

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

**Before  
J.R. PERLAK, M.D. MODZELEWSKI, R.Q. WARD  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MARCUS R. SMITH  
AVIATION ELECTRICIAN'S MATE AIRMAN (E-3), U.S. NAVY**

**NMCCA 201100433  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 18 March 2011.

**Military Judge:** CDR Kevin R. O'Neil, JAGC, USN.

**Convening Authority:** Commander, Navy Region Southwest, San Diego, CA.

**Staff Judge Advocate's Recommendation:** CDR L.B. Sullivan, JAGC, USN.

**For Appellant:** LT Toren G. Mushovic, JAGC, USN.

**For Appellee:** Maj William C. Kirby, USMC.

**28 September 2012**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

MODZELEWSKI, Senior Judge:

A panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The members sentenced the appellant to confinement for 30 days, reduction to pay grade E-1, and a bad-conduct discharge. On 12 August 2011, the convening authority

approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

## **I. Background**

Intelligence Specialist Third Class NW (NW) organized a birthday party for her husband and invited the appellant and his wife. The appellant was friends with NW's husband and the two wives were friendly. Apart from the friendships between the husbands and between the wives, there is no evidence of an independent relationship between NW and the appellant. At the party, most people were drinking, to include both NW and the appellant. After midnight, NW removed herself from the party in order to go to sleep, because she had to wake up early the next day with her young child. NW fell asleep alone in her bedroom.

Not long after she fell asleep, NW awoke to the feeling of a hand going down the back of her pants, and a finger entering her vagina. She opened her eyes and recognized the appellant, who left the room without saying anything. NW then sent her husband a text message asking him to come to the room. When her husband arrived, NW told him that the appellant had touched her.

Aviation Machinist's Mate Second Class (AD2) Malone was another guest at NW's party. He was a friend of NW and her husband, and an acquaintance of the appellant. At trial, AD2 Malone testified that, on the night of the party, the appellant admitted to him that he had "fingered" NW. Record at 575. AD2 Malone did not disclose this admission to either trial or defense counsel until a few days before the trial, despite having testified telephonically at the Article 32 hearing and having spoken to both sides more than once before trial.

Unrelated to these events, NW had a history of mental health treatment spanning at least two years before the night in question. During that period, she saw several different treatment providers and was diagnosed with Borderline Personality Disorder (BPD). At trial, the primary defense theory was that NW's diagnosed personality disorder and related need for attention created a bias or a motive to fabricate the allegation against the appellant.

## **II. Assignments of Error**

The appellant assigns three errors and we address them in the following order: first, that the military judge improperly limited a defense expert's testimony about the victim's mental

health disorder; second, that the military judge improperly limited trial defense counsel's cross-examination of NW; and third, that the evidence was factually and legally insufficient to support the finding of guilty.

### **III. Limitations on Testimony by Defense Expert**

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Sullivan*, 70 M.J. 110, 114 (C.A.A.F. 2011). Below, we first address the legal framework that the military judge applied to the proffers by trial defense counsel and by Dr. Kennedy, the defense team's forensic neuropsychologist. Next, we consider the admissibility of the contents of NW's mental health records. Finally, we address the appellant's argument that Dr. Kennedy was unfairly barred from talking about dissociative episodes, a characteristic of BPD.

#### **A. The legal framework applied to mental health evidence**

With scant analysis and extremely limited citations, the appellant assigns this error citing to the Fifth and Sixth Amendments. However, the Military Rules of Evidence governed Dr. Kennedy's testimony at trial, and we begin our analysis there. Evidence of a witness's mental health condition may be admissible, but it must be relevant to the issue of bias or the witness's competency to testify. *United States v. Sojfer*, 47 M.J. 425, 427-28 (C.A.A.F. 1998). More specifically, with respect to competency to testify the evidence must relate to the witness's ability to perceive and tell the truth. *Sullivan*, 70 M.J. at 117; see also *United States v. Sasso*, 59 F.3d 341, 347-48 (2d Cir. 1995) (employing a multi-factor analysis) and *United States v. Butt*, 955 F.2d 77, 82 (1st Cir. 1992) (summarizing "over forty years" of federal jurisprudence).

Here, the military judge repeatedly explained these "ground rules" to counsel, citing *Sojfer* and *Sasso* for the proposition that any evidence of NW's mental health conditions must have some connection to her "ability to perceive or recall events accurately." Record at 278. On the record, the military judge even opined that there was tension between *Sasso* and *Butt*, and he chose to follow *Sasso* because it was more inclusive of the type of evidence that the appellant sought to admit. Record at 277-78. Without taking a position on whether that tension

exists in the federal courts, we find that the military judge applied the rules of evidence correctly.<sup>1</sup>

## **B. The contents of NW's mental health records**

The appellant also argues that, even if the military judge applied the correct legal rule, he improperly limited Dr. Kennedy to discussing "generalities" as opposed to NW's "specific facts and circumstances." Appellant's Brief of 21 Feb 2012 at 8. These facts and circumstances were described in NW's mental health records, which Dr. Kennedy read and relied on to form her own opinions. The military judge did permit Dr. Kennedy to testify concerning some material in the records,<sup>2</sup> but he prohibited her from discussing the treatment providers' notes, which contained summaries of statements made by NW in the course of treatment. We conclude that the military judge did not abuse his discretion in doing so, because the statements were double and triple hearsay, and improper impeachment of NW.

### **1. Hearsay**

The notes are undoubtedly hearsay and they became double hearsay when the appellant offered them through Dr. Kennedy. There is also a third layer of hearsay in the notes that contain summaries of NW's statements.<sup>3</sup>

Even statements reflecting just one level of hearsay are ordinarily inadmissible in the context of expert testimony. An expert witness may rely on them to form an opinion, but may not disclose them to the members "unless the military judge

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<sup>1</sup> To the extent that the appellant challenged the military judge's statement of the law, we have reviewed the military judge's analysis *de novo* and found it to be correct. See *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (noting that even when appellate courts review the admissibility of evidence under an abuse of discretion standard, pure questions of law are reviewed *de novo*).

<sup>2</sup> The military judge allowed Dr. Kennedy to say that she reviewed all of NW's available records, and to describe all of the criteria leading to a diagnosis of BPD (e.g. that the patient craves attention). Record 839, 910-20. Dr. Kennedy then opined that NW suffered from BPD, and the military judge allowed her to explain that other providers reached the same conclusion, which Dr. Kennedy knew from reading the mental health records. *Id.* at 918-20.

<sup>3</sup> One note, on page 19 of Appellate Exhibit XXXV, even contains quadruple hearsay. The multiple layers of hearsay involved here make it unnecessary to consider whether any of these statements might have qualified at the first layer as statements made for the purpose of medical diagnosis or treatment under MILITARY RULE OF EVIDENCE 803(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

determines that their probative value in assisting the members to evaluate the expert's opinion substantially outweighs their prejudicial effect." MILITARY RULE OF EVIDENCE 703, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

The appellant never persuaded the military judge that the notes were highly probative of any issue, beyond their role in shaping Dr. Kennedy's opinion, and he has not challenged the military judge's analysis under MIL. R. EVID. 703. Rather than address the specific evidentiary issue, the appellant continues to emphasize the general impact that these providers' notes may have had on NW's credibility, arguing that they showed her attempting to manipulate her previous providers by telling them each a different set of facts. We do not discount the appeal of such evidence, but it is nevertheless hearsay.

The military judge was within his discretion to conclude that any probative value that the notes held was substantially outweighed by their prejudicial effect and confusion of the issues. First, they had nothing to do with the sexual assault at the heart of this case. The notes related only to past issues, and made no mention of the appellant. Second, NW could not have described these past issues easily in black-and-white terms. The notes dealt with subjective matters of varying degree, like addiction, personal motivations, and the status of relationships, making it difficult to conclude that they were probative of untruthfulness. Third, Dr. Kennedy never adequately explained how the notes were connected to the relevant issue of NW's ability to perceive or remember. Instead, Dr. Kennedy simply opined that NW was "an unreliable reporter,"<sup>4</sup> which the military judge properly recognized as impermissible human lie-detector testimony and prohibited. Fourth, the appellant provided no basis for us to treat historic statements made in confidence to health care providers, in the context of seeking care, as statements on the same legal footing as contemporaneous reporting to one's spouse and to law enforcement.

## **2. Improper Impeachment**

Because Dr. Kennedy failed to connect the notes with NW's ability to perceive and remember, their only possible relevance was for impeachment. But a mental disorder does not necessarily

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<sup>4</sup> Record at 856.

give rise to a bias or motive to fabricate.<sup>5</sup> The rules of legal and logical relevance apply to impeachment, *Sojfer*, 47 M.J. at 427, and the proponent of mental-health evidence must establish that there was a "real and direct nexus" between the witness's disorder and the facts of the case, *Sullivan*, 70 M.J. at 115. Whether that nexus exists is a question of logic and common sense, answered by the presentation of evidence, not by the incantation of words like "bias" and "motive to fabricate."

The appellant's proffer on this issue consisted of the records themselves and Dr. Kennedy's explanation of BPD.<sup>6</sup> Although Dr. Kennedy opined that NW suffered from BPD, her opinion did not establish a nexus between the specific contents of the medical records and some fact or issue in the case. In fact, her explanation of how BPD operates highlights the absence of a nexus in this case. When asked whether there was "[a] trigger inside of an individual with Borderline that can be flipped," she described a BPD patient's "need to be loved," which can cause them to "do whatever they can to get that attention back" if it is lost. Record at 913. The "if" in Dr. Kennedy's testimony sets up the possible nexus. But neither her testimony nor any other evidence established that NW ever acted on any such impulse.

The lack of any "trigger" for the BPD makes this case almost identical to the facts of *Butt*, where a defense expert testified that the victim's BPD and related psychoses could have caused her to falsely accuse the defendants as an "emotional backlash." 955 F.2d at 81. As in this case, however, defense counsel never established a nexus between that theory and the facts of the case.

Because the appellant did not carry his burden to establish a nexus between the mental health records and the facts of the case, the military judge was within his discretion to limit Dr. Kennedy's testimony. The records contained "personal and

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<sup>5</sup> We consider the admissibility of the statements under MIL. R. EVID. 608(c), as evidence of bias, prejudice, or motive to misrepresent. Although they are specific instances of conduct that relate to NW's character for truthfulness as contemplated by MIL. R. EVID. 608(b), they were not properly admissible as impeachment evidence on direct examination of Dr. Kennedy.

<sup>6</sup> Dr. Kennedy defined BPD for the members as a character or personality disorder belonging to the emotional histrionic group and highlighted several specific characteristics of the disorder, including being "attention-seeking," "impulsive," and "self destructive." Record at 910-16.

potentially stigmatizing material,"<sup>7</sup> and the military judge was properly as vigilant in weighing those concerns as he would be with traditional concerns like distraction and confusion of the members.<sup>8</sup>

### **C. Dissociation and Dr. Kennedy's trial testimony**

The appellant also argues that the military judge prevented trial defense counsel from exploring how BPD can cause dissociation, thereby depriving the members of relevant information about NW's ability to perceive and recall the sexual assault. Appellant's Brief at 10. But our review of the record turns this argument on its head. In fact, the trial defense counsel repeatedly declined to ask about dissociation, despite the apparent interest of both the military judge and the members in that topic.

The military judge appears to have recognized immediately the congruence between his ruling about the mental health evidence and Dr. Kennedy's description of dissociation, which she defined as "the inability of someone to form a cogent recollection . . . ." Record at 203. The military judge specifically asked Dr. Kennedy about dissociation during the first motion session, but the trial defense counsel never returned to the topic during subsequent sessions or either of the times that Dr. Kennedy testified at trial. Finally, a member asked about NW's ability to distinguish fantasy from reality, and Dr. Kennedy discussed dissociation without objection. *Id.* at 934. The trial defense counsel again asked no follow-up questions, and instead shifted his focus back to NW's perception of "a hostile world." *Id.* at 958-59. It is apparent to us that the absence of further testimony about dissociation is not attributable to the rulings of the military judge.

Overall, the military judge's rulings were straightforward applications of the rules of evidence with no constitutional implications. We find that he did not abuse his discretion.

### **IV. Limitations on Defense Cross-Examination of NW**

The appellant also assigns error under the Sixth Amendment's Confrontation Clause, arguing that the military judge improperly limited his cross-examination of NW. "Trial

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<sup>7</sup> *Butt*, 955 F.2d at 83-84.

<sup>8</sup> *Sullivan*, 70 M.J. at 115.

rulings limiting cross-examination are reviewed for an abuse of discretion." *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005) (citation omitted).

This case highlights the tension within Confrontation Clause jurisprudence. On one hand, there is perhaps no more important moment at trial than when an accused is afforded the opportunity to cross-examine his accuser, and that opportunity must be adequate. *Crawford v. Washington*, 541 U.S. 36, 57 (2004). Accordingly, the Court of Appeals for the Armed Forces has encouraged us to "allow liberal admission of bias-type evidence." *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006). On the other hand, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Military judges retain "wide latitude" to limit cross-examination, even when a line of questioning attacks an accuser's credibility. *Sullivan*, 70 M.J. at 115 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

The appellant urges us to find a constitutional violation based on four areas in which the military judge limited or foreclosed questioning: (1) NW's alleged motive to fabricate the sexual assault; (2) her statements to past mental health providers; (3) a Facebook posting she wrote to her husband; and, (4) trial defense counsel's reading of a document during the cross-examination. The appellant also makes a fifth argument that the military judge "insert[ed] himself in the role of prosecutor" by making *sua sponte* objections during the cross-examination of NW, revealing a bias in front of the members that permeated the entire trial. Appellant's Brief at 14. Below, we address each argument and discuss a sixth issue that was not briefed or argued by either party on appeal, concerning NW's past allegations of sexual assault.

#### **A. NW's alleged motive to fabricate**

The military judge ended a line of questioning once trial defense counsel began asking NW about what the counsel characterized as a "motivation to lie" that she "uses her body to gain attention." Record at 512. Putting aside our observation that trial defense counsel described a personality trait and not a motive, we nonetheless find that there was no nexus tying the alleged motive to the facts of the sexual assault.

The evidence at trial does not indicate that NW sought attention from anyone on the night of the sexual assault, or that she sought it at any time from the appellant. For an attention-seeking motive to be relevant, therefore, one would have to believe that NW was constantly in need of attention, at all times, to the extent that she was permanently prepared to falsely accuse someone of a crime. But that is "a general description of a person's disposition or of a personality," which is the definition of a character trait, not a motive. 1-7 WEINSTEIN'S EVIDENCE MANUAL, §7.01. Thus, the military judge did not abuse his discretion when he ruled that the trial defense counsel's questions were impermissible proof of character. See *Sullivan*, 70 M.J. at 114 n.3 (noting that the military judge in that case permissibly analyzed a defense proffer as relating to character, not bias).

#### **B. NW's statements to past mental health providers**

The military judge also ruled that the trial defense counsel could not ask NW about statements she made to past mental health providers. Trial defense counsel offered these statements as impeachment by specific instances of untruthfulness under MIL. R. EVID. 608(b). However, even under that approach, the material must be probative of truthfulness or untruthfulness "in the discretion of the military judge." MIL. R. EVID. 608(b). The purpose of this grant of discretion is to "avoid holding mini-trials on peripherally related or irrelevant matters." *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992) (citation omitted).

Here, the matters about which trial defense counsel sought to impeach NW were at best peripherally related. As we discussed above, these notes by NW's providers had no relation to the sexual assault or the appellant. They are subjective observations by the providers based on their discussions with NW of her relationships, personal motivations, and addiction. The record before us suggests that cross-examination on these topics would yield very little probative value to her untruthfulness: defense counsel had not established the actual falsity of the statements to her providers, despite having access to all of NW's mental health records and to the providers whose notes were at issue. At best, the appellant identified apparent inconsistencies that could just as easily be explained by the fact that the statements were contained in someone else's notes, and that they were products of various therapeutic settings over a period of time. Attempts to impeach NW on these inconsistencies would likely prove distracting and confusing for

the members, and inconclusive of her truthfulness. See, e.g., *United States v. Crowley*, 318 F.3d 401, 416 (2d Cir. 2003)(finding that the trial judge did not abuse his discretion in refusing to allow cross-examination of a victim on alleged prior false allegations). Therefore we find that the trial judge did not abuse his discretion in refusing to allow cross-examination on this matter.

We are receptive to the appellant's argument that the military judge may have misstated the law when he repeatedly characterized trial defense counsel's attempt at impeachment as an attempt "to prove credibility by specific instances." Record at 534. However, his imprecision may also be attributable to trial defense's counsel's failure to distinguish between MIL. R. EVID. 608(b) and 608(c). Trial defense counsel simply referred to "credibility and veracity,"<sup>9</sup> and never articulated that he was seeking to impeach NW under MIL. R. EVID. 608(b). Nonetheless, it is clear to us that the military judge applied MIL. R. EVID. 608(b), because he correctly focused on whether the statements reflected mental health providers' "observations and conclusions" as opposed to NW's assertions of fact. He also observed that the statements were "getting collateral" in subject matter, all of which is standard MIL. R. EVID. 608(b) analysis.

### **C. Facebook post**

The military judge also prohibited the trial defense counsel from asking about Appellate Exhibit LXIV, a post written by NW on Facebook. The appellant characterizes this post as evidence of NW "lying in a relationship to create drama,"<sup>10</sup> which was also how his defense counsel phrased the question to NW at trial: "[A]re you the kind of person that would lie in a relationship to create drama?" Record at 553.

We note first that this question, like trial defense counsel's statement of the MIL. R. EVID. 608(c) motive, is phrased in distinctly character terms. It asks about NW's general characteristics, not a specific act of hers.<sup>11</sup> Assuming that defense counsel was highlighting the untruthfulness of the post

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<sup>9</sup> Record at 531.

<sup>10</sup> Appellant's Brief at 13.

<sup>11</sup> Also note that it was the military judge, not trial defense counsel, who formulated this as an issue under MIL. R. EVID. 608(b). Trial defense counsel did not articulate a specific theory of admission.

on Facebook, we must consider whether this post was in fact probative of NW's truthfulness. On its face, it is apparent that AE LXIV discusses a practical joke played by NW and a friend. There is nothing to contradict NW's contention that she was joking, and there is no evidence that the joke was analogous in any way to a false claim of sexual assault. The posting was in the nature of an apology for any mischief or angst that the joke may have caused. It is difficult to see how AE LXIV is at all probative of NW's truthfulness, and the military judge was well within his discretion to keep it out of the trial.

#### **D. Trial defense counsel's reading of a document**

The fourth and final limitation identified in the appellant's brief is that the military judge prevented trial defense counsel from reading a document to NW while he questioned her.<sup>12</sup> Before he relied on the document, trial defense counsel asked NW three different times whether she had a phone conversation with AD2 Malone's wife (another witness), and each time NW responded that she did not remember. Trial defense counsel then began reading from a document listing the time and date that the conversation allegedly took place, but the military judge prevented him from finishing the question.

We find that the military judge did not abuse his discretion, particularly since the appellant assigns this error under MIL. R. EVID. 613 ("Prior statements of witnesses"). If the document in question was actually a telephone log, as the appellant claims, then it was not NW's prior statement. Furthermore, by the time that trial defense counsel turned to the document, NW had repeatedly stated that she did not remember the conversation. In order to proceed on the same subject, then, the trial defense counsel would have had to refresh her recollection, but he did not take that approach. He simply continued asking about the conversation, even though it would have been impossible for NW to say anything more about something she did not remember. By the time trial defense counsel read from the document, his questions were asked-and-answered, and the military judge was within his discretion to end the inquiry.

#### **E. The military judge's *sua sponte* objections**

The appellant also argues that the military judge abandoned his impartiality and became, in effect, a second prosecutor whenever he objected *sua sponte* to questions by the trial

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<sup>12</sup> Although the appellant characterizes this document as a "telephone log," Appellant's Brief at 12, the document is not attached to the record of trial.

defense counsel. We have discussed directly above one of the occasions highlighted by the appellant, the military judge's intervention when trial defense counsel began reading from a document. The appellant also identifies several occasions during Dr. Kennedy's testimony when the military judge intervened without objection, a moment when he told trial defense counsel that his questions were argumentative "to [his] peril,"<sup>13</sup> and several occasions on which the military judge told trial defense counsel to "move on."<sup>14</sup>

We find no abuse of discretion in the military judge's control of the court-martial, nor any reason to question his impartiality. There is a strong presumption that military judges are impartial. *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). They must take care not to become an advocate for either party, but that does not prevent them from participating "actively" in courts-martial to ensure that the members receive the information they need. *United States v. Foster*, 64 M.J. 331, 332-33 (C.A.A.F. 2007). In fact, military judges "shall exercise reasonable control over . . . presenting evidence so as to (1) make the . . . presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MIL. R. EVID. 611(a) (emphasis added).

Turning to each of the errors identified by the appellant, we find that the military judge's interventions during Dr. Kennedy's testimony served all three of the MIL. R. EVID. 611(a) purposes, particularly the latter two. Notably, the military judge was not objecting at whim, but instead enforcing his own pretrial rulings as counsel persisted in testing the limits of the same.

The military judge's comment to trial defense counsel about "peril" may not have been the ideal choice of words, but it does not rise to the level of error. Contextually, in front of members, it may well have been a signal that this argumentative advocacy might be backfiring. The question that incited this comment was in fact argumentative, and the comment itself does not appear to have limited proper cross-examination. Likewise, the military judge's direction to counsel to "move on" is not automatic error. See *United States v. Wilcox*, 631 F.3d 740, 750-51 (5th Cir. 2011).

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<sup>13</sup> Record at 600.

<sup>14</sup> See, e.g., Record at 547.

Overall, the military judge stayed well-within the scope of his authority and responsibility under MIL. R. EVID. 611(a). There is insufficient evidence to overcome the presumption of impartiality, and no reason that the military judge's conduct would, "taken as a whole in the context of [the] trial," place the legality, fairness, and impartiality of the court-martial into question. *Quintanilla*, 56 M.J. at 78.

#### **F. NW's past allegations of sexual assault**

In the course of our review under Article 66(c), UCMJ, we have also considered the military judge's ruling on the admissibility of NW's past allegations of sexual assault. NW's mental health records contain several references to three separate occasions on which NW claimed to have been sexually assaulted or inappropriately touched, spanning back as far as her elementary school days. From her medical records, it appears that NW may have recounted those events to therapists years later, imprecisely using legal or technical terms. Trial defense counsel argued that he was entitled to confront NW about these earlier allegations and about her later conversations with mental health providers about these episodes, to explore whether she had lied or exaggerated. The military judge ruled that trial defense counsel could not confront NW about the allegations because he had not shown they were false.

The military judge did not abuse his discretion, because the past allegations were not relevant in the absence of evidence that they were actually false. The appellant bore the burden to provide such evidence, since the mere existence of the allegations was not relevant to NW's credibility. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). But the appellant provided no evidence to establish the falsity of the statements. The only evidence in the record supports the military judge's conclusion that none of the three allegations was shown to be false.

There is also no evidence before us that NW exaggerated any of the three prior allegations. The terms "sexual assault" and "rape" were not NW's statements *per se* — they appear in the notes written by NW's mental health providers. Accordingly, we find no error.

### **VI. Factual and Legal Sufficiency**

We have also reviewed the findings for factual and legal sufficiency. When we examine the factual sufficiency of the evidence, we must be convinced beyond a reasonable doubt of the appellant's guilt, mindful of the fact that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all of the essential elements beyond a reasonable doubt. *Id.* at 324.

The appellant urges us to find factual insufficiency by discounting the testimony of NW and AD2 Malone. The arguments concerning NW emphasize her impeachment on trivial matters, and we need not address them. With respect to AD2 Malone, we concur that his eve-of-trial disclosure of the appellant's admissions was unusual, but he endured extensive cross-examination on the subject. His explanation for the late disclosure is at least somewhat logical; he was deployed to Kuwait during the pretrial stages, testified telephonically at the Article 32 hearing, and had limited communications with either counsel.

AD2 Malone's account of the appellant's statement is even more convincing in light of the appellant's own reversal in his pretrial statements. The appellant first issued a strong denial of any wrongdoing, Prosecution Exhibit 5, but in a second statement he claimed lack of memory while admitting that he "got out of hand" at NW's house and "disrespect[ed]" her and her husband. PE 6 at 2. This admission is consistent with what he told AD2 Malone. It is not surprising that the appellant was more graphic with a friend than with a law enforcement agent.

Considering also the immediacy of NW's reporting to her husband and the lack of evidence that she harbored any ill will toward the appellant, we are persuaded beyond a reasonable doubt of the appellant's guilt, and we are convinced that a reasonable fact finder would be as well.

## **VI. Conclusion**

Finding no error materially prejudicial to the appellant's substantial rights, the findings and the sentence as approved by the convening authority are affirmed.

Chief Judge PERLAK and Judge WARD concur.

For the Court

R.H. TROIDL  
Clerk of Court