IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	FINAL BRIEF ON BEHALF OF APPELLEE
v.	
MASTER SERGEANT (E-8) **ALAN S. GUARDADO,** United States Army, *Appellant*	Crim. App. Dkt. No. 20140014
	USCA Dkt. No. 17-0183/AR

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

Issue Presented

WHETHER THE ARMY COURT INCORRECTLY FOUND THAT THE MILITARY JUDGE'S PANEL INSTRUCTIONS WERE HARMLESS ERROR IN LIGHT OF *UNITED STATES V. HILLS*.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter the Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2015). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2015).

Statement of the Case

A general court-martial composed of officer and enlisted members convicted Master Sergeant (E-8) Alan B. Guardado [hereinafter Appellant], contrary to his pleas, of aggravated sexual contact with a child, indecent liberties with a child (three specifications), aggravated assault, assault consummated by a battery upon a child under the age of 16 years (two specifications), indecent language, indecent assault, and an indecent act with a child, in violation of Articles 120, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, and 934 (2012)

[hereinafter UCMJ].[1] The panel sentenced Appellant to reduction to the grade of E-1, total forfeitures, and confinement for eight years. The convening authority approved the sentence as adjudged.

On November 15, 2016, the Army Court affirmed the findings in part, while dismissing one specification of assault consummated by a battery upon a child under the age of 16 years and two specifications of general disorder, as well as conditionally dismissing one specification of assault consummated by a battery upon a child under the age of 16 years and one specification of indecent act. The Army Court affirmed only so much of the sentence as applies to confinement for seven years and eight months, total forfeitures, and reduction to the grade of E-1. On March 3, 2017, this Court granted review in this case.

Statement of Facts

KG was born on 22 June 1998. (JA 193). She is Appellant's daughter. (JA 194). Appellant and KG's mother divorced when she was very young and KG primarily lived with her mother, although she still visited Appellant. (JA 195-196). For KG's tenth birthday she visited Appellant in Alabama. (JA 198-199). At some point on her birthday, KG and Appellant travelled in Appellant's truck to

[1] The panel acquitted Appellant of one specification of indecent liberties with a child, one specification of rape, one specification of abusive sexual contact, and one specification of wrongful sexual contact, in violation of Art. 120, UCMJ, 10 U.S.C. §920.

pick up something for the party they were having. (JA 201-202). While driving, Appellant reached his hand into KG's pants, below the underwear, and touched her vagina. (JA 201-202). KG was confused and did not react. (JA 203). KG could only recall that Appellant touched her for "a while." (JA 203). When Appellant stopped touching her, he said, "Sorry" and "Don't." (JA 205).

Because KG was only ten years old and did not understand what had happened, she did not report the incident to anyone. (JA 205). A few months later, KG and her mother were watching an episode of the crime show "America's Most Wanted" involving sexual assault. (JA 206). KG's mother took the opportunity to counsel her about sexual assault, and KG then realized what Appellant had done to her. (JA 206). She then told some friends what Appellant had done. (JA 206). Next, she wrote a journal note, which others later believed to be a suicide note, about what Appellant had done. (JA 207-208). Her mother discovered this note and reported the abuse to the police. (JA 209).

At trial, the defense elicited from KG on cross-examination that her mother had spoken to her many times about her testimony but KG explained, "She told me to speak the truth and whatever I feel like–and whatever I believe I should say." (JA 231). The defense did not confront KG about any prior statement she had made. However, without objection from the trial counsel, the defense later elicited from AC, KG's boyfriend, that KG had previously provided somewhat different

details about the offense to AC. (JA 249, 251, 256). KG was never allowed to explain or deny the statement to AC. Based on KG's testimony, Appellant was convicted of aggravated sexual contact with a child. (JA 378).

Appellant was also charged with raping VC towards the end of 1994. (JA 032). VC alleged at trial that she met Appellant while she was in basic training at the age of eighteen. (JA 158). After an unsuccessful attempt to take VC out on a date, Appellant and VC met up again at the residence of a mutual friend. (JA 158). VC alleged that during an evening of drinking at the home, she "blacked out" after one drink and woke up to find Appellant raping her on a bed. (JA 160). VC did not report the sexual assault until six months later while receiving undisclosed treatment at Walter Reed Medical Center. (JA 165). Although law enforcement did come interview VC regarding her allegations, no actions were taken against Appellant until years later during the investigation for this case. (JA 165). Appellant was acquitted of raping VC. (JA 378).

Appellant was charged with multiple offenses relating to CH, a former soccer player on a girls team he coached. (JA 074). Appellant allegedly rubbed his penis on the butt of CH, and told her that she had "a nice ass." (JA 032, 034). At the time of the alleged sexual contact, CH was seventeen. (JA 074, 078). CH testified that during her time on the team, Appellant would make comments to her about her legs and tell her that she had a nice ass. (JA 076). CH alleged that

Appellant touched her while she was practicing in the goalie box, though CH admitted that some contact was unintentional. (JA 077, 083-084). Appellant was convicted of indecent language based on CH's testimony, but was acquitted of any physical contact. (JA 378).

Summary of the Argument

The Army Court did not err in their ruling that the erroneous propensity instruction given was harmless beyond a reasonable doubt. The evidence of aggravated sexual contact was overwhelming and result of the trial would not have changed even if the propensity instruction had not been given to the panel. For the solitary sexual offense conviction which involved the erroneous instruction, KG was a compelling witness who provided evidence beyond a reasonable doubt that Appellant committed a sexual offense against her. The remaining sexual offense allegations involving VC and CH were supported by weak evidence or outright contradicted by eye witnesses, and therefore resulted in acquittals. Due to the weakness of the government case with respect to VC and CH, the panel did not find that the other charged misconduct happened by a preponderance of the evidence. Therefore the erroneous propensity instruction did not impact the verdict or sentence and was harmless beyond reasonable doubt.

Standard of Review

In *United States v. Hills*, this Court rejected an application of M.R.E. 413 "as a mechanism for admitting evidence of charged conduct . . . in order to show propensity to commit the very same charged conduct." 75 M.J. 350, 354 (C.A.A.F. 2016). In doing so, it identified two issues with the use of M.R.E. 413 in *Hills*: one statutory ("Neither the text of M.R.E. 413 nor the legislative history of its federal counterpart suggests that the rule was intended to permit the government to show propensity by relying on the very acts the government needs to prove beyond a reasonable doubt in the same case."), and the other constitutional (". . . the instructions that the military judge provided both undermined the presumption of innocence and created a tangible risk that Appellant was convicted based on evidence that did not establish his guilt beyond a reasonable doubt."). *Id.*

"If instructional error is found [when] there are constitutional dimensions at play, [the Appellant's] claims must be tested for prejudice under the standard of harmless beyond a reasonable doubt." *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id.* "An error is not harmless beyond a reasonable doubt when 'there is a reasonable possibility

that the [error] complained of might have contributed to the conviction.'" *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007).

Argument[2]

Where the court-martial's findings indicate a conscientious review of the evidence, courts can find Mil. R. of Evid. 413 or 414 errors to be harmless beyond a reasonable doubt. *See United States v. Schroder*, 65 M.J. 49, 56-57 (C.A.A.F. 2007)[3]. In *Schroder*, the victim gave a detailed and credible account of the Appellant's offense and the defense argued that the Appellant lacked the requisite specific intent of sexual gratification. *Id.* The court-martial returned a finding of not guilty to the offense as charged, but guilty to a lesser-included offense not requiring specific intent. *Id.* Given these facts, the court held that the Mil R. Evid. 414 error in that case was harmless beyond a reasonable doubt because the findings "suggest[ed] that the members were not swayed to convict on this count by the instructional error regarding the use of propensity evidence." *Id. See also United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001) ("As the members acquitted

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[2] Although Appellant's brief strays into the alleged prejudice caused by a Mil. R. Evid. 404(b) ruling, this Court has already commented on the applicability of *Hills* to this argument, "the issue before us has no bearing on our jurisprudence with respect to joinder, severance, or the use of multiple offenses with similar facts to argue identity, absence of mistake, modus operandi, etc." *United States v. Hills*, 75 M.J. 350, 357 n. 4 (C.A.A.F. 2016). Appellant's second argument should be rejected.

[3] The instructional error in *Schroder* was that the uncharged acts of misconduct admitted were not qualifying offenses, rather than the use of charged misconduct to show propensity for other charged misconduct.

Appellant of the rape charge, this Court finds no reason to doubt that the members followed the instructions given them.").

In *Hills* this Court said, "We note that the Government's case was weak as there was no eyewitness testimony other than the allegations of the accuser, the members rejected the accuser's other allegations against the Appellant, and there was no conclusive physical evidence. We cannot know whether the instructions may have tipped the balance in the members' ultimate determination." *Hills* at 358.

This case does not present the same difficulties caused by the erroneous instructions in *Hills*. KG gave testimony that was clear, concise, and virtually unimpeachable that Appellant touched her vagina on her tenth birthday. Although this Court appears to disfavor cases without corroborating evidence, the panel did not, and in cases like this evidence from the victim can certainly be strong enough to carry a case to a legally and factually sufficient guilty verdict without additional evidence.

KG clearly described the single incident where Appellant put his hand in her pants and touched her vagina. Appellant's best defense to this allegation was that KG was mad at Appellant for terminating her access rights to iTunes. (JA 226-228). Appellant also tried to somehow link KG's outcry to an episode of "America's Most Wanted," although that link was drawn more through inference

and with less strength than the supposed anger over iTunes. (JA 223-224). Despite the attempt at trial and on appeal to link the television show to the fabrication of rape allegations, KG was clear that she was recalling events that happened to her, not what she saw on television. (JA 224). When the best defense to a daughter accusing her father of sexual abuse is anger over a television show or iTunes access, the result at trial will be the same regardless of whether the panel is instructed that they can consider propensity. Quite simply, propensity was not necessary and added nothing when the complaining witness had nothing to gain and stood to lose a parent with her testimony, yet gave that testimony anyway.

The panel listened to the evidence, believed KG, and applied the law correctly which can be seen in the acquittal for rape of a child and conviction for the lesser included offense which was supported by KG's testimony. The panel listened to the testimony of KG and convicted based on what she was sure happened. When asked by prosecutors how sure she was that Appellant's fingers touched her vagina, KG responded, "I'm a hundred percent sure." (JA 204). The prosecutor then asked, "How sure are you that even if it was slight, that his fingers penetrated the vaginal opening at all?" KG answered, "I'm pretty sure." (JA 204). No impermissible lowering of the burden occurred. The panel convicted only where evidence was overwhelming. Appellant was not convicted due to any

propensity inference; he was convicted because his daughter gave clear and powerful testimony about his crime.

In order for this Court to find prejudice, it must determine that despite the strength of the government's case, one or more of the other crimes Appellant was acquitted of was used to create an impermissible propensity inference and contributed to the finding of guilty. The risk is that the panel determined that either the rape of VC occurred to a preponderance of the evidence standard, or that the abusive sexual contacts of CH occurred to a preponderance of the evidence standard. Based on the strength of the evidence, neither the alleged incident with VC nor the alleged incidents with CH were proven by even the lower preponderance of the evidence standard.

It is not reasonable to assume that (1) the panel believed that Appellant raped VC by a preponderance of the evidence; (2) yet acquitted him of the higher beyond a reasonable doubt standard. Appellant was acquitted of this specification because the evidence was extremely weak for the acquitted offenses. VC's allegations were twenty years old and, most importantly, Appellant put on evidence from a third party that the sex was consensual. (JA 391). Law enforcement had investigated the allegations when they were initially made in 1994, and no action was taken. (JA 186-187).

The panel found Appellant guilty of indecent language with regard to CH, the teenage girl on his soccer team, but found him not guilty of both the Art. 120 and Art. 128 offenses he was charged with relating to CH. (JA 378). If the panel was improperly using propensity evidence to lower the burden of proof and find that Appellant was the type of person who committed sex offenses, they certainly would have used that evidence to convict him of rubbing his penis on CH's butt when they found beyond a reasonable doubt he focused inappropriate attention on her. Instead, the panel acquitted appellant of all the physical contact specifications. There is no more clear example of the panel parsing out what the facts meant than the results from CH's allegations. The panel did not convict Appellant merely because he was a bad person or a man with a propensity to molest children; the panel held the government to their burden and properly convicted appellant only where there was proof beyond a reasonable doubt.

It is not reasonable for this Court to find prejudice because the panel did not believe that the other Mil. R. Evid. 413 eligible offenses occurred. If this Court did find prejudice it would mean that it believed the panel took offenses they did not believe happened, and then used those offenses to determine that Appellant acted in accordance with behavior that did not happen. This Court must assume that the panel followed the instructions they were given. The panel was instructed that, before they could use propensity evidence, they must find that the offenses

occurred by a preponderance of the evidence. The panel did not find that the other sexual offenses occurred at all, and so there can be no prejudice because no propensity evidence played a part in the panel's findings.

Conclusion

WHEREFORE, the Government prays this Honorable Court affirm the Army Court's decision and the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on May 3, 2017.

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