantive evidence on the merits.

Our superior court has consistently interpreted MIL. R. EVID. 801(d)(1)(B) to require a prior consistent statement to have been made prior to any motive to fabricate or improper influence that it is offered to rebut. *Allison*, 49 M.J. at 57; *United States v. Taylor*, 44 M.J. 475, 480 (C.A.A.F. 1996)(citing *Tome v. United States*, 513 U.S. 150 (1995)); *United States v. McCaskey*, 30 M.J. 188, 192 (C.M.A. 1990). When it is alleged a witness has multiple motives to fabricate, or multiple improper influences on his or her testimony, then the prior consistent statement need not precede all such motives or influences to be admissible, but only the one it is offered to rebut. *Allison*, 49 M.J. at 57.

In order to preserve an evidentiary issue for appellate review, an appellant must have made a timely objection at trial. MIL. R. EVID. 103(a)(1). If an appellant failed to make a timely objection, this Court may still review the issue for plain error. MIL. R. EVID. 103(d); see *United States v. Cardreon*, 52 M.J. 213, 216 (C.A.A.F. 1999).

We review an erroneous evidentiary ruling for prejudice to the appellant by weighing four factors:

- (1) The strength of the Government's case;
- (2) The strength of the defense's case;
- (3) The materiality of the evidence in question; and
- (4) The quality of the evidence in question.

United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999); *United States v. Giambra*, 38 M.J. 240, 242 (C.M.A. 1993); *United States v. Banks*, 36 M.J. 150, 170 (C.M.A. 1992); *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985).

B. Analysis

1. Admissibility

In this case, the Government offered five prior consistent statements by the alleged victim, who testified at trial and was subject to cross-examination. The admissibility of those statements under MIL. R. EVID. 801(d)(1)(B) turns on whether they were made before or after the motive to fabricate alleged by the defense had arisen.

Putting aside the plausibility of the defense theory that MIDN 3/C RN fabricated his allegations, it is clear the alleged motive to fabricate arose well before the consistent statements offered by the Government. Under the defense theory, MIDN 3/C RN had a motive to fabricate allegations that would cast him as a sympathetic victim from the time he learned his chain of command would recommend to the Commandant that he be dismissed for honor

violations. Subsequently, according to the defense theory, an opportunity to make such an allegation arose when he found himself alone in bed with the appellant. All five of the consistent statements offered by the Government were made after the alleged indecent assault and after the alleged motive to fabricate had arisen.

Citing *McCaskey*, the Government argues our superior court has left the door open to the possibility a consistent statement made *after* the point of alleged fabrication or improper motive might still be admissible under MIL. R. EVID. 801(d)(1)(B), and urges us to walk through that door on this occasion. We decline to do so. First, the *McCaskey* language cited by the Government is dicta; the actual holding of the case is that the military judge erred by admitting a prior statement made after the point at which the alleged motive to fabricate had arisen. *McCaskey*, 30 M.J. at 193. Second, five years after *McCaskey*, the United States Supreme Court, interpreting an identical provision in the Federal Rules of Evidence, explicitly rejected the admissibility of statements made after the alleged fabrication or after the alleged improper motive had arisen. *Tome*, 513 U.S. at 158-59. Our superior court subsequently ratified the applicability of the Supreme Court's holding in *Tome* to courts-martial. *Taylor*, 44 M.J. at 480.

Alternatively, the Government argues the prior statements are admissible to rebut an implied allegation that MIDN 3/C RN fabricated his statement to the Naval Criminal Investigative Service (NCIS), made a few days after the statements to his girlfriend and classmates. During cross-examination, MIDN 3/C RN admitted that, after he arrived at this girlfriend's apartment in Albany, she touched his penis with her mouth at some point prior to the time he went to the hospital for a sexual assault exam. The defense then questioned MIDN 3/C RN about why he had not included that detail in his NCIS statement. He explained he omitted it because he did not think it relevant, until after an NCIS agent explained the kinds of forensic tests involved in a sexual assault exam.

Under this theory of admissibility, MIDN 3/C RN's prior consistent statements were not offered to rebut a charge that his trial testimony was fabricated or subject to an improper influence or motive, but rather to rebut a perceived implication that his NCIS statement was fabricated. The language of MIL. R. EVID. 801(d)(1)(B), however, strongly suggests that the charge being rebutted with a prior consistent statement must be that the declarant's *trial testimony* was fabricated or subject to improper influence or motive. See *McCloskey*, 30 M.J. at 192.

Further, the defense did not actually imply MIDN 3/C RN had fabricated anything in his statement to NCIS. Rather, the defense highlighted that he had omitted an arguably important detail. This tactic is best described as an attempt to impeach MIDN 3/C RN's credibility generally, rather than as a charge of recent

fabrication or improper influence or motive. Where the defense impeaches a witness's credibility with a prior inconsistent statement, the Government may use a prior consistent statement to cast doubt on whether the prior inconsistent statement was in fact made or whether the purportedly inconsistent statement is really inconsistent with the witness's trial testimony. Likewise, the Government may use a prior consistent statement to amplify or clarify the allegedly inconsistent statement. In these instances, however, the prior consistent statement is used not as substantive evidence of the truth of the matters asserted, as is the case when the statement is introduced under MIL. R. EVID. 801(d)(1)(B). Rather, the statement is offered for the limited purpose of rehabilitating the witness's credibility. See *United States v. Castillo*, 14 F.3d 802, 806 (2d Cir. 1994)(citing *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986)).⁵

In this case, even if the prior consistent statements might have been admissible for the limited purpose of rehabilitating MIDN 3/C RN's credibility, the military judge did not limit their use. In fact, the military judge explicitly instructed the members they could use the prior consistent statements "as evidence of the truth of the matters expressed therein." Appellate Exhibit XXXVII at 4.

We conclude, therefore, that the prior statements of MIDN 3/C RN offered by the Government did not serve to rebut a charge of recent fabrication or improper influence or motive, and were inadmissible under MIL. R. EVID. 801(d)(1)(B). Consequently, we hold that the military judge erred in admitting those statements as substantive evidence on the merits.

2. Plain Error

The defense objected to the hearsay testimony of MIDN 3/C Jones and Ms. Holmes, preserving the issue for appeal. The Defense did not, however, object to the hearsay testimony of Midshipmen Morrone, Bohning and Modrak. Pursuant to MIL. R. EVID. 103, the appellant has forfeited appellate review of the admissibility of that testimony, absent plain error. Consequently, before turning to the question of prejudice, we must examine the question of plain error as it applies to the hearsay evidence offered by Midshipmen Morrone, Bohning and Modrak.

⁵ The standard for admitting hearsay for the limited purpose of rehabilitating the witness's credibility is less onerous than the standard used to determine whether testimony qualifies as nonhearsay under MIL. R. EVID. 801(d)(1)(B). See *Castillo*, 14 F.3d at 806 (citing *United State v. Rubin*, 609 F.2d 51, 66-70 (2d Cir. 1979)(Friendly, J., concurring), *aff'd on grant of cert. limited to another issue*, 449 U.S. 424 (1981)); *Pierre*, 781 F.2d at 333. A prior consistent statement may be used to rehabilitate a witness when the statement has a probative force bearing on credibility beyond merely showing repetition. *Id.*

The appellant has the burden of persuading the Court that (1) there was an error, (2) that it was plain or obvious, and (3) that the error materially prejudiced a substantial right. *United States v. Cardreon*, 52 M.J. 213, 216 (C.A.A.F. 1999); *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998).

We have already concluded the military judge erred in admitting these statements, so we now address whether that error was plain or obvious. An error is plain when it is obvious or clear under current law. *United States v. Olano*, 507 U.S. 725, 734 (1993). An error may be said to be plain when the settled law manifests that an error has taken place. *See United States v. Promise*, 255 F.3d 150, 160 (4th Cir. 2001)(en banc). Put another way, an error is plain if it is so egregious and obvious that a trial judge and prosecutor would be derelict in permitting it. *See United States v. Baker*, 57 M.J. 330, 337 (C.A.A.F. 2002) (Crawford, C.J., dissenting)(quoting *United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001)(citing *United States v. Gore*, 154 F.3d 34, 43 (2d Cir. 1998)).

In this case, the error was plain. At the time of trial, precedents of both the Supreme Court and the Court of Appeals for the Armed Forces established that, for a statement to be admissible under MIL. R. EVID. 801(d)(1)(B), the statement must have been made prior to the motive to fabricate. Further, the prior consistent statements offered by the Government were obvious hearsay, readily identifiable as such, even in the absence of an objection. Indeed, the military judge had previously entertained a defense motion in limine to exclude these statements as inadmissible hearsay.⁶

3. Prejudice

A finding of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudiced the substantial rights of the appellant. Art. 59(a), UCMJ. We evaluate prejudice from an erroneous evidentiary ruling using the four-part test set out in part IIIA. above.

The first factor to consider is the strength of the Government's case. The Government's case largely rested on the testimony of the alleged victim, MIDN 3/C RN. There was no physical evidence the appellant had indecently assaulted the victim, and aside from the alleged victim, no other witnesses to the alleged assault. Indeed, even the victim testified he had not actually seen the appellant touching him, and could not rule out that he was having an erotic dream when he ejaculated during the night. He testified, however, that he was not asleep or

⁶ The military judge denied the motion in limine on the grounds the issue was not ripe, as the admissibility of the prior consistent statements depended upon the actual testimony of the alleged victim at trial. Record at 65. He later ruled these same statements were not admissible as excited utterances under MIL. R. EVID. 803(2). *Id.* at 331-32.

dreaming when he was touched the second time. In short, the Government's case came down to whether the members believed the victim's testimony. To assist the fact-finder in making that decision, the Government presented the five prior consistent statements, as well as evidence of the victim's distraught demeanor while discussing the allegations with these five witnesses.

The second factor to consider is the strength of the defense. The appellant elicited some evidence that the victim had a motive to falsely accuse the appellant, or alternatively had dreamed both instances of touching. Further, he presented evidence impeaching the victim's character for honesty, and evidence tending to show his own good military character during four years at the Naval Academy.

The third and fourth factors to consider are the materiality of the evidence in question and its quality. In the context of this case, the admission of five prior consistent statements was undoubtedly material. At root, this case pitted the credibility of the appellant against the credibility of the victim, whose testimony was the only evidence directly linking the appellant to the alleged offense. These five statements had significant potential to tip the balance, persuasively bolstering the credibility of the victim.

After weighing these four factors, we conclude the appellant's substantial rights were materially prejudiced by the erroneous admission of these five prior consistent statements.

IV. Conclusion

For the foregoing reasons, the findings and sentence are set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority, who may order a rehearing.

Senior Judge RITTER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court