17 April 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 17-04148/AF
Air Force Academy Cadet, STEPHAN H. CLAXTON, USAF *Appellant.*	)	Crim. App. No. 38188

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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17 April 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 17-0148/AF
Air Force Academy Cadet, STEPHAN H. CLAXTON, USAF, *Appellant.*	)	Crim. App. No. 38188

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE PRESENTED

WHETHER THE GOVERNMENT'S FAILURE TO DISCLOSE THAT AIR FORCE ACADEMY CADET E.T. WAS A CONFIDENTIAL INFORMANT FOR THE AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS (AFOSI) PURSUANT TO BRADY V. MARYLAND, 373 U.S. 83 (1963), WAS HARMLESS BEYOND A REASONABLE DOUBT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally accepted. The United States notes that Appellant was also convicted of assault consummated by a battery on

S.W. for unlawfully unbuttoning and unzipping her pants. (J.A. at 30-31.)

STATEMENT OF FACTS

Cadet M.I.

In March 2011, Cadet M.I. met Appellant one evening when her friend, Cadet R.H. and her acquaintance, Cadet E.T. suggested going to Appellant's dorm room to socialize. (J.A. at 153.) Cadet M.I. had never met Appellant before that night. (J.A. at 151.) Over the course of the evening, Cadet M.I., Appellant, Cadet R.H., and Cadet E.T. were "hanging out" in Appellant's dorm room. (J.A. at 220.) The four cadets consumed drinks mixed with liquor and played a card game. (Id.)

At some point while all four cadets were still in Appellant's dorm room, Cadet M.I. became sick from drinking. (J.A. at 156.) Because Appellant's dorm room was closest to the men's restrooms, the three other cadets, including Appellant, escorted Cadet M.I. to the men's restroom when she needed to vomit. (J.A. at 157.) Afterwards, the three cadets escorted Cadet M.I. back to Appellant's dorm room. (Id.) Cadet R.H. described Cadet M.I. as being "obviously drunk." (J.A. at 199.)

Once back in Appellant's dorm room, the four cadets decided to watch a movie in the room. (J.A. at 157, 200.) Cadet M.I. sat alone on the bed of Appellant's roommate, who was not present that evening. (J.A. at 159-60, 201.) Appellant was either sitting on his bed or at his desk. (J.A. at 160, 201.) Cadet

M.I. testified that at no point did she ever flirt or have physical contact with Appellant. (J.A. at 168.) Cadet R.H. confirmed that he observed no physical contact or romantic interest between Cadet M.I. and Appellant. (J.A. at 201.)

About twenty to thirty minutes into the movie, Cadet M.I. recalled falling asleep. (J.A. at 160.) Cadet E.T. left the room first, and Cadet R.H. left the room during the movie. (J.A. at 201.) At that point, Appellant and Cadet M.I. were the only two left in the dorm room. When Cadet R.H. left Appellant's dorm room, he observed that Cadet M.I. was asleep, alone, in the roommate's bed, while Appellant was in his own bed. (J.A. at 200-01.)

Cadet M.I. testified that she was woken up by "a hand or an arm brush[ing] up against [her] head." (J.A. at 160.) At that point, she did not know whose hand or arm had touched her. (Id.) Moments later, Cadet M.I. felt somebody get in the bed behind her. (J.A. at 161.) Cadet M.I. testified that she "was terrified and [she] froze." (J.A. at 162.) She explained, "[w]e all had been drinking so there was no telling what a person could do when they're drunk, especially if they went that far." (Id.) The person then grabbed her hand, pulled it behind her back, and placed it on his penis. (J.A. at 163.) She described that it felt "slimy" and "loose." (Id.) Once that happened, Cadet M.I. pulled her hand away and stood up and vomited in a trash can next to the bed. (J.A. at 163-64.) At that point, she saw Appellant in the bed. (J.A. at 164.)

Later that night, Cadet M.I. told Cadet R.H. and Cadet E.T. what had happened. (J.A. at 166.) She initially filed a restricted report of sexual assault because she did not want any of the cadets, including herself, to get in trouble for drinking alcohol. (J.A. at 169.)

At trial, the Government introduced a transcript from Appellant's interview with AFOSI, during which he conceded he received no "vibes" of romantic feelings from Cadet M.I. that night. (J.A. at 587.) In a sworn statement introduced at trial, Appellant admitted that Cadet R.H. and Cadet E.T. left him alone in his room with Cadet M.I. (J.A. at 561.) Appellant further admitted:

> I . . .went into the same bed as [Cadet M.I.]. She moved around a little and I pulled down my pants and boxers. At this time her hand was placed on my leg by me and I started touching myself. I positioned myself so that her hand would get closer and closer to my penis until it finally did. This continued for about 20-30 seconds.

(Id.)

Appellant also admitted that he believed Cadet M.I. was passed out or incoherent when he got into bed with her, and that "[w]ithout a doubt in my mind my actions were wrong." (J.A. at 563, 566.) Appellant sent text messages to his mother after the event saying he "inappopiately [sic] touched a female a while back and have probably caused her caused her ditress [sic] . . ." (J.A. at 567.) Appellant further admitted in his own sworn statement that he had forwarded those text

messages to Cadet R.H. who ultimately showed them to Cadet M.I. (J.A. at 205-07, 558.)

S.W.

S.W. met Appellant when they were both attending the Preparatory School for the Air Force Academy in 2008. (J.A. at 221.) Since that time, they remained friends but did not socialize together often. (Id.)

In November 2011, Cadet E.T. invited S.W. to join him and some friends for dinner at Buffalo Wild Wings. (J.A. at 222.) Cadet E.T., Cadet R.H., Cadet D.B., Cadet D.G., Cadet S.C., Appellant, and a few other cadets were all present at the restaurant. (J.A. at 208, 223, 241, 266, 347.) S.W. consumed approximately three margaritas and two shots of alcohol at dinner. (J.A. at 224.)

After dinner, the group returned to the Academy so the cadets could be back in their dorms for the nightly inspection. (J.A. at 224, 242, 267, 348.) After the dorm inspection, the group left the Academy to go to a bar downtown. (J.A. at 225, 267, 348.) On the drive downtown, Appellant passed around a bottle of vodka, and S.W. took a "shot" from the bottle. (J.A. at 225.)

Once they arrived at the bar, S.W. was too drunk to go inside. (J.A. at 226, 268, 350.) Cadet E.T. assisted S.W. into a restroom to vomit. (J.A. at 226-27, 300.) At that point, S.W. was so inebriated that she passed out. (J.A. at 227, 243,

300.) Cadet E.T. had to carry S.W. out of the restroom back to the car. (J.A. at 243, 301.)

The rest of the group eventually returned to the car. (J.A. at 244, 302.) Because no one knew where S.W. lived, and she was in such a state of inebriation she was unable to tell the cadets where she lived, the cadets decided to bring her back to the Academy. (J.A. at 269, 302-03.) Once they arrived at the Academy, Appellant and Cadet D.B. carried S.W. to one of the dorm rooms and placed her on the bed. (J.A. at 303-04, 351.) S.W. was passed out or unresponsive when she was placed on the bed, but her clothes were not out of place. (J.A. at 245-46, 352.) S.W. did not remember anything from the point when she felt she was too intoxicated to enter the bar until she entered Cadet E.T.'s room and laid down. (J.A. at 227.) Her next memory after laying down in Cadet E.T.'s room was waking up in an ambulance. (Id.)

After placing S.W. in the bed, the other cadets decided to leave Cadet E.T.'s room to look for a mattress pad. (J.A. at 246, 353.) Soon after, Cadet C.S. informed Cadet D.B. and Cadet E.T. that Cadet E.T.'s door had been locked. (J.A. at 247, 353.) Returning to the door, Cadet E.T. and Cadet D.B. began "banging on the door." (Id.) When Appellant opened the door, Cadet D.B. grabbed him and pulled him out of the room. (J.A. at 354.) Appellant punched Cadet D.B. and later struck and choked Cadet E.T. (J.A. at 250, 271, 308, 336-37, 354, 357.) The next

day Cadet R.H. and Cadet C.S. observed Cadet D.B. with a bruise on his face. (J.A. at 212, 252.) Cadet R.H. also saw Cadet E.T. with marks on his neck. (J.A. at 212.)

After Appellant was removed from the room, five cadets – Cadets C.S., E.T., D.B., D.G., and T.W. – testified to observing S.W. laying on the bed with her shirt pulled up to her bra line, and her pants unbuttoned, unzipped, and exposing her underwear. (J.A. at 248-49, 270, 309, 335, 355.) Six cadets – Cadets C.S., E.T., D.B., R.H., D.G., and T.W. – described S.W. as being passed out or unresponsive after Appellant was removed from the room. (J.A. at 209, 249, 270, 316, 335, 355.) Eventually, the paramedics were called. The paramedics had a difficult time waking S.W. up, and took her away in an ambulance. (J.A. at 211-12, 358.)

Appellant was interviewed by AFOSI following the incident. Initially, Appellant claimed that he didn't remember everything that happened and that he did not remember touching S.W. (J.A. at 554-55.) However, he admitted to locking the door to Cadet E.T.'s room and to hitting both Cadet D.B and Cadet E.T. (J.A. at 554-55, 571, 573.) In a subsequent statement to AFOSI, Appellant admitted that he put his arm around S.W. while she was passed out on the bed.[1] (J.A. at 561, 601.) He fully acknowledged that he believed S.W. was "passed

[1] Appellant also admitted to kissing S.W. while she was passed out and incoherent. (J.A. at 561, 601.) However, AFCCA found that this admission was not sufficiently corroborated and should have been excluded at trial. (J.A. at 26-27.)

out/incoherent." (J.A. at 555, 566.) Appellant also admitted, "I strongly believe it's possible" that he unbuttoned S.W.'s pants. (J.A. at 566.)

Cadet E.T.'s involvement with AFOSI

Cadet E.T. began his education at the Air Force Academy in August 2009, and by the end of his first year, he was on academic probation. (J.A. at 441, 670.) Cadet E.T. was also placed on conduct probation, but was removed by 12 November 2010. (J.A. at 667.) Cadet E.T. accrued demerits for a variety of infractions between January 2010 and January 2012. (J.A. at 658.) The trigger for disenrollment at the Air Force Academy was 200 demerits. (J.A. at 475.) Cadet E.T. was ultimately disenrolled from the Air Force Academy after Appellant's June 2012 trial. (J.A. at 60.) Information about Cadet E.T.'s academic probation, demerits, and disciplinary record were all made available to trial defense counsel prior to trial. (J.A. at 669.)

Cadet E.T. claimed in his Dubay testimony that he was interviewed by SA Michael Munson of AFOSI as a witness concerning a party that had occurred in Divide, Colorado in October 2010. (J.A. at 454-55.) According to Cadet E.T., this interview occurred in late 2010, and at that time, he also provided a sworn statement about the events that took place at the party. (Id.) At the interview, SA Munson pitched the idea of Cadet E.T. becoming a confidential informant. (J.A. at 455.)

At the Dubay hearing, Cadet E.T. testified that after initially meeting with SA Munson, he came back a second time to sign a declaration of agreement and filled out a questionnaire about his hobbies and interests. (J.A. at 456.) Cadet E.T. claimed he met with SA Munson on several occasions to provide information on misconduct by cadets. (J.A. at 456-57.) According to Cadet E.T., SA Munson directed him specifically to track Appellant, because AFOSI had heard that other cadets did not trust Appellant or feel safe around him, and AFOSI suspected he might perpetrate other sexual assaults. (J.A. at 457, 459-60.)

Cadet E.T. testified at the Dubay hearing that the after the incident between Appellant and Cadet M.I. occurred in March 2011, he told SA Munson that "an incident happened with [Appellant]" and that alcohol was involved. (J.A. at 478.) He and SA Munson did not discuss the incident further, because Cadet M.I. had made a restricted report. (J.A. at 478.) Cadet E.T. claimed that he believed he was working as a confidential informant at the time of the incident involving Cadet M.I. (J.A. at 477-78.)

However, as part of a Department of Defense Inspector General (IG) investigation, SA Munson contradicted much of Cadet E.T.'s testimony about their relationship. SA Munson acknowledged that he interviewed Cadet E.T. as a witness to the Divide party, but that the interview occurred in April 2011. (J.A. at 699.) Indeed, agents notes taken during Cadet E.T.'s interview about the Divide

party show that the interview occurred on 6 April 2011. (J.A. at 714-16.) Cadet E.T.'s sworn statement about the Divide party was likewise made on 6 April 2011. (J.A. at 717-19.)

SA Munson also confirmed in his IG testimony that he pitched the idea to Cadet E.T. of becoming a confidential informant at the April 2011 interview, and that he may have had Cadet E.T. fill out some initial paperwork related to becoming a confidential informant. (J.A. at 698-701.) But he testified that Cadet E.T. did not become a confidential informant that time, and that he never ran Cadet E.T. as a source, never contacted him, never levied him or gave him any tasks. (J.A. at 701.) He explained that he would not have asked Cadet E.T. to get close to certain people. (Id.) Other testimony at the Dubay hearing established that AFOSI cannot task or levy an individual unless that person has been officially approved as a confidential informant. (J.A. at 427.)

SA Munson did not recall Cadet E.T. ever calling him to relay any information. (J.A. at 702, 704.) In fact, SA Munson did not remember having any interactions with Cadet E.T. after their initial interview in April 2011. (J.A. at 706.) SA Munson testified that he absolutely did not give Cadet E.T. specific direction to pay special attention to Appellant. (J.A. at 710.) He continued, "I wouldn't tell him to take an interest in someone without him being an informant." (Id.)

The Dubay military judge found as fact that "Cadet [E.T.]'s first interaction with AFOSI was in April 2011." (J.A. at 671.) She also found that after SA Munson and Cadet E.T.'s initial meeting in April 2011, "SA Munson did not consider Cadet [E.T.] an OSI CI, and Cadet [E.T.] did not believe he was an OSI CI. Cadet [E.T.] did not make it his duty or goal to keep an eye on [Appellant] so he could report back to OSI." (J.A. at 671-72.)

In her ruling, the Dubay military judge later explained:

> I gave little weight to [Cadet E.T.]'s testimony or to Appellate Exhibit LXVIII.[2] It appeared his testimony was well rehearsed. His testimony was often inconsistent with other evidence, which may be because his testimony was tailored to documents he received in a FOIA request. Overall, his testimony sounded self-serving. He had a clear agenda, which was to propagate his story that he was disenrolled as a result of his activity at the behest of OSI, as part of his effort to be made whole. He had none of these credibility issues at trial.

(J.A. at 673.)

Cadet E.T. did officially become a CI with AFOSI on 7 December 2011. (J.A. at 508-09, 629-30.). SA Brandon Enos served as Cadet E.T.'s handling agent. (J.A. at 441.) The relationship was first initiated on 2 December 2011, when Cadet E.T. was called into AFOSI as a witness related to Appellant's alleged sexual assault of S.W. (J.A. at 504-05, 622.) On 2 December 2011, Cadet E.T.

[2] Appellate Exhibit LXVIII was Cadet E.T.'s sworn testimony to the IG Investigator, dated 17 January 2014. (J.A. at 146.)

also made a sworn statement to AFOSI regarding the S.W. allegations.[3] (J.A. at 678-82.) After Cadet E.T. was interviewed regarding the S.W. incident, SA Enos pitched the idea to Cadet E.T. of becoming a confidential informant. (J.A. at 505.) In that conversation with SA Enos, Cadet E.T. did not claim or otherwise inform SA Enos that he had been working with SA Munson. (J.A. at 461, 524-25.)

On 7 December 2011, Cadet E.T. filled out the necessary paperwork to become a confidential informant, including a declaration of agreement and nondisclosure agreement. (J.A. at 507, 629-30.) AFOSI agents also ran an extensive background check on Cadet E.T.,[4] trained him on entrapment, took photographs of him and his car, and administered a polygraph examination. (J.A. at 506-07.)

Cadet E.T.'s dossier revealed that he told AFOSI that he was motivated to work as a confidential informant due to his high level of demerits. (J.A. at 622.) He further related that he feared being removed from the Air Force Academy and would do anything he can to remain at the Academy and keep a career in the Air Force. (Id.) SA Tyler Rube of AFOSI told Cadet E.T. that if he were ever facing disenrollment, AFOSI would speak with his commanders about the work he had

[3] Cadet E.T. made a previous sworn statement regarding the S.W. incident to Security Forces personnel on 5 November 2011, at the direction of his squadron commander. (J.A. at 460, 675-78.)

[4] This background check revealed no information about Cadet E.T. being a confidential informant prior to that date. (J.A. at 525.)

done with AFOSI as a confidential informant. (J.A. at 442.) But the agents never promised Cadet E.T. that they could save him from disenrollment. (Id.)

All of Cadet E.T.'s initial meetings in December 2011 and January 2012 with AFOSI as a confidential informant related to "Operation Gridiron," which involved investigating members of the Air Force Academy football team for drug use. (J.A. at 450.) The height of Operation Gridiron occurred in January 2012, and AFOSI was trying to close those investigations by April 2012. (J.A. at 531.) SA Enos continued to levy Cadet E.T. until approximately July 2012. (JA. At 531.)

Cadet E.T. was never tasked to gather information on Appellant, and in fact, AFOSI concluded its investigation into Appellant in mid-December 2011. (J.A. at 450-51, 509-10.) There were no confidential informants used by AFOSI in the sexual assault investigations regarding Appellant. (J.A. at 422.)

At the Dubay hearing, SA Enos testified that every piece of information provided by Cadet E.T. during the course of his work as a confidential informant "ended up being legitimate information" and "turned out to be credible" and that "nothing that he provided was false and everything led to at least a case being opened . . ." (J.A. at 511, 530.)

Discovery Requests Related to Appellant's trial

In a discovery request dated 3 February 2012, trial defense counsel requested "The names, address and phone numbers of all confidential witnesses, including, but not limited to undercover AFOSI's or Security Forces' informants and/or agents." (J.A. at 80, 90.) Trial defense counsel also requested, "Any information obtained from an informant whose information and identity has not already been disclosed. Information withheld on privacy or other grounds of privilege shall be identified for *in camera* review by the military judge." (J.A. at 82.) Despite the fact that the USAFA/JA Staff Judge Advocate and Chief of Military Justice were aware that Cadet E.T. was serving as a confidential informant, this information was never disclosed to trial defense counsel prior to or during Appellant's June 2012 trial. (J.A. at 33, 36, 94.)

Ruling of the Dubay Military Judge

In her conclusions of law, the Dubay military judge found that the failure to disclose that Cadet E.T. was a confidential informant was harmless beyond a reasonable doubt. (J.A. 673.) After the Dubay hearing closed, government counsel notified the Dubay military judge and trial defense counsel that another witness who testified at Appellant's court-martial had acted as a confidential informant for AFOSI in relation to Operation Gridiron. (Id.) The government requested an email identifying the witness be included in the record for

consideration at the appellate level, and the military judge attached the email as Appellate Exhibit LXXXVII. (Id.) The military judge did not consider this matter, as it was outside the scope of the order issued by the convening authority. (Id.)

SUMMARY OF THE ARGUMENT

The Government's failure to disclose Cadet E.T.'s status as a confidential informant was harmless beyond a reasonable doubt. Given the facts of this case, there is no possibility that disclosure of Cadet E.T.'s status would have affected the outcome of Appellant's trial. Even if trial defense counsel had been able to impeach Cadet E.T. concerning his status as an AFOSI informant, that impeachment would not have been effective. The record does not establish that Cadet E.T. was a confidential informant in Appellant case or that he had reason to believe that he would derive a benefit from providing information or testimony in *Appellant's* case in particular. Also, the Government would have been able to rehabilitate Cadet E.T. with testimony as to his character for truthfulness and with a prior consistent statement. Furthermore, Cadet E.T.'s trial testimony was extensively corroborated by multiple other witnesses and Appellant's own admissions. Impeaching Appellant on his confidential informant status would not have caused the members to doubt the credibility of Cadet E.T.'s trial testimony or have otherwise raised a reasonable doubt as to Appellant's guilt.

Moreover, even if disclosure of Cadet E.T.'s status as a confidential informant would have enabled trial defense counsel to introduce the theory at trial that Cadet E.T. was "setting up" Appellant to commit sexual assaults, this would not have affected the outcome of the trial either. Such a theory is implausible and not supported by the rest of the record. The record as a whole would not have enabled Appellant to establish the affirmative defense of entrapment, and presentation of this theory would not have otherwise raised a reasonable doubt as to Appellant's guilt. Also, the theory that Cadet E.T. had been "setting up" Appellant to commit sexual assaults would not have been compelling evidence in extenuation and mitigation at sentencing, since Appellant ultimately made his own choice to commit the criminal acts. The ability to advance such a theory at trial would not have affected the sentence ultimately adjudged in Appellant's case.

Finally, information in the record that the Government failed to disclose a second confidential informant should not change the outcome of this appeal. Even absent the testimony of the two confidential informants, the Government's case was overwhelmingly strong as to all specifications of which Appellant was found guilty. As such, there is no need for this Court to order a second Dubay hearing. This Court can already be confident that any nondisclosure concerning confidential informants was harmless beyond a reasonable doubt without further factfinding.

ARGUMENT

THE GOVERNMENT'S FAILURE TO DISCLOSE CADET E.T.'S STATUS AS A CONFIDENTIAL INFORMANT WAS HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review

A Dubay judge's findings of fact are reviewed for clear error. United States v. Wean, 45 M.J. 461, 462-63 (C.A.A.F. 1997). A Dubay judge's conclusions of law are reviewed de novo. United States v. Anderson, 55 M.J. 198, 201 (C.A.A.F. 2001.)

Law

Under Brady v. Maryland, 373 U.S. 83, 87 (1963), "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." Evidence is "material" under Brady "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Smith v. Cain, 565 U.S. 73, 75 (2012) (quoting Cone v. Bell, 556 U.S. 449 (2009)). A "reasonable probability" means that the likelihood of a different result is great enough to "undermine confidence in the outcome of the trial." Id. (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995).

Article 46, UCMJ also provides military members with "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the

President may prescribe." In turn, the President has implemented Article 46 through Rules for Courts-Martial (R.C.M.) 701-703. United States v. Coleman, 72 M.J. 184, 186-87 (C.A.A.F. 2013). In pertinent part, R.C.M. 701(a)(2)(A) and 701(a)(6)(A) provide for discovery of documents "which are material to the preparation of the defense" and of evidence "which reasonable tends to negate the guilt of the accused of an offense charged." "Article 46 and its implementing rules provide greater statutory discovery rights to an accused than does his constitutional right to due process." Coleman, 72 M.J. at 187 (citing United States v. Roberts, 59 M.J. 323, 327 (C.A.A.F. 2004)).

This Court recognizes "two categories of disclosure error:" (1) cases in which trial defense counsel made no discovery request or only a general request; and (2) cases in which the defense made a specific discovery request. Id. Disclosure errors falling into the first category are tested for harmless error. Id. "Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." Roberts, 59 M.J. at 327 (citing United States v. Hart, 29 M.J., 407, 410 (C.M.A. 1990)). Failure to disclose requested evidence favorable to the defense is not harmless beyond a reasonable doubt "if the undisclosed evidence might have

affected the outcome of the trial." Coleman, 72 M.J. at 187 (citing Hart, 29 M.J. at 409).

In analyzing disclosure issues, this Court asks whether the evidence at issue was subject to disclosure, and if disclosure did not occur, this Court tests the effect of the nondisclosure on Appellant's trial. Id. (citing Roberts, 59 M.J. at 325).

The Supreme Court has stated that where an accused has improperly been denied the opportunity to impeach a witness for bias, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Relevant factors in assessing whether the error was harmless beyond a reasonable doubt are: (1) whether the testimony was cumulative; (2) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (3) the extent of the cross-examination otherwise permitted; and (4) the overall strength of the prosecution's case. Id.

Analysis

Although Appellant framed his issue as a Brady violation, he also references R.C.M. 701 and argues that the United States must prove that the nondisclosure of Cadet E.T.'s status as a confidential informant was harmless beyond a reasonable doubt. (App. Br. at 26-27.)

The United States does not contest that Cadet E.T.'s status as a confidential informant working for AFOSI should have been disclosed to trial defense counsel pursuant to R.C.M. 701, Article 46, and Brady. The United States also acknowledges that Appellant made a specific request for the disclosure of information relating to any confidential informant involved in Appellant's court-martial, and therefore, under Roberts, the United States has the burden of showing that the nondisclosure was harmless beyond a reasonable doubt.[5] Nonetheless, even under this more rigorous standard for assessing prejudice, there is **no possibility** that disclosure of this information would have affected the outcome of Appellant's trial, and as such, the nondisclosure was harmless beyond a reasonable doubt.

Appellant contends that he was prejudiced by the nondisclosure of Cadet E.T.'s status as a confidential informant because (1) he was prevented from cross-examining Cadet E.T. and exposing his bias in favor of the government, and (2) he was prevented from advancing the theory that Cadet E.T. (and a second confidential informant) had orchestrated events to "set up" Appellant to be accused

[5] The Dubay military judge's incorrect finding that trial defense counsel never made a specific discovery request related to confidential informants apparently stems from the fact that neither party at the Dubay hearing provided the Dubay military judge with any documentation about discovery requests. (J.A. at 673.) However, the entirety of the record establishes that trial defense counsel did indeed make such a request.

of sexual assault. (App. Br. at 31-34.) For the reasons described below, neither of these arguments is persuasive.

a. Even if Appellant had been able to cross-examine Cadet E.T. on his work as a confidential informant with AFOSI, such evidence would not have affected the outcome of Appellant's trial.

The impeachment evidence concerning Cadet E.T.'s work with AFOSI would have done little to damage the believability of Cadet E.T.'s testimony at the court-martial. Impeachment of Cadet E.T. could have allowed trial defense counsel to advance the theory that Cadet E.T. was fabricating his testimony implicating Appellant in the alleged crimes in order to curry favor with AFOSI, who in turn would help him avoid disenrollment from the Academy. However, the Government would have been able to counter that theory with evidence establishing that Cadet E.T. had no reason to believe that he would derive a benefit from providing information in *Appellant's* case in particular. The military judge found as fact that Cadet E.T. was not a confidential informant in Appellant's case and was never instructed by AFOSI to keep an eye on Appellant.[6] These findings were supported by the record, and not clearly erroneous, and therefore must be

[6] The Dubay military judge's findings strongly imply that, at the time of Appellant's trial, Cadet E.T. would *not* have testified that he had been working with SA Munson as a confidential informant since the end of 2010. Notably, at the time of trial, Appellant had not yet been disenrolled and thus had no motive to exaggerate or embellish his relationship with AFOSI. As the Dubay military judge explained, Cadet E.T. "had none of these credibility issues at trial." (J.A. at 673.)

accepted by this Court.[7] Moreover, Cadet E.T. provided his sworn statements about Appellant's case before becoming a confidential informant on 7 December 2011, and thus before he had any reason to expect a personal benefit from providing information to AFOSI.

Although fear of disenrollment motivated Cadet E.T. to work for AFOSI beginning in December 2011, there is no indication that fear of disenrollment ever caused Cadet E.T. to provide AFOSI with any *false* information. Indeed, SA Enos testified at the Dubay hearing that every piece of information that Cadet E.T. provided as a confidential informant "turned out to be credible." Had trial defense counsel impeached Cadet E.T. regarding his confidential work with AFOSI and motive to fabricate, the Government would have been able to rehabilitate Cadet E.T. with testimony concerning Cadet E.T.'s character for truthfulness. *See* Mil. R. Evid. 608(a). SA Enos would have been able to testify to his opinion of Cadet E.T.'s character for truthfulness and his foundation for that opinion. It is evident from the record that at the time of Appellant's trial in June 2012, SA Enos had a very positive impression of Cadet E.T.'s truthfulness.

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[7] The Dubay military judge's findings of fact rested on her determination that Cadet E.T. did not testify credibly at the Dubay hearing. In short, she determined that SA Munson's statements to the Inspector General were credible, and Cadet E.T.'s contradictory testimony was not. Such a finding cannot be said to be clearly erroneous. *See* Anderson v. City of Bessemer City, NC, 470 US 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.")

Further, impeaching Cadet E.T. would have allowed the Government to introduce under Mil. R. Evid. 801(d)(1)(B) a prior consistent statement that Cadet E.T. made on 5 November 2011 to Security Forces Investigators, rather than to AFOSI. Cadet E.T. made this sworn written statement at the behest of his squadron commander, on the same day as the incident involving S.W. occurred. (J.A. at 675-77.) This statement was made approximately a month before Cadet E.T. was interviewed by AFOSI about the S.W. allegations and became a confidential informant. Since the statement was made before Cadet E.T. had any official relationship with AFOSI, it was also made before any motive to fabricate associated with his official confidential informant duties would have arisen.[8] Cadet E.T.'s prior sworn statement given to Security Forces on 5 November 2011 was consistent with the testimony he ultimately gave at trial, and would have strongly rebutted trial defense counsel's contention that Cadet E.T. was fabricating his trial testimony. *See* Coleman, 72 M.J. at 188 (As part of its analysis that a discovery error was harmless beyond a reasonable doubt, this Court considered the fact that the government could have rehabilitated a witness using a prior consistent statement.)

[8] "Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut." United States v. Allison, 49 M.J. 54, 57 (C.A.A.F. 1998.)

Not only was the impeachment evidence minimally probative in and of itself, Cadet E.T. was a peripheral witness to most of the charges and specifications, and his testimony was both cumulative with and corroborated by the testimony of numerous other witnesses and by Appellant's own admissions. *Cf.* Smith 565 U.S. at 76 (failure to disclose evidence impeaching eyewitness required reversal under Brady where eyewitness's testimony was the *only* evidence linking petitioner to the crime.) Cadet E.T.'s status as a confidential informant did nothing to explain away Appellant's own highly damaging admission to AFOSI. Trial defense counsel also had access to Cadet E.T.'s full disciplinary history, and could have used it to imply that Cadet E.T. had a motive to testify against Appellant in order to receive leniency. (J.A. at 674.) There is no indication that the military judge would have disallowed this avenue of inquiry had trial defense counsel chosen to pursue it.

Cadet E.T. provided testimony relevant to following specifications of which Appellant was convicted: Charge I, and its Specification (attempted abusive sexual contact of S.W.); Charge II and its Specification (wrongful sexual contact of Cadet M.I.); Charge III, Specification 1 (assault consummated by a battery for striking Cadet D.B. in the face); Charge III, Specification 2 (assault consummated by a battery for unbuttoning and unzipping the pants of S.W.); and Charge III,

Specification 4 (assault consummated by a battery for striking and choking Cadet E.T.) [9]

(1) Wrongful Sexual Contact of Cadet M.I.

With respect to the specification involving Cadet M.I., Cadet E.T. testified that he, Cadet R.H., Cadet M.I. and Appellant were all drinking alcohol in Appellant's room one night in March 2011. (J.A. at 282-83.) Cadet E.T. recounted that he left Appellant's room before the other three; that later that night, Cadet R.H. summoned him to Cadet M.I.'s room; and that Cadet M.I. was very upset and told them that Appellant "had grabbed her hand and put it on him." (J.A. at 284-86.) Cadet E.T. testified that Appellant initially denied touching Cadet M.I., but later Appellant stated that he was "getting help" and "talking to someone." (J.A. at 288.)

For this specification, Cadet E.T. only provided peripheral details surrounding the offense, as he was not physically present when the offense occurred. The most important pieces of evidence supporting this specification were Cadet M.I.'s testimony about what occurred when she and Appellant were alone in his room, and Appellant's own admissions to the sexual contact. Cadet E.T.'s testimony was cumulative and was corroborated by the testimony of Cadet

[9] Cadet E.T.'s testimony also related to the facts and circumstances surrounding Charge II, Specification 3 (that Appellant kissed S.W. without her consent). However, AFCCA dismissed this specification pursuant to Adams due to lack of corroboration. (J.A. at 27.)

M.I., Cadet R.H. and by Appellant's own highly damaging admissions. Given Cadet M.I.'s strong, certain testimony and Appellant's admission that he caused Cadet M.I.'s hand to touch his penis and that she was passed out or incoherent when he got into bed with her, the Government's case was overwhelming. The Van Arsdall factors weigh in favor of a determination that Appellant's inability to cross-examine Appellant on his status as a confidential informant was harmless beyond a reasonable doubt with respect to the specification involving Cadet M.I.

(2) Attempted Abusive Sexual Contact of S.W. and Assaults of S.W., Cadet. D.B. and Cadet E.T.

With respect to the specifications involving S.W. and the ensuing assaults, Cadet E.T. testified as follows: Cadet E.T., S.W., Appellant and several other cadets went to dinner at Buffalo Wild Wings and later went downtown. (J.A. at 297-98.) S.W. became intoxicated, passed out in the bathroom of a bar, and had to be carried back to the car. (J.A. at 300-01.) The cadets took S.W. back to the Air Force Academy and placed her in Cadet E.T.'s bed, where she fell asleep. (J.A. at 303-05.) The cadets left Cadet E.T.'s room momentarily to look for a mattress pad. (J.A. at 305.) Then, Cadet S.C. informed the other cadets that Cadet E.T.'s door was locked and Cadet E.T. realized Appellant was no longer with them. (J.A. at 306.) Cadets E.T. and D.B. banged on the locked door, and when it opened Cadet D.B. pulled Appellant out of the room. (J.A. at 307.) Cadet E.T. observed S.W.'s shirt pulled up to the breast area and her pants unbuttoned and unzipped,

and she continued to be unresponsive. (J.A. at 309.) Later, Cadet E.T. saw paramedics attending to S.W. (J.A. at 318.) The next day, S.W. told Cadet E.T. she had no recollection of what happened the night before. (J.A. at 320.)

When Appellant returned to Cadet E.T.'s room, Cadet D.B. said, "don't let that rapist in the room." Appellant punched Cadet D.B. and said "I'm not a rapist." (J.A. at 311.) Cadet D.B. did not return any punches. (J.A. at 313.) When Cadet E.T. tried to separate Appellant from Cadet D.B., Appellant put his hand around Cadet E.T.'s neck and pushed Cadet E.T. onto the bed. (Id.)

Cadet E.T.'s testimony was extensively corroborated by other witnesses at Appellant's court-martial. The two most significant portions of Cadet E.T.'s testimony, (1) that S.W. was passed out and unresponsive at the time of the offenses and (2) that S.W. was found with her shirt pushed up to her breasts and with her pants unbuttoned and unzipped, were corroborated by five and four other witnesses respectively. Appellant himself admitted to locking the door to Cadet E.T.'s room, that S.W. was passed out and incoherent, and that it was a strong possibility that he had unbuttoned S.W.'s pants.

Consistent with Cadet E.T.'s testimony, Appellant also admitted hitting both Cadet E.T. and Cadet D.B. Three other cadets – Cadets D.B., Cadet C.S., and Cadet T.W. – confirmed that Appellant struck Cadet D.B. (J.A. at 250, 336-37, 357.) Three other cadets corroborated Appellant's assault of Cadet E.T. Cadet

S.C. observed Appellant grab Cadet E.T. by the throat and hit Cadet E.T. in the face. (J.A. at 250.) Cadet D.B. and Cadet T.W. also testified to seeing Appellant choke Cadet E.T. (J.A. at 271, 336-37.)

Due to the numerous witnesses testifying to the events of 4-5 November 2011 and Appellant's own admission, the Government's case was extremely strong. The Van Arsdall factors weigh in favor of a determination that Appellant's inability to cross-examine Appellant on his status as a confidential informant was harmless beyond a reasonable doubt with respect to the specifications involving S.W. and Appellant's physical assaults of Cadets D.B. and E.T.

In sum, even if trial defense counsel had been fully able to cross-examine Cadet E.T. on the extent of his involvement as an informant with AFOSI, such impeachment would not have caused the members to believe that Cadet E.T. might be fabricating his testimony against Appellant. Furthermore, such impeachment would not have raised a reasonable doubt as to Appellant's guilt as to any specification of which he was ultimately convicted. The evidence would not have affected the members' ultimate decision on findings. Since the discovery error did not affect the outcome of Appellant's trial, it was harmless beyond a reasonable doubt.

b. Even if Appellant had been able to introduce the theory at trial that Cadet E.T. was "setting up" Appellant to commit sexual assaults, the advancement of such a defense theory would not have affected the outcome of Appellant's trial.

Appellant contends that the Government's failure to disclose Cadet E.T.'s status as a confidential informant wrongfully precluded him from advancing the theory that Cadet E.T. was "setting up" Appellant to commit sexual assault. However, the notion that Cadet E.T. was orchestrating situations where Appellant would commit sexual assaults in order to have information to report to AFOSI is contradicted by the facts in the record. Despite being aware of Appellant's inappropriate actions toward Cadet M.I. in March 2011, Cadet E.T. did not report the details of the event to AFOSI at that time.[10] In fact, it was S.W. who first mentioned to AFOSI that Appellant had also sexually assaulted Cadet M.I. earlier in the year. (J.A. at 503.) It simply does not make sense that Cadet E.T. would deliberately "set up" Appellant to commit sexual assault in order to ingratiate himself to AFOSI, but then fail to report the details for months until it was

[10] At the Dubay hearing, Cadet E.T. claimed that he thought he was working as a confidential informant in March 2011, and thus after the incident with Cadet M.I. occurred, he told SA Munson that Appellant had sexually assaulted someone. (J.A. at 478.) However, Cadet E.T. claimed he did not go into any details with SA Munson because Cadet M.I. had filed a restricted report. (Id.) This testimony was highly dubious given that documentation in the record showed that Cadet E.T. did not even meet SA Munson for the first time until April 2011. (J.A. at 714-19.) In any event, it is clear that whether or not Cadet E.T ever mentioned the incident to SA Munson, he did not provide any details and no AFOSI investigation was initiated based on Cadet E.T.'s statements.

eventually brought to AFOSI's attention by someone else. Likewise, Cadet E.T. did not speak with AFOSI about the incident involving S.W. until nearly a month after it occurred, and AFOSI initiated that interview – not Cadet E.T. (J.A. at 504.) These actions are not consistent with someone who is orchestrating situations for the specific purpose of reporting information to AFOSI. Under the circumstances of this case, such a defense theory would have been quite far-fetched and would not have raised a reasonable doubt as to Appellant's guilt for any specification of which he was convicted. Trial defense counsel's inability to present this implausible theory did not affect the outcome of trial, either for findings or sentence.

Even assuming Cadet E.T. had been plotting to put Appellant in questionable situations, such actions would not have excused the misconduct Appellant ultimately committed – either in terms of criminal liability or for sentencing. Nothing in the record suggests that Appellant would have been able to establish the affirmative defense of entrapment. In order to raise the affirmative defense of entrapment, "the defense has the initial burden of going forward to show that a government agent originated the suggestion to commit the crime." United States v. Hall, 56 M.J. 432, 436 (C.A.A.F. 2002) (internal citations omitted). *See also* R.C.M. 916(g). The record does not establish that Cadet E.T. – or anyone else – ever "induced" Appellant or "suggested" that Appellant commit

sexual assault or assault consummated by a battery.[11] In fact, the record confirms that Appellant was alone with Cadet M.I. in his room at the time he perpetrated his offense against her, and that he was alone with S.W. in Cadet E.T's locked room (save for the sleeping Cadet T.W.) when he perpetrated his offenses against her.

Appellant made multiple statements to AFOSI concerning both events with Cadet M.I. and S.W. Appellant had numerous opportunities to tell investigators that Cadet E.T. had encouraged, pressured or induced Appellant to commit sexual assault, if that had indeed happened. Despite equivocating profusely in his interviews and statements, Appellant never made such a claim.

Furthermore, even if Cadet E.T. had been "orchestrating circumstances" where Appellant might commit sexual assault, nothing in the record suggests that Appellant did not ultimately make the decision to commit the sexual offenses of his own volition. Without a doubt, in each situation, Appellant could have chosen not to engage in a criminal act, but he chose instead to take advantage of two vulnerable women. One can be sure that this implausible defense theory would not have garnered any sympathy for Appellant from the court-members at sentencing.

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[11] "Inducement is government conduct that 'creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offenses.' . . . Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, 'persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship.' . . . Inducement cannot be shown if government agents merely provide the opportunity or facilities to commit the crime or use artifice or stratagem." Hall, 56 M.J. at 436-37 (internal citations omitted).

In short, the potential defense theory that Cadet E.T. was "setting up" Appellant to commit sexual assault was not supported by the record and would not have enabled Appellant to establish the defense of entrapment. Such a theory would not have raised a reasonable doubt as to Appellant's guilt to any specification and would not have been a compelling factor in extenuation and mitigation at sentencing. As such, Appellant's inability to advance this theory at trial did not affect the outcome of his court-martial as to either the findings or sentence. Once again, the Government's failure to disclose Appellant's status as a confidential informant was harmless beyond a reasonable doubt.

c. The Government's failure to disclose the identity of a second confidential informant should not change the ultimate outcome of this appeal.

In his brief, Appellant also alleges that that the Government's failure to disclose a second confidential informant prejudiced Appellant. Although not specifically encompassed by the granted issue, the issue of the second informant could still be relevant to the question of whether Appellant was prejudiced by the Government's failure to disclose Cadet E.T.'s status as a confidential informant. However, under the circumstances of this case, the existence of the second, undisclosed confidential informant still does not change the final conclusion the nondisclosure was harmless beyond a reasonable doubt.

Appellate Exhibit LXXXII establishes that the second confidential informant was involved in Operation Gridiron. Operation Gridiron began in December 2011

and was "targeted specifically at the United States Air Force Academy football team for illegal drug use and distribution involving multiple football players." (J.A. at 437, 450.)

The height of Operation Gridiron occurred from January through March 2012. (J.A. at 531.) AFOSI began to close down Operation Gridiron in April 2012, well before Appellant's trial in June 2012. (Id.) As trial defense counsel even conceded during the Dubay hearing, Operation Gridiron was "not targeting Cadet Claxton," it was targeting other football players. (J.A. at 539.)

Thus, the second confidential informant's involvement in an AFOSI investigation that did not target Appellant gave him/her no reason to fabricate his/her testimony at Appellant's court-martial. Even assuming the information would have been admissible as impeachment evidence of bias or motive to fabricate under Mil. R. Evid. 608(c), it would have been of extremely limited value to Appellant and would not have undermined the strength of the Government's case.

The existence of the second confidential informant also does not change the fact that multiple other witnesses testified in support of each charge and specification of which Appellant was convicted, and that these witnesses' testimonies were highly consistent with one another. The existence of the second confidential informant further cannot explain away Appellant's decidedly

incriminating admissions to AFOSI. The overwhelming nature of the Government's case against Appellant renders a second Dubay hearing unnecessary, and renders any discovery errors relating to confidential informants harmless beyond a reasonable doubt.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 17 April 2017.

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