

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**WILLIAM R. SAVALA
TORPEDOMAN'S MATE SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 200800818
GENERAL COURT-MARTIAL**

Sentence Adjudged: 27 June 2008.

Military Judge: CDR John Wooldridge, JAGC, USN.

Convening Authority: Commander, U.S. Naval Forces, Japan,
Camp Foster, Okinawa, Japan.

Staff Judge Advocate's Recommendation: CDR Glenn R.
Hancock, USN.

For Appellant: Maj Kirk Sripinyo, USMC; Civilian Counsel:
Philip Cave, Esq.

For Appellee: Capt Mark Balfantz, USMC.

28 January 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MAKSYM, Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of attempted larceny, rape, unlawful entry, and adultery, in violation of Articles 80, 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 920, and 934. The appellant's sentence extended to confinement for 7 years, reduction to pay grade E-1, forfeitures of \$898.00 pay per month for 84 months, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged, but suspended the adjudged and automatic forfeitures until January 1, 2009.

The appellant alleges five errors before us: first, that the military judge improperly excluded evidence that the alleged victim had previously made an unrelated allegation of rape against a third party; second, that the evidence was factually and legally insufficient to prove that the appellant committed rape; third, that the evidence was factually and legally insufficient to prove that the appellant attempted to commit larceny; fourth, that the evidence was factually insufficient to prove that the appellant made a false official statement¹; and fifth, that the evidence was factually insufficient to prove unlawful entry. Although not articulated by the appellant at trial or in his first assignment of error, we also consider whether the military judge committed plain error when he precluded evidence that should have been admitted under MILITARY RULE OF EVIDENCE 608, MANUAL FOR COURTS MARTIAL, UNITED STATES (2008 ed.).

We have carefully considered the parties' pleadings, oral arguments, and the record of trial. We conclude that the appellant's conviction for attempted larceny cannot withstand the test for factual sufficiency and dismiss it with prejudice. We are satisfied that the remaining convictions are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred as to those offenses. Arts. 59(a) and 66(c), UCMJ. However, we cannot affirm the sentence, and address it in our decretal paragraph.

I. Evidence of Prior Rape Allegation

A. Analysis of Error

Pursuant to MIL. R. EVID. 412(c), the appellant moved *in limine* to determine the admissibility of evidence implicating the Rape Shield Rule. Specifically, the appellant sought to cross-examine his accuser ("ARM") on an unrelated allegation of rape she made against a third party one year before, as well as offer extrinsic evidence related to the prior allegation, including the testimony of the third-party accused and several police reports generated at the time of the prior incident. Appellate Exhibit XII. Generally, the appellant argued that ARM's behavior on the night of the prior incident was similar to her behavior on the night of her alleged rape at the hands of the appellant, and that the prior allegation of rape was relevant to her truthfulness, ability to remember, and motivations to lie. He argued that it "shows a pattern of behavior showing lack of mistake" and that it shows "how her actions could lead to a belief that she was consenting." *Id.* at 4. The prior incident, the appellant maintained, "indicates that she would engage in sexual intercourse with a stranger or someone she didn't know well and then falsely claim rape." *Id.* at 6.

¹ The appellant initially mistakenly advanced this assignment of error as he was not convicted of this offense by the members. He subsequently withdrew it.

Specifically, the defense counsel proffered that the third party would testify that ARM had been found asleep and partially clothed in an illegally parked car and that she had falsely accused him of rape because "she was afraid of what to tell the police and her parents about the circumstances surrounding her being found in her car." *Id.* The appellant believed this to have been relevant to show that ARM generally has a character for untruthfulness and that she will lie in order to protect her reputation. *Id.*

Under the theory that the behavior of the alleged victim during the prior incident bore a striking similarity to her putative behavior on the night of his own alleged offense, the appellant also wanted to offer evidence that ARM was extremely flirtatious on the night of the prior incident and that it was she who initiated sexual intercourse with the alleged perpetrator. *Id.* To the same end, the accused sought to offer evidence that ARM was under the influence of methamphetamine on the night of the prior incident. *Id.* at 2. This was relevant, he argued, because it bore a striking similarity to his version of the facts in the instant case. According to the appellant, it showed that "she engages in casual sexual intercourse when partying with alcohol, Absinthe, and drugs." *Id.* at 7.

Relying solely upon *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000), the military judge denied the defense motion, finding that allowing the evidence would necessitate a "trial within a trial" and that the "mere filing of a complaint is not even probative of the truthfulness or untruthfulness of the complaint filed." Record at 91, 92. Not wanting to rely on "pure speculation" about the veracity of the prior allegation, the military judge found that the prejudicial effect outweighed any probative value. *Id.* at 96.

Under MIL. R. EVID. 412, a military judge properly excludes evidence that an accuser has made a prior, unrelated allegation of rape against a third party when there are no reliable indicia that the prior allegations were false. *McElhaney*, 54 M.J. at 130; *United States v. Velez*, 48 M.J. 220 (C.A.A.F. 1998); *cf. United States v. Bahr*, 33 M.J. 228 (C.M.A. 1991).

This rule reflects a careful balancing of the right of the accused "to be confronted with the witnesses against him" and have "compulsory process for obtaining witnesses in his favor," U.S. CONST. amend. VI, with the legitimate desire of Congress to shield rape victims from irrelevant and harassing inquiries into their prior sexual experiences, MIL. R. EVID. 412. It acknowledges that the right of confrontation "means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Id.* at 315-16 (quoting 5 J. Wigmore, *Evidence* § 1395, p. 123 (3d ed. 1940)). Indeed, the Constitution guarantees cross-examination directed toward

revealing possible biases, prejudices, or ulterior motives of the witness, and, for this reason, the partiality of a witness is "always relevant as discrediting the witness and affecting the weight of his testimony." *Id.* at 316 (quoting 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970)); see also *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

This Sixth Amendment right to confront is understood to go hand-in-hand with the Fifth Amendment right to due process. Together, they give a criminal defendant the right to present evidence that is relevant, material, and favorable. *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *Rock v. Arkansas*, 483 U.S. 44 (1987) (criminal defendants have the right to testify to hypnotically refreshed memories).

As the Supreme Court has consistently held, however, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). "[T]rial judges retain wide latitude" to limit reasonably a criminal defendant's right to cross-examine a witness "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Del. v. Van Arsdall*, 475 U.S. 673, 679 (1986).

On several occasions, the Supreme Court and the Court of Appeals for the Armed Forces (CAAF) have attempted to reconcile the right of criminal defendants to confront their accusers and make their case with the desire of legislators to protect rape victims from irrelevant harassment. In *Olden v. Kentucky*, 488 U.S. 227 (1988), for example, the Supreme Court overturned a conviction for rape because the defendant had not been allowed to inquire whether his accuser was falsely alleging rape in order to hide the fact that she was carrying on an extramarital affair. In *McElhaney*, the case most heavily relied upon by the trial judge in this case, CAAF found that the military judge had not abused his discretion when he prevented the accused from questioning his accuser regarding her prior, unrelated allegations of rape. 54 M.J. at 130. In that case, CAAF agreed that the defense evidence "amounted merely to [a third party's] denial of an unrelated rape accusation made by the victim." *Id.* The accused offered no reliable indicia that the allegation was false. For this reason, CAAF decided that *McElhaney* was analogous to *Velez*, 48 M.J. at 220, where CAAF held that the military judge did not abuse his discretion in excluding evidence of a prior rape allegation because there was no evidence that the complaint had been untrue. In *Bahr*, on the other hand, the Court of Military Appeals found that the military judge had incorrectly prevented the accused from questioning whether his accuser had repeatedly lied to her schoolmates about being raped in order to seek attention. 33 M.J. at 228. In that case, the probability that the allegations were false seemed to be much higher than in

Velez or *McElhaney*. From these cases, we discern a general rule: an accused has a constitutional right to offer evidence that his accuser made prior unrelated allegations of rape against third parties when there are reliable indicia that the prior allegations were false.

In this case, we review the military judge's ruling on the admissibility of this evidence for clear abuse of discretion. *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000); *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Andreozzi*, 60 M.J. 727 (Army Ct.Crim.App. 2004). The challenged action must be "'arbitrary, fanciful, clearly unreasonable', or 'clearly erroneous.'" *McElhaney*, 54 M.J. at 130 (quoting *Miller*, 46 M.J. at 65).

As part of his motion *in limine*, the appellant provided the military judge with myriad police reports related to the previous incident. In one of these reports, the investigator stated that ARM believed that she *may* have been sexually assaulted based on the fact that she awoke in her car at 0800 partially undressed with an opened condom wrapper in the rear seat. AE XII at 15. The narrative suggests that ARM did not know for certain what had happened, but that she suspected sexual assault based solely on the circumstances of where and how she had awoken. Another report went into further detail, but recounted the same uncertainty on the part of ARM, emphasizing the fact that she could not remember what had happened. That report included a request that the case be cleared as unfounded. *Id.* at 17.

Attached to these reports were several summaries of interviews that the local police conducted, including an interview with ARM. "[The complainant] stated the last thing she remembers it was about 0300 hrs and then she ended up at the gas station, in her car, behind the wheel, on Indian River Road and had no idea how she got there. . . . [She] stated she does not recall any sexual intercourse occurring. . . ." *Id.* at 19. According to these notes, ARM remembered little about the incident.

In stark contrast to the alleged victim's inability to remember, the suspect in the case presented a detailed explanation to the police, painting his accuser as the instigator of consensual sexual intercourse. *Id.* at 20. According to an additional "Miscellaneous" report, ARM, when confronted with the suspect's version of events, told the police that she believed his version was plausible but that she could not recall what had happened. "It was explained to the victim what the suspect had said and *she did not doubt that it could have happened that way, she just does not remember.*" *Id.* at 22 (emphasis added). The complainant's uncertainty, coupled with the fact that she tested positive for methamphetamines, persuaded the local authorities to clear the case as unfounded and not pursue charges against the suspect.

Framing the issue in terms of MIL. R. EVID. 412, the appellant presented this evidence to the military judge and to this court under the theory that ARM, less than a year before she accused the appellant of rape, falsely accused a different man of rape under similar circumstances. Were we to consider the appellant's evidence under this theory alone, we would find that the military judge did not abuse his discretion. Clearly, the police reports raise some basis for concluding that ARM fabricated her prior allegations. We cannot, however, say that it constituted a clear abuse of discretion to deem them insufficiently trustworthy to demand admission under the Sixth Amendment. *McElhaney*, 54 M.J. at 120; *Velez*, 48 M.J. at 220; *cf. Bahr*, 33 M.J. at 228.

Our analysis of the appellant's evidence, however, cannot stop here. In addition to attaching to his motion *in limine* police reports made at the time of the prior allegations, the appellant also attached statements made to the Naval Criminal Investigative Service at the time of her new allegations against him. AE XII at 12. In these statements, ARM addressed her prior allegations, but did not show the self-doubt and ambivalence displayed in her original police reports. Instead, ARM ardently claimed that she had been sexually assaulted by a man in June 2006, but that charges were never filed against him because it was a case of he-said she-said:

Q: Have you ever been sexually assaulted before?

A: Yes . . . About a year ago in the beginning of June 06 before I enlisted in the Navy I was sexually assaulted by this guy [I met]. I told my dad that I needed to go to the hospital and my sister took me. The hospital staff called [local police department]. Police responded and I filed a complaint against [the guy].

Q: Did you ever appear in court or were the charges dropped by the local District Attorney's Office.

A: Charges were never filed because they told me it was a "he said she said" case."

AE XII at 12. Contrary to what the local police stated in their reports, ARM seemed confident in her NCIS statement that she had been raped a year before, but that justice had not been served because of her inability to prove the charges.

We believe that ARM's statements to NCIS about her previous allegations arguably differed in a substantial manner from her statements to local law enforcement the year prior. Perhaps there is some honest explanation for the differences, but that explanation would have been best judged by the members after being elicited during cross-examination. We acknowledge that the issue was never squarely presented to the military judge. We are nonetheless hesitant to say that the appellant was correctly precluded from questioning his accuser about the discrepancies in

her statements. It is axiomatic that evidence probative of a witness's untruthfulness may be inquired into upon cross-examination. MIL. R. EVID. 608. Exclusion of evidence going to the truthfulness of an alleged victim in a rape case touches upon the most vital guarantees of a fair trial under the Fifth and Sixth Amendments. Evidence of this sort is almost *per se* relevant, material, and favorable. See *Valenzuela-Bernal*, 458 U.S. at 858.

Even without deciding that this constituted plain error, however, we are certain that the evidence should have been admitted when the Government opened the door to the evidence at trial. During the Government's case-in-chief, the trial counsel asked ARM why she had delayed in making a formal complaint to law enforcement. She responded that it was because she was worried that no one would believe her "[b]ecause it had actually happened to me before and it didn't get resolved back in the states." Record at 202.

Before beginning his cross-examination, the appellant argued that the Government had opened the door on the prior allegation of rape. Ruling against the appellant a second time, the military judge found that the Government had not opened the door and refused to allow any cross-examination on the subject. We believe that this constituted an abuse of discretion.

Referring to the adversarial trial setting, the Supreme Court has stated that "it is important that both the defendant and prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988). To this end, parties are sometimes permitted to introduce otherwise inadmissible evidence if a party "opens the door" for rebuttal. See *United States v. Bresnahan*, 62 M.J. 137, 147 (C.A.A.F. 2005) (the military judge did not commit plain error in allowing the Government to cross-examine an expert with inadmissible "profile evidence" because the accused opened the door); *United States v. Swift*, 53 M.J. 439, 450 (C.A.A.F. 2000) (referencing the principle that unwarned statements may be used to impeach the testimony of an accused); *MCCORMICK ON EVIDENCE* § 57 at 229 (4th ed. 1992) (discussing "Fighting Fire With Fire: Inadmissible Evidence as Opening the Door").

There are, of course, limits to this doctrine. Even when the door has been opened, for example, the military judge cannot admit evidence with "nonexistent, probative value" that has a "high potential for prejudice and confusion of issues." *United States v. Baumann*, 54 M.J. 100, 105 (C.A.A.F. 2000) (the military judge abused his discretion when he allowed the Government to offer hearsay that the accused molested his sister twenty-five years prior despite the fact that the door had been opened).

Here, we believe that the Government offered evidence related to the prior allegation in order to bolster the credibility of the complaining witness. It did this despite its

previously articulated opposition during motion practice to the appellant's petition to question the alleged victim on the same subject. In this way, we believe that the Government put the prior allegation squarely at issue and, with the military judge's assistance, gained an unfair advantage over the appellant. The appellant had a right to meet these arguments, and the military judge abused his discretion when he refused to acknowledge that the testimony of the complaining witness had opened the door. Rather than completely bar the appellant from challenging his accuser's version of events, the military judge could have allowed limited cross-examination without inviting undue prejudice or confusion.

B. Prejudice with Regards to Findings

Having determined that the military judge abused his discretion, we must now determine whether the appellant's conviction for rape and housebreaking can nonetheless be upheld on the grounds that the error was harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 681.

The Constitution entitles a criminal defendant to a fair trial, not a perfect one. *Id.* at 681; *United States v. Hastings*, 461 U.S. 499, 508-09 (1983); *Bruton v. United States*, 391 U.S. 123, 135 (1968). The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States v. Nobles*, 422 U.S. 225, 230 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error, *Van Arsdall*, 475 U.S. at 682.

Based in the main upon the overwhelming evidence of the appellant's guilt, we are confident beyond any reasonable doubt, that even assuming that the appellant had been able to comprehensively cross-examine his accuser regarding her prior allegation of rape, that the error was harmless beyond a reasonable doubt. *Id.* at 684. We have applied the four part test from *United States v. Hall*, 56 M.J. 432, 437 (C.A.A.F. 2002) and looked at the strength of the Government's case, the strength of the defense's case, the materiality of the evidence in question, and the quality of the evidence in question.

It is true that the testimony of an alleged victim is often the critical component of a successful prosecution for rape. Unlike many rape cases, however, the accuser in this case is not the only key witness. Of paramount importance in this case is the testimony of the appellant's friend, Seaman Robert Townsel, a witness who directly contradicted the appellant's already implausible version of events. Similarly, the presence of DNA evidence, the testimony of the victim's companions that night, and the testimony of the appellant himself leave no room to doubt that the appellant committed this crime. Finally, we place great

weight on the fact that the appellant, by his own repeated admission during direct and cross-examination, had never met his alleged victim when he knocked on her door at 0500, engaging in sexual intercourse with her shortly thereafter. Record at 399, 407.

Many other facts related to this charge are also uncontroverted. On June 22, 2007, ARM left the base at approximately 2300 in order to patronize a bar called the Side Door. *Id.* at 196-97. Before departing for the bar, she consumed three to four beers. *Id.* at 197. Once at the Side Door, she drank another beer and two shots - one of tequila and one of Absinthe. *Id.* She left the Side Door feeling intoxicated and went another establishment called Club Red. *Id.* at 198. At Club Red, she drank another beer and at least one other shot of tequila. She started to "get hazy." *Id.* Her friend, a Petty Officer Stern, noticed that she was "pretty intoxicated" as her coordination was "not very good" and her speech was slurred. *Id.* at 255-56, 279.

The appellant and his friend, Seaman Townsel, were also at Club Red that night. *Id.* at 294. According to Seaman Townsel, ARM bumped into him while he was standing at the bar talking to someone else. *Id.* Seaman Townsel asked if she was "fxxxed up" already, to which she replied, "Hell, yeah." *Id.* Later, ARM fell into a table, knocking glasses to the ground. She needed her friends to help her off of the table. *Id.* at 296. After Club Red, Petty Officer Stern, ARM, and two others visited a karaoke bar before returning to the barracks in a taxicab. All parties, including the appellant, agreed at trial that ARM did not meet or speak to the appellant that night. *Id.* at 256, 296, 405, 407. ARM stumbled as she walked to her room in the barracks around 0130. *Id.* at 280.

Between 0530 and 0600, several hours after ARM went to bed, the appellant and Seaman Townsel returned to the barracks. *Id.* at 312. As the appellant and Seaman Townsel got out of the car, the appellant said something like, "Let's go hit up the female, you know." *Id.* at 298, 321. Seaman Townsel knew where the victim lived, *id.* at 307, and they walked to her room, *id.* at 298, 395. When they arrived, the appellant knocked on her door.

All of these background facts are uncontroverted in the record. At this point, however, the appellant's version of events departs dramatically and dispositively from that of his friend and ARM.

At trial, the appellant testified that ARM opened the door sometime after 0500 in the morning, that he introduced himself to her for the first time in his life, that they engaged in a five minute conversation in which ARM expressed a romantic interest in him, and that he was invited to return to the room momentarily. Record at 396, 399. The appellant went on to testify that he briefly visited his own room in order to don a new t-shirt, brush

his teeth, and apply cologne. *Id.* at 396. On cross-examination, he confirmed several times that he had never met ARM before he knocked on her door that morning. *Id.* at 399, 405. According to the appellant's version of events, he then returned to ARM's barracks room, and after some conversation, engaged in consensual intercourse with her until she changed her mind. *Id.* at 397. Once she said "stop," he claimed that he "pulled out," that she ran to the bathroom, and he left the room. *Id.* He could not remember if he ejaculated before he stopped having intercourse, so could not explain, at the members prompting, how his semen wound up on the sheets. *Id.* at 414, 415.

This highly implausible version of events was diametrically opposed by the testimony of his friend and companion Seaman Townsel. Seaman Townsel testified that the door opened on its own when the appellant knocked. Surprised at finding the door unlocked, the appellant exclaimed, "Oh, shit, the door's open." *Id.* at 300, 467. Seaman Townsel testified that he looked in the room and did not see anything. *Id.* at 300. Critically, at no time did the appellant converse with ARM. *Id.* at 468. Instead, Seaman Townsel testified that he told the appellant, "[C]ome on, let's close it, we don't need to be here." *Id.* at 300. The appellant then closed the door and he and Seaman Townsel left. *Id.* A few days later, a special agent investigating the case tested the door and confirmed that the automatic lock was broken. *Id.* at 242.

ARM's testimony supports Seaman Townsel's contention that this conversation did not take place. Her testimony was that the first thing she recalled after leaving the club with her friends was that she was being raped. *Id.* at 198. As she woke up, ARM told the her assailant, "no," and, "stop," as she pushed on his shoulders. *Id.* at 199, 233. However, he did not stop, but continued to rape her. *Id.* at 199. ARM testified that the next thing she remembered, she was waking up in the shower. *Id.* at 200. Later, investigator's found the appellant's semen on ARM's sheets. *Id.* at 340; Prosecution Exhibit 10.

Even if the appellant had cross-examined ARM on her arguably inconsistent statements or her prior allegations, we are confident beyond a reasonable doubt that it would not have altered the outcome of the trial. The defense was permitted an extensive cross-examination into the facts that she had a fiancé, record at 221, that she abused alcohol, *id.* at 228, that she had made a pact with her fiancé to stop drinking, that she had broken this pact on the night of the incident, *id.* at 232, and that she had been untruthful on a security clearance questionnaire, *id.* at 230. Although we acknowledge that the appellant would have us discount Seaman Townsel's testimony because he initially lied to the police and was himself initially a suspect, we believe that he had no real reason to lie at trial. Any maladies in the version of events he presented to the police were fully resolved prior to trail. We find his testimony, and not that of the appellant, to be credible.

We therefore find that the errors in preventing the appellant from cross-examining his accuser relative to her prior allegation of rape and on her statements to NCIS about the prior allegations were harmless beyond a reasonable doubt. For these reasons, we also find, contrary to the appellant's third and fifth assignments of error, that the evidence was legally and factually sufficient to support the appellant's conviction for rape and for unlawful entry.

C. Sentencing

During sentencing, the appellant made one final attempt to cross-examine his accuser on her prior allegation of rape. As evidence in aggravation, the Government called ARM to the stand to testify, at length, to the psychological trauma and pain she underwent on account of her rape. She claimed that the rape played a role in the end of her engagement to her fiancé, that it has made it difficult for her to work or sleep, and that it caused her to seek counseling. Record at 545, 548.

Following her direct examination, counsel for the appellant argued that he should be allowed to cross-examine ARM on whether any of her pain and suffering came from the prior alleged rape. The military judge once again ruled that MIL. R. EVID. 412 prevented the appellant from questioning ARM on the prior rape. We believe that this ruling constituted an additional abuse of discretion. If the defense wanted to question ARM on whether any of the trauma she suffered was a consequence of the earlier incident, it should have been permitted to do so. Furthermore, we are not confident beyond a reasonable doubt that this error did not cause the members to award a more severe sentence than they otherwise would have.

II. Factual and Legal Insufficiency of Attempted Larceny Charge

In addition to charging the appellant with rape, unlawful entry, and adultery, the Government also charged the appellant with attempting to steal various items from the van of Technical Sergeant (TSgt) Kenneth L. Caughman, U.S. Air Force, on or about 10 February 2008. In his third assignment of error, the appellant argues that the evidence was legally and factually insufficient to prove the charge.

On the night in question, Petty Officer Ramon Villareal, U.S. Navy drove the appellant into town in a 1997 Honda SMX minivan, initially parking the van near a nightclub which they planned to patronize. Record at 380. Later, Petty Officer Villareal left the club in order to move the van and park it elsewhere. Petty Officer Villareal told the appellant that he was going to move his van, but Petty Officer Villareal could not be certain that the appellant heard him. *Id.* at 381.

Meanwhile, the appellant remained at the club drinking until he realized that his friend had departed the premises. According

to the appellant, he then left the club in search of his friend. Coming across a 1996 Honda Odyssey minivan that he mistakenly believed to be that of Petty Officer Villareal, the appellant opened the van door, sat down, and waited for his friend to return. While he was waiting, the appellant began to search in the car for the car keys so that he could turn on the air conditioning. *Id.* at 401.

As luck would have it, TSgt Caughman, the van's true owner, and his friends were walking out of a bar at that very moment. *Id.* at 369. As he approached his van, TSgt Caughman saw that the door was open and the light was on. *Id.* at 369, 373. As he drew still closer, TSgt Caughman saw the appellant slumped over the seat digging in between the driver's and passenger's seat where TSgt Caughman kept CDs and other items. *Id.* at 369, 373. The appellant popped up and TSgt Caughman asked him what he was doing in his van. *Id.* at 369-70, 374. The appellant told him that he had not known that the van belonged to TSgt Caughman because he himself had the same sort of vehicle. He told TSgt Caughman that he had been looking for the keys. *Id.* at 370, 374, 401. TSgt Caughman then assaulted the appellant, who ran away. *Id.* at 370, 374-75. TSgt Caughman did not find anything missing or broken. *Id.* at 370.

The test for legal sufficiency is whether considering the evidence in the light most favorable to the Government, a reasonable finder of fact could have found all the essential elements beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1997). The elements the Government was required to prove were that the appellant committed an act - amounting to more than mere preparation - with the specific intent to:

- (1) [Wrongfully take, obtain or withhold] certain property from the possession of the owner or of any or any other person,
- (2) That the property belonged to a certain person,
- (3) That the property was of a certain value, or some value; and
- (4) That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud the other person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 46b(1). We believe that the Government met its burden for legal sufficiency.

The test for factual sufficiency, however, is whether, after weighing all the evidence in the record of trial and making allowances for lack of personal observation, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt.

Turner, 25 M.J. at 325. In this case, we can only uphold the appellant's conviction if we believe beyond a reasonable doubt that he attempted to steal from TSgt Caughman. *Id.* We are not so convinced.

The appellant's version of events, which was confirmed by the testimony of his friend and companion, seems highly plausible to us. We hold that the evidence offered by the Government at trial was factually insufficient to prove beyond a reasonable doubt that the appellant attempted to permanently deprive TSgt Caughman of any item stored in his van. Accordingly, we set aside the findings of guilty as to the Additional Charge and its specification, and dismiss the Additional Charge and its specification.

III. Sentence Rehearing

We have dismissed the appellant's conviction for attempted larceny. We have questioned whether it was plain error under MIL. R. EVID. 608 to exclude evidence going to prior inconsistent statements made by the alleged victim. We have ruled that the military judge committed a prejudicial error during sentencing when he prevented the appellant from questioning his accuser about the contribution that a prior rape played in her psychological trauma. We must now consider whether it is necessary to order a sentence rehearing in light of multiple errors by the trial judge.

A "dramatic change in the penalty landscape" gravitates away from the ability to reassess. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). In order to avoid a rehearing, this court would have to be able to discern the extent of the error's effect on the sentence. *United States v. Hawes*, 51 M.J. 258, 260 (C.A.A.F. 1999) (quoting *United States v. Davis*, 48 M.J. 494, 495, (C.A.A.F. 1998)). Our reassessment would have to be based on a conclusion that the sentence that would have been imposed at trial absent the error "would have been at least of a certain magnitude." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). This conclusion about the sentence that would have been imposed must be made "with confidence." *United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999).

We cannot express this with confidence, and conclude that the only fair course of action in this case is to set aside the sentence and authorize a sentence rehearing. We are not convinced that the sentencing landscape has not dramatically changed or that we could reliably determine what sentence the members would have imposed. *United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006); *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006).

IV. Conclusion

With the exception of the Additional Charge and its specification, the findings are affirmed. The sentence is set aside. The record is returned to the Judge Advocate General of the Navy for remand to the convening authority who may order a rehearing on the sentence.

Senior Judge MITCHELL concurs.

BEAL, J. (concurring in the result):

I concur that the military judge's ruling on the defense motion *in limine* seeking to cross-examine ARM about the Virginia Beach incident was not an abuse of discretion. I also concur that it was error for the military judge to deny the appellant an opportunity to cross-examine ARM about the Virginia Beach incident after the prosecution opened the door by asking ARM why she delayed reporting her 23 June 2007 sexual assault and she responded "because this has happened to me before." By referring to the Virginia Beach incident, ARM used that occasion as justification for her hesitation in reporting the more recent assault, thus bolstering the credibility of her in-court testimony. By inviting this testimony, the prosecution transfigured a completely irrelevant line of questioning into a relevant area of concern. Nevertheless, as the majority opinion aptly demonstrates, this error was harmless beyond a reasonable doubt.

I also concur that the evidence was factually insufficient to support a conviction of attempted larceny. Accordingly, I concur in the majority's decision to remand the case for a rehearing on sentence because I believe the dismissal of the attempted larceny charge significantly changes the sentencing landscape.

I write separately because I disagree with that part of the majority opinion which suggests the military judge erred by failing to find inconsistencies between ARM's sworn statement to the Naval Criminal Investigative Service (NCIS) and the statements attributed to her by the Virginia Beach Police Department. In my view, the majority reads *much* too much into the two Virginia Beach Police reports contained in Appellate Exhibit XII. While I recognize the importance of being able to probe any witness' credibility, particularly in cases of this nature, I see nothing contained in AE XII which, under MILITARY RULE OF EVIDENCE 608, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) reasonably raises the issue of ARM's character for truthfulness, bias, prejudice, or motive to misrepresent.

The attachments to the motion labeled as AE XII consist of four separate documents, of which the following three are relevant to this issue: 1) ARM's sworn statement taken by NCIS on 26 June 2007; 2) The Virginia Beach Police Department's initial

incident report on 11 June 2006; and, 3) excerpts from the Virginia Beach Police Department's investigative report dated 11 July 2006. As for the NCIS statement, the only references to the Virginia Beach incident are ARM's responses to two questions that NCIS posed after the narrative of her statement:

Q: Have you ever been sexually assaulted before?

A: Yes. . . About a year ago in the beginning of June 06 before I enlisted in the Navy I was sexually assaulted by this guy named [P]. I told my dad that I needed to go to the hospital and my sister took me. The hospital staff called Virginia Beach Police Department. Police responded and I filed a complaint against [P].

Q: Did you ever appear in court or were charges dropped by the local District Attorney's Office.

A: Charges were never filed because they told me it was a "he said she said" case.

AE XII at 12.

The excerpts from the two Virginia Beach Police Department reports do not provide us with single statement made by ARM; instead they contain only the investigator's summarizations of his/her interviews with ARM and other witnesses. The initial incident report of 10 June 2006 indicates the following:

Victim was at a party and drinking beer bong. Victim stated the last she remembers is about 3AM Friday and then she was passed out in her car at a Crown Station off Indian River Road about 8AM Friday.

Victim stated her bra was off and she. . . . A opened condom in the rear seat.

Victim believes she may have been sexually assaulted. A SANE exam was done.

AE XII at 15.

The 11 July 2006 investigative report provides a fuller summary of the investigator's initial interview with ARM on 10 June 2006. ARM attended a party with about ten other people. The last thing ARM claimed to remember was, "it was about 0300 hrs and then she ended up at the gas station, in the car, behind the wheel, on Indian River Road and had no idea how she got there." *Id.* at 19. The investigator noted that ARM informed him that she was told she left the party with "a guy named [P]" and that she received a call from someone named [P] who she suspected was the same person with whom she left the party. *Id.*

The investigator also provided further details of ARM's condition when she awoke, "She stated she was half naked at the Crown Station and there was an open condom in her back seat. She said she keeps her condoms in the console. Her bra was off and she was unsure how it got that way. [ARM] stated she does not recall any sexual intercourse occurring, yet her underwear was wet when she put them back on. Also, her underpants smelled like ejaculate." *Id.* The investigator summarized his interview with the suspect in detail, who indicated a consensual encounter between ARM and the suspect had occurred. *Id.* at 20-21. The investigator's final entry reads, "It was explained to the victim what the suspect said and she did not doubt that it could have happened that way, she just does not remember." *Id.* at 22.

When there is only one actual statement in evidence, i.e., ARM's statement to NCIS on 26 June 2007, I fail to see how the majority can be "hesitant to say that the appellant was correctly precluded from questioning his accuser about the discrepancies in her statements". Majority Opinion at 6-7. Regardless of however the police officer characterized ARM's statements during their interviews, such records are poor (if any) evidence of ARM's actual statements.² Secondly, even if the law enforcement official's characterization of ARM's statements was accurate - I still do not see any inconsistency. The fact that ARM conceded that the suspect's account may have been accurate was not inconsistent from *her belief* that she was sexually assaulted. ARM's account, as related by the investigating officer, established that ARM succumbed to a black-out induced by intoxication. Awakening in the state that she did, with no memory of how she got there, it was reasonable for her to believe she was sexually assaulted - just as it may have been reasonable for the other party to believe there was a consensual liaison. By conceding she may have acted as the other party described, ARM did not recant her belief that she was sexually assaulted, she merely admitted she didn't remember what happened - from her perspective, it was a he said - she said case.

For the Court

R.H. TROIDL
Clerk of Court

² MIL.R.EVID. 803(8) lists public records and reports as being exceptions to the general prohibition on hearsay evidence with one specific exception to the exception: matters observed by police officers.