IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	FINAL BRIEF ON BEHALF OF
	)	APPELLANT
Appellee	)	
v.	)	
	)	
Sergeant (E-5)	)	Crim. App. Dkt. No. 20130582
GENE N. WILLIAMS,	)	
United States Army,	)	USCA Dkt. No. 17-0285/AR
Appellant	)	

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Issue Presented

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRONEOUSLY FOUND THAT THE PROPENSITY INSTRUCTION GIVEN IN THIS CASE FALLS WITHIN AN EXCEPTION TO THE HOLDING IN *UNITED STATES V. HILLS*, 75 M.J. 350 (C.A.A.F. 2016).

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

Issue Presented

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRONEOUSLY FOUND THAT THE PROPENSITY INSTRUCTION GIVEN IN THIS CASE FALLS WITHIN AN EXCEPTION TO THE HOLDING IN *UNITED STATES V. HILLS*, 75 M.J. 350 (C.A.A.F. 2016).

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, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. 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 November 8 and 29, 2011; February 10, March 21, June 27, August 1 and 27, October 10, 2012; and June 14 and 17–21, 2013, a general court-martial composed of officer and enlisted members convicted Sergeant (SGT) Gene N. Williams, contrary to his pleas, of one specification of rape, four specifications of forcible sodomy, and five specifications of assault consummated by battery, in violation of Articles 120, 125, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 928 (2000; 2006). The panel sentenced SGT Williams to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 20 years, and a dishonorable discharge. The convening authority approved the reduction, forfeiture, and confinement portion of the adjudged sentence, but approved only a bad-conduct discharge.

On February 29, 2016, the Army Court affirmed the findings of guilty and the sentence. (JA 1–13). Sergeant Williams was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, filed a Petition for Grant of Review on March 14, 2016. On June 22, 2016, this Honorable Court granted appellant's petition on one issue. (JA 14). On August 8, 2016, this Court subsequently remanded appellant's case to the Army Court for consideration in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). (JA 15).

On January 12, 2017, the Army Court again affirmed the findings of guilty and the sentence. (JA 16–18). The Army Court found "the military judge's Mil. R. Evid. 413 instruction was improper based on *Hills*" and constituted error of a constitutional dimension. (JA 17). However, the Army Court stated this case was "an exception to *Hills*" and the error was therefore harmless beyond a reasonable doubt. (JA 17–18). The Army Court further explained this "exception" was "specifically anticipated by the CAAF in [*Hills*]," as "the only propensity evidence the panel was allowed to consider stemmed from a specification *that had already been independently proven beyond a reasonable doubt*." (JA 17) (emphasis in original).

Sergeant Williams was again notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on March 13, 2017. On June 12, 2017, this Court granted appellant's petition on the issue presented. On July 5, 2017, this Court granted appellant's motion to extend time to file appellant's brief until July 27, 2017.

Issue Presented

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRONEOUSLY FOUND THAT THE PROPENSITY INSTRUCTION GIVEN IN THIS CASE FALLS WITHIN AN EXCEPTION TO THE HOLDING IN *UNITED STATES V. HILLS*, 75 M.J. 350 (C.A.A.F. 2016).

Statement of Facts

The charges in appellant's court-martial involved allegations made by his ex-wives, TW and SW. (JA 19–21).[1] For TW, appellant was charged with rape "on divers occasions between on or about 7 July 2000 and on or about 1 January 2003." (JA 19). For SW, appellant was charged with acts of forcible sodomy and physical assault from 2007 to 2011. (JA 21–22).

During her testimony, TW alleged she was raped "quite often, three or four times a week, sometimes every day of the week." (JA 342). TW also explained "in one week, it could be 4 or 5, next week it could be 8 to 10. The next week it could be 4 or 5 times a day." (JA 391). TW eventually agreed the overall number of alleged assaults was potentially between "800 and 1000 times," but she also explained "to me it's countless." (JA 391–94, 405, 410, 415, 460). TW also stated that "ninety percent" of their sexual encounters were not consensual. (JA 335–36, 394).

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[1] The government dismissed the original Specification of Charge I, Specification 2 of Charge II, and Specification 3 of Charge III. (JA 23–24).

At trial, the military judge instructed the members the "on divers occasions" rape allegations by TW (Charge I) could be considered as propensity evidence in proving the sodomy allegations by SW (Charge II). (JA 623). A portion of these instructions explained:

> In The Specification of Charge I the accused is charged with committing sexual assault, that is, rape against [TW] on divers occasions. Evidence that the accused committed rape on divers occasions alleged in The Specification of Charge I may have no bearing on your deliberations in relation to any of the allegations of forcible sodomy in the Specifications of Charge II unless you first determine by a preponderance of the evidence that is more likely than not that the offenses alleged in The Specification of Charge I occurred. If you determine by a preponderance of the evidence the offenses alleged in The Specification of Charge I occurred, even if you are not convinced beyond a reasonable doubt that the accused is guilty of those offenses, you may nonetheless then consider the evidence of those offenses for its bearing on any matter to which it is relevant in relation to the forcible sodomys alleged in Charge II. You may also consider the evidence of such other acts of sexual assault for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual assault.

(JA 623).

Another portion of the findings instructions told the members, "The order in which the Specifications are to be voted on should be determined by the president subject to objection by the majority of the members." (JA 627).

In characterizing TW's testimony in his closing argument, the trial counsel said: "And let's start first with what we have in Charge I with the rapes on [TW].

First, sexual intercourse happened, *countless times*. Five to seven a week, four to six a week, sometimes eight to ten times a week, sometimes he's in the field, it was *countless*." (JA 525) (emphasis added). The trial counsel later added, "history seems to repeat itself, so there's so many similarities that the accused used when you look at the two [alleged victims] . . . *when you get to the propensity instruction, think about that.* Of how he's learned from TW and what he did to TW and he's gotten better with it with SW." (JA 607) (emphasis added).

The panel members ultimately convicted appellant of each of the offenses contained within Charge I and Charge II. (JA 610). The panel members also convicted appellant of several of the assault specifications within Charge III. (JA 610).

All other facts necessary to the resolution of the issue presented are included below.

Summary of Argument

In this case, the Army Court correctly found the military judge's instructions contained prejudicial error of a constitutional dimension. However, the Army Court wrongly concluded this error was harmless beyond a reasonable doubt. Specifically, the Army Court said this case is purportedly an "exception to *Hills*," as "the only propensity evidence the panel was allowed to consider stemmed from a specification *that had been independently proven beyond a reasonable doubt*." (JA 17) (emphasis in original). This conclusion was based on assumptions, faulty logic, and misapplication of the law and facts.

Most strikingly, the Army Court's analysis failed to acknowledge the potential disparity between the allegations and findings. While the Army Court's analysis treated the rape specification as though it involved only a singular alleged act, it instead contained up to "800 to 1,000" or even "countless" alleged offenses. (JA 391–94, 405, 410, 415, 460, 525). There is simply no way of knowing how many of these allegations the panel members found were proven beyond a reasonable doubt, how many the panel members found were proven by a preponderance of the evidence, and how many the panel members found were not proven. As such, it cannot be known whether the erroneous instructions regarding the use of these allegations as propensity evidence "may have tipped the balance in the members' ultimate determination." *Hills*, 75 M.J. at 358.

Law and Standard of Review

"[N]either the structure of M.R.E. 413 and its relationship to M.R.E. 404(b) nor the legislative history of the federal rule upon which it is based suggests that M.R.E. 413 and its attendant instructions may be applied to evidence of charged misconduct." *Id.* at 355. While this rule was intended to permit the members to consider the testimony of an accused's past sexual offenses, "it seems obvious that it is impermissible to use M.R.E. 413 to show that charged conduct demonstrates the accused's propensity to commit . . . the charged conduct." *Id.* at 353. To that extent, "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.* at 356.

Instructional errors are reviewed de novo. *Id.* at 357 (citing *United States v. Killion*, 75 M.J. 209 (C.A.A.F. 2016)). In *Hills*, this Court also held "the instructions that accompanied the so-called propensity evidence in this case constituted constitutional error." *Id.* at 353. When an error is constitutional, an appellant's claims must be tested for prejudice under the standard of harmless beyond a reasonable doubt. *Id.* at 357 (citations omitted). "An error is not harmless beyond a reasonable doubt when 'there is a reasonable probability that the [error] complained of might have contributed to the conviction.'" *Id.* (citing

United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007) (internal quotation marks omitted) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

"The Government bears the burden of establishing that a constitutional error has no causal effect upon the findings." *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007). An error has not contributed to the verdict when it is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *United States v. Collier*, 67 M.J. 347, 356 (C.A.A.F. 2009) (citations omitted). Notably, in *Hills*, this Court further explained, "We cannot know whether the instructions may have tipped the balance in the members' ultimate determination. The instructions were, therefore, not harmless beyond a reasonable doubt." 75 M.J. at 358.

Argument

In this case, the Army Court attempted to invent an "exception" to the holding in *Hills*, as "the only propensity evidence the panel was allowed to consider stemmed from a specification *that had been independently proven beyond a reasonable doubt*." (JA 17) (emphasis in original). However, in outlining this purported "exception," the Army Court's analysis included a series of dangerous assumptions, faulty logic, and misapplication of the law to the facts.

More specifically, the Army Court's analysis: 1) failed to account for the full language of the instructions in making a flawed comparison to *People v. Villatoro*,

281 P.3d 390 (Cal. 2012); 2) ignored how the members may have first voted and convicted Appellant of Charge II and its Specifications *before* finding Appellant guilty of Charge I and its Specification, and 3) failed to acknowledge the potential disparity between the "countless" allegations and the findings.

1. The Army Court made a flawed comparison to *Villatoro* in finding this case was "an exception to *Hills*."

In assessing the instructions in this case, the Army Court misconstrued the extent of the holding in *Hills*, particularly how this Court distinguished *People v. Villatoro*, 281 P.3d 390 (Cal. 2012). In *Villatoro*, as noted by this Court in *Hills*, the trial judge never gave an instruction containing a "preponderance of the evidence" standard for using charged conduct as propensity evidence. *Hills*, 75 M.J. at 357.

This Court even noted the decision in *Villatoro* "turned in part on the fact that 'the modified instruction did not provide that the charged offenses used to prove propensity must be proven by a preponderance of the evidence.'" *Id.* (*citing Villatoro*, 281 P.3d at 400). As such, "[T]he instruction clearly told the jury that all offenses must be proven beyond a reasonable doubt, even those used to draw an inference of propensity. Thus, there was no risk the jury would apply an impermissibly low standard of proof." *Id.* In appellant's case (as in *Hills*), the military judge instructed on a preponderance of the evidence standard. (JA 623).

This was the same type of instruction that *Villatoro* itself cited as "mental gymnastics." 281 P.3d at 400 (citation omitted).[2]

2. There is no way of knowing the order in which the panel members voted.

While the Army Court attempted to synthesize appellant's case with *Villatoro* by stating "there is no erosion in the presumption of innocence when an offense is first proven beyond a reasonable doubt" (JA 17), such a conclusion remains entirely inapt under the circumstances of appellant's case. Plain and simple, there is no way of knowing the order in which the panel members voted on the charged offenses.

The military judge instructed the members, "The order in which the Specifications are to be voted on should be determined by the president subject to objection by the majority of the members." (JA 627). Based on these instructions,

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[2] Furthermore, although the Army Court quoted the propensity instruction given by the military judge in its first opinion, it did not address in its second opinion the ambiguous, contradictory, and confusing portion of the instruction which stated: "You may also consider the evidence of such other acts of sexual assault for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual assault." (JA 16–18, 623). Appellant argues the panel members could have reasonably construed this ambiguous and confusing language as instructing them to consider the allegations within Charge I to prove propensity or predisposition for *any* charged offense involving sexual assault, *to include Charge I itself*. Again, the charged language of this offense involved "on divers occasions" (JA 19, 611, 623), and the government's evidence and argument explained this included potentially "800 to 1000" or even "countless" allegations. (JA 391–94, 405, 410, 415, 460, 525).

the members may have first voted and convicted appellant of Charge II and its Specifications *before* finding Appellant guilty of Charge I and its Specification. The Army Court's truncated analysis did not address, discuss, or even acknowledge this possibility. (JA 16–18).

3. The Army Court did not address the effect of "on divers occasions."

Finally, the Army Court completely failed to address how the "divers occasions" language from Charge I, which included "countless" allegations by the accusing witness, impacts the analysis of this critical issue. This specification alleged that Appellant: "On divers occasions between on or about 7 July 2000 and on or about 1 January 2003, did, at or near Wiesbaden, Germany, rape [TW]." (JA 19). Therefore, the charged language involved alleged conduct over approximately two and a half years.

Again, when analyzing the military judge's erroneous instructions in this case, the Army Court found, "[W]ith regards to the forcible sodomy specifications contained in Charge II, the only propensity evidence the panel was allowed to consider stemmed from a specification *that had been independently proven beyond a reasonable doubt*." (JA 17) (emphasis in original). This analysis completely failed to acknowledge the potential disparity between the "countless" allegations and the findings, which could indicate the panel found as few as two of the allegations had been proven beyond a reasonable doubt. While the Army Court's

analysis treated The Specification of Charge I as though it involved only a singular alleged act, it instead contained potentially between "800 and 1,000" or even "countless" alleged offenses. (JA 391–94, 405, 410, 415, 460, 525).

Put another way, in light of the charged language of "on divers occasions" and the testimony, the Army Court failed to acknowledge a critical and threshold issue: based on the findings, there is no way of knowing how many of the "countless" allegations the panel members found were proven beyond a reasonable doubt, how many the panel members found were proven by a preponderance of the evidence, and how many the panel members found did not happen.

In conclusion, and contrary to the Army Court's analysis, there is no way of knowing whether the members found appellant guilty of Charge II only after first determining his guilt of every one of the "countless" allegations in Charge I beyond a reasonable doubt. There is also no way of knowing how many of these "countless" alleged acts were used by the panel members as propensity evidence. Under such circumstances, the government cannot meet its burden to prove this error was harmless beyond a reasonable doubt. Instead, as in *Hills*, "[w]e cannot know whether the instructions may have tipped the balance in the members' ultimate determination." 75 M.J. at 358.

Conclusion

Wherefore, at a minimum, SGT Williams requests this Honorable Court set aside and dismiss The Specifications of Charge II.[3]

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[3] Appellant again notes the ambiguous, contradictory, and confusing portion of the instruction which stated, "You may also consider the evidence of such other acts of sexual assault for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual assault." (JA 16–18, 623). The panel members could have reasonably construed this language as instructing them to consider the allegations within Charge I to prove propensity or predisposition for *any* charged offense involving sexual assault, to include Charge I itself.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Williams, Crim. App. Dkt. No. 20130582, USCA Dkt. No. 17-0285/AR, was electronically filed with the Court and Government Appellate Division on July 27, 2017.

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