IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20140939
Specialist (E-4) **CHRISTOPHER B. HUKILL,** United States Army, Appellant	)	USCA Dkt. No. 17-0003/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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WHETHER, IN A COURT-MARTIAL TRIED BY MILITARY JUDGE ALONE, THE MILITARY JUDGE ABUSED HIS DISCRETION BY GRANTING THE GOVERNMENT'S MOTION TO USE THE CHARGED SEXUAL MISCONDUCT FOR MILITARY RULE OF EVIDENCE 413 PURPOSES TO PROVE PROPENSITY TO COMMIT THE CHARGED SEXUAL MISCONDUCT.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, [hereinafter UCMJ] 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On September 2 and December 10-11, 2014, at Fort Campbell, Kentucky, a military judge sitting as a general court-martial convicted Specialist (SPC) Christopher B. Hukill, contrary to his plea, of rape and abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The military judge sentenced SPC Hukill to reduction to E-1, total forfeitures of all pay and allowances, confinement for seven years, and a dishonorable discharge. The convening authority approved the adjudged sentence.

On August 9, 2016, the Army Court affirmed the findings of guilty and the sentence. (JA 004). Following a Motion to Reconsider, the Army Court again affirmed the findings of guilty and the sentence on August 16, 2016. (JA 001). In accordance with Rule 19 of this Court's Rules of Practice and Procedure, SPC Hukill was notified of the Army Court's decision and subsequently petitioned this Court for review on October 4, 2016. On November 23, 2016, this Honorable Court granted SPC Hukill's petition for review.

Statement of Facts

Specialist Hukill was charged with one specification of rape and one specification of abusive sexual contact. (JA 009). For the offense alleged in Specification 1 of the Charge (rape), AB claimed she was hosting a barbecue at her house with a few friends, including SPC Hukill, when the party ran out of alcohol.

(JA 019). Specialist Hukill and AB then drove to a nearby liquor store to purchase more alcohol when instead SPC Hukill suggested they go to his house to bring the alcohol he had there back to the party. (JA 020). Once inside the house, AB claimed SPC Hukill grabbed her from behind as she reached for the alcohol located on top of his refrigerator, and threw her down. (JA 021). According to AB, SPC Hukill then got on top of her, began taking her clothes off, and penetrated her vagina with his fingers without her consent. (JA 021-023). There were no eye witnesses or deoxyribonucleic (DNA) evidence to corroborate AB's allegations.[1]

On cross-examination, the defense counsel impeached AB, alleging, amongst other things, that (1) she was biased against SPC Hukill because of her friendship with his ex-fiancée whom AB believed SPC Hukill mistreated (JA 034), and that (2) after the alleged rape, she went back to the barbecue with SPC Hukill. (JA 041).

Specification 2 of the Charge (abusive sexual contact) captures an encounter between SPC Hukill and HG that began with an evening of drinking at a bar. (JA 049). Despite consuming twenty-seven shots of tequila, HG claims she recalls everything that happened between her and SPC Hukill that night, including SPC

[1] Specialist Hukill's ex-fiancé did, however, claim that SPC Hukill told her he committed the offense against AB. (JA 107). The government also called AB's boyfriend as a witness, who claimed he saw a "red mark" on SPC Hukill's face when he returned to the barbeque. (JA 045).

Hukill allegedly touching her genitalia without her consent while he was bathing her after she vomited on herself. (JA 087). There were no eye witnesses or DNA evidence to corroborate HG's allegations. The defense counsel impeached HG's memory of the night in question, particularly on her insistence that she could remember everything that happened despite having consumed almost thirty shots of tequila. (JA 087).

In a pretrial motion in limine, the government sought to introduce evidence of both charged offenses under Mil. R. Evid. 413 to show the charged sexual misconduct demonstrated SPC Hukill's propensity to commit the charged sexual misconduct. (JA 137). Specialist Hukill's trial defense counsel opposed this motion, as well as the standard instructions for use of Mil R. Evid. 413 evidence and spillover evidence contained in the Military Judge's Benchbook [hereinafter Benchbook]. (JA 144). In their opposition motion, the defense argued that Mil. R. Evid. 413 was intended to be used for conduct other than the charged offenses. (JA 144-150). Defense counsel argued further that ". . . the use of the evidence as propensity evidence within the four corners of the charge sheet is unconstitutional because it violates the due process requirement of the government to independently prove every element of every specification beyond a reasonable doubt." (JA 149).

Over defense objection, the military judge granted the government's motion, ruling: "The Government Motion in Limine to use the charged sexual offenses as

propensity for each other under MRE 413 is GRANTED." (JA 154). Prior to trial, SPC Hukill elected to have his case tried by military judge alone.

During the court-martial, the trial counsel argued propensity evidence to the fact-finder, the military judge. During opening, the trial counsel stated:

> Specialist Hukill says he has a superhero complex; a need to help the hurt or sick. Yet, within a month, there are two allegations of sexual assault by two unrelated victims against this superhero; two allegations of sexual assault; two distinct reports but with strikingly similar details; details that reveal a similar scheme, a similar method of attack; details that beg the questions, is this superhero really a villain?

(JA 017).

During closing argument, the trial counsel argued the evidence for both offenses was "strong in their own regard" but was "maybe even stronger when you look at the two together." (JA 127-128). The trial counsel continued:

> Your Honor, the accused has committed two incidents of sexual assault, two very similar incidents. They are strong in their own right, but they're even stronger together when you consider M.R.E. 413. There's no motives. There's no reasons that the victims would make this up. And there has been no testimony that would show their stories, as the events themselves, have even changed even though they have repeatedly told them since April of 2014. Convict the accused of both Specifications and The Charge.

(JA 129).

Summary of Argument

In *Hills*, this Court unanimously held that charged offenses may not be used under Mil. R. Evid. 413 to prove an accused's propensity to commit the charged offenses. *United States v. Hills*, 75 M.J. 350, 352 (C.A.A.F. 2016). Here, despite the military judge's pretrial ruling allowing charged offenses to be used in the manner found improper in *Hills* and receiving argument from the trial counsel applying this erroneous view of the law, the Army Court affirmed SPC Hukill's findings of guilty and sentence, reasoning "military judges are presumed to know the law and follow it despite clear evidence to the contrary." (JA 003).

The military judge's application of Mil. R. Evid. 413 to the contested charged offenses was unconstitutional because it undermined SPC Hukill's presumption of innocence. Here, like *Hills*, the military judge applied Mil. R. Evid. 413 to already admissible, and already admitted, evidence and then used the contested charged offenses as evidence that SPC Hukill had a propensity to engage in those very same offenses he was constitutionally presumed innocent of committing. Further, the military judge's application of Mil. R. Evid. 413 cannot be considered harmless because the government's case for both specifications was not strong.

Argument

WHETHER, IN A COURT-MARTIAL TRIED BY MILITARY JUDGE ALONE, THE MILITARY JUDGE ABUSED HIS DISCRETION BY GRANTING THE GOVERNMENT'S MOTION TO USE THE CHARGED SEXUAL MISCONDUCT FOR MILITARY RULE OF EVIDENCE 413 PURPOSES TO PROVE PROPENSITY TO COMMIT THE CHARGED SEXUAL MISCONDUCT.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). The meaning and scope of Mil. R. Evid. 413 is a question of law that is reviewed de novo. *Hills*, 75 M.J. at 354 citing *LRM v. Kastenberg*, 72 M.J. 364, 369 (C.A.A.F. 2013). Whether a rule of evidence is unconstitutional as applied is reviewed *de novo*. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012). To determine if the rule of evidence is unconstitutional as applied, this Court conducts a fact-specific inquiry. *Id.*

Law and Argument

In *Hills*, this Court held, "We hold that because the evidence of the charged sexual misconduct was already admissible in order to prove the offenses at issue, the application of Military Rule of Evidence (MRE) 413 – a rule of admissibility for evidence that would otherwise not be admissible – was error." *Hills*, 75 M.J. at 352. "[T]he Due Process Clause protects the accused against conviction except

upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This standard "provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895) (internal quotations omitted)). "It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent." *Id.* An error that infringes upon the presumption of innocence deprives the criminal defendant of a fair trial and therefore violates due process. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). When an error is constitutional, an appellant's claims must be tested for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Schroder*, 65 M.J. 49, 56 (C.A.A.F. 2007) (citing *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)).

This Court's decision in *Hills* is controlling. Like *Hills*, evidence of the charged sexual misconduct in this case was already admissible, thus the application of Mil. R. Evid. 413 to those same offenses was error. Although *Hills* involved instructions to a military panel that this Court found elevated the error to constitutional dimensions, the same concerns are present here. While SPC Hukill

does not dispute the notion that the military judge is presumed to know and follow the law, the edition of the Benchbook in circulation at the time of trial provided for the permissible use of the charged offenses as propensity evidence to prove the very same charged offenses after they had been proven by a preponderance of the evidence. *See* Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 7-13-1, n. 4.2 (Sep. 2014). Further, as the Army Court recently acknowledged, the Army Court "*required* that exact instruction." *United States v. Williams*, 75 M.J. 621, 628 (Army Ct. Crim. App. 2016) (emphasis in original) (citing *United States v. Dacosta*, 63 M.J. 575, 583 (Army Ct. Crim. App. 2006) ("Therefore, for all cases tried on or after ninety days from the date of this opinion . . . [the military judge] shall inform the panel members . . . .")). Additionally, the Army Court's "opinion in *Dacosta* went further and mandated a determination" by a preponderance of the evidence that the offenses occurred before considering the propensity evidence. *Id.*

The Army Court did not overturn its mandate in *Dacosta* until February 29, 2016. *See Williams*, 75 M.J. 621. Specialist Hukill was tried in 2014. Thus, the state of the law at the time of SPC Hukill's trial was that propensity could be derived from a contested charged offense and that the propensity was created after proof by a preponderance of the evidence. Accordingly, at the time of his trial, the military judge followed the law allowing him to do what this Court found to be

erroneous in *Hills*. Indeed, the military judge ruled as much in his pretrial ruling admitting evidence of charged misconduct for propensity purposes. (JA 152-154).

Notwithstanding the above, the Army Court found that:

> This case is far different than *Hills* as appellant elected to be tried by a military judge sitting alone. Although the military judge earlier in the proceeding ruled that the government could use propensity evidence in a manner found to be in error in *Hills*, this ruling became moot by virtue of appellant's election for a bench trial.

(JA 003).

Accordingly, the Army Court is of the opinion that an appellant's forum choice is dispositive on this issue even in cases where, as here, the military judge specifically ruled that the evidence found to be erroneously admitted in *Hills* was admissible and where the military judge failed to state on the record he eschewed this erroneous view of the law even as trial counsel made arguments raising the matter to his attention.

The only reasonable inference from the military judge's pretrial ruling is that he believed the government could lawfully use charged misconduct as propensity evidence to prove the charged misconduct. Indeed, the final sentence of his ruling states just that. Curiously, however, the Army Court rests its decision on the notion that the military judge "is presumed to know the law" yet the Army Court disregarded the fact that the law, as the military judge knew it, was erroneous because of the Army Court's own mandate in *Dacosta*. If the military judge did

indeed know that charged misconduct could not be used as propensity evidence for other charged misconduct, he would not have granted the government's motion and would have corrected the trial counsel's improper arguments *sua sponte* at trial.

As this Court recognized in *Hills*, "The juxtaposition of the preponderance of the evidence standard with the proof beyond a reasonable doubt standard with respect to the elements of the same offenses would tax the brain of even a trained lawyer." *Hills*, 75 M.J. 350 at 358. With the two different standards of proof and the fact the military judge erroneously admitted propensity evidence and then permitted the trial counsel to argue the impermissible propensity evidence at trial, this Court cannot be confident that the military judge's consideration of erroneous Mil. R. Evid. 413 propensity evidence did not tip the balance in his ultimate determination. Accordingly, this Court should find the error was not harmless beyond a reasonable doubt.

Finally, this was not a case involving overwhelming evidence of the accused's guilt. While SPC Hukill did make an inconsistent statement about what happened in the kitchen with AB, the evidence for both offenses relied primarily on the alleged victims' own words and the testimony of biased witnesses. Accordingly, the improper use of propensity evidence in this case was prejudicial.

Conclusion

WHEREFORE, SPC Hukill respectfully requests this Honorable Court dismiss Specifications 1 and 2 of the Charge.

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CERTIFICATE OF COMPLIANCE WITH RULE 21(b)

1. The brief complies with the type-volume limitation of Rule 24 because it contains 2,586 words and 284 lines of text.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2013 with Times New Roman font, using 14-point type. Margins are at least 1 inch on all four sides.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Hukill*, Army Dkt. No. 20140939, USCA Dkt. No. 17-0003/AR, was electronically filed with the Court and the Government Appellate Division on January 6, 2017.

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