IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. Dkt. No. 20150218
	)	USCA Dkt. No. 18-201/AR
Private (E-2) **ANTHONY M. BODOH**, United States Army, Appellant	)	

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, Appellee v. Private (E-2) **ANTHONY M. BODOH** United States Army, Appellant	)))))))))	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150218 USCA Dkt. No. 18-0201/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY ALLOWING THE TRIAL COUNSEL TO MISSTATE THE LAW AND ARGUE THAT THE PANEL SHOULD BASE ITS VERDICT ON SHARP TRAINING.

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 January 12, February 24, and March 24-27, 2015, a panel of officers sitting as a general court-martial convicted Private (PV2) Anthony M. Bodoh, contrary to his pleas, of one specification of sexual assault and one specification of

assault consummated by battery, in violation of Article 120 and Article 128, UCMJ, 10 U.S.C. §§ 920, 928 (2012). The panel sentenced PV2 Bodoh to a reduction to E-1, forfeiture of $1,546.80 per month for 60 months, five years confinement, and a bad conduct discharge. Private Bodoh was credited with 277 days of pretrial confinement. The convening authority approved the sentence as adjudged. (JA 015). On February 16, 2018, the Army Court affirmed the findings and sentence. (JA 001). The issue presented to this Honorable Court was assigned as error to the Army Court but the findings and sentence were affirmed on different grounds, without addressing this issue. (JA 001).

Statement of Facts

A. The Fort Hood SHARP program.

At Fort Hood, the installation where PV2 Bodoh was tried, the installation Sexual Harassment/Assault Response and Prevention (SHARP) office maintains official slides from 2012, used as the standard training materials for annual unit refresher training for Fort Hood units. *SHARP Annual Unit Refresher*. (JA 895). Presumably, and based on the dates relevant to this appeal, these slides were used for annual SHARP training for the population that comprised PV2 Bodoh's panel at court-martial. These official Fort Hood slides include the following presenter's notes: "It should be emphasized that someone under the influence of alcohol may

not be able to clearly give consent to sex. Soldiers should avoid mixing alcohol and sex." (JA 895).

The official presentation discusses behaviors that imply a propensity to commit a sexual assault: targeting someone who is vulnerable, providing alcohol or drugs to potential victims to increase vulnerability, disrespectful behavior, and attempting to isolate someone, among others. (JA 895).

Similarly, the same presentation also admonishes leaders to stop sex assaults: "We all have a responsibility to take action to change our culture to eliminate 'an enemy that lies within our ranks.'" (JA 895) (quoting comments made in 2010 by then Chief of Staff of the Army (Chief of Staff), General (GEN) George W. Casey). Similar admonishments to decisively eliminate sexual assault in the Army occur throughout the presentation.

B. The Army's SHARP program.

The U.S. Army's official website stated that, as recently as September 2016 and notably after the date of the appellant's trial, some SHARP trainers continued to train Soldiers that a single drink of alcohol renders a person incapable of consenting to sexual activity. *See* C. Todd Lopez, *Army Secretary: SHARP needs to increase focus on prevention*, 20 September 2016. (JA 887).

Janet Mansfield, from the Office of the Judge Advocate General, also spoke at the forum. (JA 887). Ms. Manfield told the audience that "there is a 'myth' in

the Army, which should be dispelled, that once somebody has consumed one drink of alcohol, they are no longer legally consenting to sexual activity. That's just not true." (JA 890-91). Although the SHARP program has updated its materials to accurately reflect the law, Ms. Manfield stated that some trainers are not using the updated materials and miss the information." (JA 891). She also told the forum that "right now, Army prosecutors tell her that when they [conduct voir dire] and they ask about who has had training that contains the incorrect information, 'at least half the hands go up every time.'" (JA 891).

C. Trial counsel's commentary about the Army's SHARP program throughout trial.

1. *Voir Dire*

During *voir dire*, the trial counsel asked the ten[1] panel members:

> Given the training that Soldiers go through, does anyone think that a Soldier should get verbal consent for having sexual intercourse with somebody? Given the SHARP program and the training to go through, does anyone think you should have verbal consent before having sexual intercourse, by a show of hands?

(JA 066). Four panel members answered in the affirmative. (JA 066). Neither the defense counsel nor the military judge either corrected the trial counsel's misstatement of the law or asked the panel members about this belief, derived from the Army's SHARP program. While one of the four members who raised their

[1] (JA 026-27).

hands was excused from the panel for other reasons, the other three sat on the panel throughout the trial, participating in deliberations on both findings and sentence. (JA 109-11).

The trial counsel also asked the panel:

> Do you think it's easier for a Soldier to report they were sexually assaulted or a civilian to report there [sic] were sexually assaulted?

(JA 050). After discussion with two members about the structure in the military with SHARP to support victims, (JA 050), the trial counsel rephrased his question:

> So, I guess, to paraphrase, you think a SHARP program is more known to Soldiers and that would – does anyone disagree that the SHARP program may make it easier for Soldiers to report than civilians?

(JA 050). All members provided a negative response. (JA 050).

The trial counsel discussed SHARP, again, with the members:

> Does anyone here believe that just because the SHARP program or political – or the political environment, that they would have to find the accused guilty in a sexual assault case based upon the SHARP Program?

(JA 073). He also asked:

> Does anyone here believe that just because the SHARP program or political environment that they could not listen to the evidence fairly?

(JA 073). To both questions, all members answered with negative responses. (JA 073). The trial counsel referenced *voir dire* during rebuttal argument when he

argued to the members, "[w]e asked you what you expected to find when everyone was high, when everyone was drunk, and the problems with eyewitness testimony, and that's what you could expect." (JA 793).

2. References to the Army's SHARP program during cross-examination of the Appellant

At trial, PV2 Bodoh testified in his own defense. He testified that he had consensual vaginal and oral sex with the alleged victim. (JA 409-15). The trial counsel cross-examined PV2 Bodoh, *inter alia*, on what SHARP training he had received at basic training, at advanced individual training, and at Fort Hood. (JA 422). That line of questioning culminated as follows:

> Q. And you know about not having sex with people when they've had drugs and alcohol, correct?
>
> A. To the best of my knowledge, she wasn't –
>
> Q. You know about not having sex with people that are on drugs and alcohol, correct? You are not supposed to do that.
>
> A. Yes, sir.
>
> Q. And you know you are not supposed to sleep with other people's wives in the military?
>
> A. Yes, sir.

> Q. You are not supposed to sleep with someone when they are on Triple C's,[2] correct?
>
> A. Yes, sir.

(JA 422-23).

Private Bodoh's civilian defense counsel eventually objected to badgering the witness. The military judge responded:

> As to badgering the witness, it is overruled. However, your questions are a misstatement of the law. There's nothing that says you can't have sex with somebody who has taken alcohol or Triple C. So if you want to phrase your questions to make them a correct statement of the law, I will allow them; otherwise, the objection is sustained.

(JA 423).

Despite sustaining his own objection to the fourth in a series of questions that misstated the law, the military judge never issued a curative instruction to the panel, or otherwise elaborated on how the questions misstated the law.

The trial counsel immediately resumed the same line of questioning:

> Q. Private Bodoh, do you feel it's inappropriate to have sex with someone when they are on alcohol, correct? When they are drunk?
>
> A. Depends if there is consent or if there is no consent.

[2] Triple C's are recreational doses of over-the-counter cough medicine taken in tablet form for the purpose of abuse thereby exceed the recommended dosage by physicians and the drug maker. (JA 206-10).

> Q. And you feel that it is inappropriate to have sex with when they are on drugs?
>
> A. Again, if there is consent or if there is no consent.

(JA 424). The defense counsel objected again, and the military judge sustained the objection without explaining how the trial counsel had misstated the law and without issuing any curative instruction. (JA 424).

3. The Army's SHARP program throughout government argument

The government's theory of criminal liability consisted of cumulative factors of non-consent based on all of the circumstances before the members. (JA 721). The trial counsel described it to the panel as follows:

> Going to why now, do – [sic] and we'll walk through the evidence, why she didn't consent. Because she could not consent, in not one of these, and it's important, Panel Members, it's not one thing that makes her unable to consent for a non-competent person; it's all of them put together. It's not just that she was very high on drugs, because she was up there. It's not that she was drunk on alcohol, because she was up there. It's how they interplay together in what makes her freeze and why there was no consent.

(JA 727). Later, the trial counsel stated: "If you're convinced beyond a reasonable doubt this girl was at all afraid and drunk and all high, factors of all of them, her age, he is guilty of what he did." (JA 793).

4. Argument for impairment and non-consent

The trial counsel asked the panel "What do you keep learning when you're going through the SHARP programs? People who are on drugs and alcohol are more vulnerable to be assaulted." (JA 731).

To highlight, the trial counsel also argued, *inter alia*, that if the alleged victim was too drunk to drive, then she could not legally consent to sex:

> This is not – [sic] no reasonable person. None of you sober, sitting in here say, [sic] 'This girl definitely gives a free and voluntary agreement that she's competent to make decisions for herself.' She's not driving anywhere. She's not enlisting in the Army. She's not doing contracts.

(JA 795-96).

To counter the defense's theories about the alleged victim's motives and biases, the trial counsel responded:

> "She's vulnerable, as you all know again from your SHARP training, your common sense, and your life experience it makes them more - - makes victims more vulnerable when they're doing that because it's harder for them to report. It's harder for them to be believed because their memories are bad. . ."

(JA 745).

5. Using SHARP to explain counter-intuitive behaviors and mitigate bias

In rebuttal the trial counsel stated, of the alleged victim's behavior: "that's why we have implemented the SHARP program, because those things happen." (JA 797). The trial counsel then emphasized, "[w]e're taught that counterintuitive

behavior, as leaders, is normal to experience and they can't expect them to cope the same and that's what you will do; you'll see from her." (JA 797).

6. Addressing the appellant's statements

In evaluating the appellant's pre-trial statements, the trial counsel highlighted certain aspects of the video interview. Most importantly, the trial counsel told the panel, "Look at his body language and ask yourself if any 20-year-old [sic] *in the Army's environment today* would act like that if told they were accused of rape. . ." (JA 733).

The trial counsel addressed alleged inconsistencies between appellant's statements and the evidence presented to the members:

> Someone did that to that woman. I don't care if she's on drugs. I don't care if she's on alcohol. You cannot rape someone anally and tear them open. He does not get a free pass because she was high or because she was drunk or because it's hard to believe her or because she can't remember or that she's scared for herself because that's how you re-victimize someone over and over again."

(JA 751). Later, during rebuttal, the trial counsel emphasized PV2 Bodoh "does not get a free pass for what he did because she was too intoxicated to remember and because everyone was drunk." (JA 793).

7. Using SHARP to undermine the defense theory

The trial counsel attacked defense theories and actions at trial by stating:

> Also she's fearful with everything he's done and never having any consequences, never anyone doing anything to

> him, no one, the command, no one doing anything to him. She simply didn't fight back. She froze. Everyone would wish she would have fought back. Everyone would wish she would have yelled and screamed. And those myths that [defense counsel] said aren't that common anymore, that's all that [defense counsel] cross examined her on. That's all your Soldiers learn in the SHARP program every day about those myths. It's not that common."

(JA 755).

8. Final statement to the panel

Finally, the trial counsel summarized his argument by stating: "You have the evidence. You have the common sense. *You have the training*. Find him guilty of all charges and specifications." (JA 804) (emphasis added).

The trial lasted for four days, March 24-27, 2015. The trial counsel raised the issue of SHARP training on three of those four days: March 24, 2015 (JA 066), March 26, 2015 (JA 422-24), and March 27, 2015. (JA 731, 745, 755, 797, 804).

D. The military judge's instructions for findings.

Prior to deliberations, the military judge gave the following instruction on mistake of fact as to consent:

> "Consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent…

> Lack of consent may be inferred based on the circumstances. All of the surrounding circumstances are to be considered in determining whether a person gave consent or whether a person did not resist or ceased to resist only because of another person's actions.
>
> [An] incompetent person cannot consent to a sexual act.
>
> A person cannot consent to a sexual act while under threat or in fear.

(JA 711). The military judge also provided the following instructions to the members:

> In weighing and evaluating the evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world.

(JA 716).

The appellant was convicted of sexually assaulting the alleged victim vaginally and orally, but acquitted of sexually assaulting her anally. (JA 807).

Summary of Argument

The trial counsel repeatedly misstated to the panel the law regarding consent and admonished the panel members to convict the appellant based on their own SHARP training, rather than the law as instructed by the military judge. The trial counsel imputed these SHARP standards and wove themes from SHARP training throughout the trial: from *voir dire*, (JA 066), to the cross examination of the appellant, (JA 422-23), to his closing argument, (JA 731, 745, 755), and during rebuttal, (JA 797), including the very last statement he made to the panel. (JA

804). The trial counsel was so set on leveraging SHARP training that he continued to cross-examine the appellant about it even after the military judge warned him to stop misstating the law. (JA 423-24).

The government's argument and misstatements of law were improper. The Trial counsel improperly invoked the standards and training from the Army's SHARP program, which were inconsistent with the law and the instructions given to the panel, to construct a guidepost upon which to convict PV2 Bodoh.

The prejudicial effect of the trial counsel's improper arguments were exacerbated by his question during *voir dire*: "Given the SHARP program and the training to [sic] go through, does anyone think you should have verbal consent before having sexual intercourse, by show of hands?" (JA 066). The trial counsel then cultivated three panel members' uncorrected, false beliefs by further misstating the law, based on erroneous information from unit SHARP training, during the cross-examination of the appellant, and finally by repeatedly invoking SHARP training during closing and rebuttal.

Allowing the trial counsel's remarks to go unchecked was error, plain and obvious. Based on the particularly troubling pattern of legal misstatements and improper appeals to command's SHARP training, this error was highly prejudicial.

Error and Argument

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY ALLOWING THE TRIAL COUNSEL TO MISSTATE THE LAW

AND ARGUE THAT THE PANEL SHOULD BASE ITS VERDICT ON SHARP TRAINING.

Standard of Review

Whether argument is improper is a question of law that this court reviews *de novo*. *United States v. Marsh*, 70 M.J. 101, 106 (C.A.A.F. 2011) (citation omitted). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Because the appellant did not object to the trial counsel's arguments at trial, this court reviews the propriety of the arguments for plain error. *Marsh*, 70 M.J. 104 (citation omitted). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

Furthermore, "error is clear if 'the trial judge and prosecutor [would be] derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'" *United States v. Gomez*, 76 M.J. 76, 88 (C.A.A.F. 2017) (citing *United States v. Frady*, 456 U.S. 152, 163 (1982)). Finally, "prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Hornback*, 73 M.J. at 160.

Law

"[P]rosecutorial misconduct is behavior by the prosecuting attorney that oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935) (internal quotation marks omitted)). Repeated and persistent violations of the Rules for Courts-Martial and Military Rules of Evidence may constitute prosecutorial misconduct. *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014). Counsel vouching and making disparaging comments about defense counsel are also improper. *Fletcher*, 62 M.J. at 180-81. Because "[a]n accused is supposed to be tried and sentenced as an individual on the basis of the offense(s) charged and the legally and logically relevant evidence presented. Thus, trial counsel is also prohibited from injecting argument into irrelevant matters . . ." *United States v. Schroeder*, 65 M.J. 49, 58 (C.A.A.F. 2007).

Further, improper argument may also constitute prosecutorial misconduct when it is intended to inflame the passions of the panel or constitutes improper comment on an appellant's constitutional rights. *See United States v. Sewell*, 76 MJ. 14, 18 (C.A.A.F. 2017). This Court presumes, "'absent contrary indications, that the panel followed the military judge's instructions' with regard to the

improper testimony and the trial counsel's arguments." *United States v. Short*, 77 M.J. 148, 151 (C.A.A.F. 2018) (citing *United States v. Sewell*, 76 M.J. 14, 19 (C.A.A.F. 2017)).

A. The government's argument and misstatements of law were improper because the government misstated the law and improperly invited the standards and training from the Army's SHARP program as a guidepost to convict of sexual assault.

Recently, this Court reminded practitioners of the case law that embodies the parties' responsibilities in ensuring appellant receives a fair trial. *United States v. Andrews*, 77 M.J. 393 (C.A.A.F. 2018). Military judges have a "sua sponte duty to insure that an accused receives a fair trial." *Id.* (citing *United States v. Watt*, 50 M.J. 102, 105 (C.A.A.F. 2009)). Just as this Court found that, at the very least, the military judge should have interrupted the trial counsel's argument in *Knickerbocker*, the simmering pervasiveness of the trial counsel's errors in this case should have triggered interruption by the military judge. *See United States v. Knickerbocker*, 25 C.M.A. 346, 2 M.J. 128. 129, 54 C.M.R. 1072 (C.M.A. 1977).

1. Similar to *United States v. Andrews*, trial counsel improperly misstated the law when discussing the meaning of consent.

During closing, trial counsel leveraged the mistake of fact instruction against the appellant by imploring the members to find him negligent in that he was not reasonable under all the circumstances. (JA 795). The trial counsel argued, "She's

not driving anywhere. She's not enlisting in the Army. She's not doing contracts." (JA 795-96).

In *United States v. Andrews*, this Court adopted the Navy-Marine Court of Criminal Appeal's (N-M.C.C.A) conclusion that such misstatements of the law are plain and obvious error. *United States v. Andrews*, 77 M.J. 393 (C.A.A.F. 2018) (citation omitted). Here, the trial counsel invited the panel to consider the legal standards outlined in Article 111, UCMJ, by invoking the legal prohibition on drive a vehicle while under the influence, as well as intoxication's impact on a person's capacity to "do contracts" or enlist in the Army to infer that a person who is too intoxicated to engage in these activities is also too intoxicated to consent to sexual activity. These are similar to the arguments made by the trial counsel in *Andrews*, and for similar reasons, are plain and obvious error.

2. Trial counsel improperly vouched and provoked unsolicited command views of the legal standards and training from the Army's program.

This Court held that improper vouching "can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed." *United States v. Fletcher*, 62 M.J. 175, 181 (C.A.A.F. 2005). "Improper interjection of the prosecutor's views can also include 'substantive commentary on the truth or falsity of testimony or evidence." *Id.* (internal citations and quotations omitted).

Here, the military judge erred by not interjecting when the trial counsel vouched for, and used, the command as a way to place the weight of the command's program behind the supposed strength of the government's case. *First*, the trial counsel threw the weight of the SHARP program, and its erroneous legal standards, to buttress the circumstances surrounding factors affecting nonconsent (JA 731, 746); *second*, the trial counsel invoked SHARP as a way to disparage defense counsel's advocacy for appellant and while improperly bolstering their expert witness, (JA 731-33); *third*, trial counsel weaponized SHARP as a way to explain VH's inconsistencies, biases, and motives. (JA 797, 755). Most importantly, trial counsel left the panel with one last decree: "You have the training. Finding him guilty. . ." (JA 804). Such unsolicited views from the prosecutor "tilt the scales of justice, risk prejudicing the defendant, and carry the potential for distracting the jury from its assigned task of assessing the credibility based solely on the evidence presented at trial and the demeanor of the witnesses." *Id.* (citing *United States v. Perez-Ruiz*, 353 F.3d 1 at 9-10 (1st Cir. 2003)).

3. Trial counsel's improper comments on the SHARP program that brought the command into the deliberative process.

This Court has "condemned references to departmental or command policies made before members." *United States v. Kropf*, 39 M.J. 107 (C.A.A.F. 1994); *see also United States v. Grady*, 15 M.J. 275 (C.M.A. 1984), *United States v.*

Kirkpatrick, 33 M.J. 132 (C.M.A. 1991). Specifically, in *Kirkpatrick*, this Court stated:

> What is improper is the reference to such policies before members in a manner which in effect brings the commander into the deliberation room. It is the spectre of command influence which permeates such a practice and creates the appearance of improperly influencing the court-martial proceedings which must be condemned.

Kropf, 39 M.J. at 109 (citing *Kirkpatrick*, 33 M.J. at 276).

While *Kropf* and *Grady* involve command policies in presentencing proceedings, these cases affirm: (1) the condemnation of references to command policies; (2) the military judge's responsibilities in *sua sponte* interjecting to correct such misstatements, and (3) providing immediate limiting instructions to prevent exacerbating the error. *See Kropf*, 39 M.J. at 108-110; *Grady*, 15 M.J. at 276.

These principles apply equally in findings, because "[e]ach case is to be considered on the law and facts applicable to it alone and the policies of a particular commander have no place in the trial itself." *United States v. Estrada*, 7 U.S.C.M.A. 635 (C.M.A. 1957). "There is only one reason that the commander's policies are brought to the attention of the court. That reason is to influence the members in their decisions of the case before it." *Id.* at 638.

Worse than in *Kropf*, *Grady*, and *Estrada*, the trial counsel in this case interjected a command policy during three of the four days of trial. Additionally,

SHARP is unlike other command programs; specifically, it is designed to attack the culture in the Army to eliminate sexual predators that lie within the ranks. (JA 895). To execute this mission, the Army employs training materials that invoke improper legal standards and promote propensity principles. Those who attend this training are future panel members; and as demonstrated in PV2 Bodoh's court-marital, at least one of the myths concerning sexual assault permeated and went uncorrected during *voir dire*. (JA 066).

Understanding the history and development of the SHARP program, the government manipulated SHARP training and its underlying purpose to overcome the weaknesses in its case, bolster its witnesses, counter defense theories, and meet its burden of proof. Using this background, the trial counsel invited a culture war within the Army, fought by command and effectuated by leaders, to seep into the court-martial process. Specifically, the trial counsel invoked the political environment (JA 733), the SHARP program, command inaction (JA 755), and invited personal responsibility of panel members to re-victimize if they acquit PV2 Bodoh. This insidious and pervasive weaving of the Army's SHARP program throughout the course of the trial amounts to clear and obvious error.

B. The improper argument materially prejudiced PV2 Bodoh's substantial rights.

1. The trial counsel's misconduct was severe.

In determining the severity of the misconduct, there are five indicators this Court considers: (1) "the instances of misconduct as compared to the overall length, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole, (3) the length of the trial, (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any of the rulings from the military judge." *Fletcher*, 62 M.J. at 184.

There was pervasive misconduct, permeating the entire course of the three days (excluding sentencing): from *voir dire*, through direct and cross-examinations, as well as closing and rebuttal argument. *See* Statement of Facts. During *voir dire*, the trial counsel weaponized the SHARP program as (1) a reminder of SHARP's legal standards, without the court or the trial counsel, correcting the misstatement of the law and (2) a reminder of the training provided by the program. In direct and cross-examinations, the trial counsel misstated the law as to consent and invoked the SHARP program training to degrade opposing counsel. (JA at 731-32, 746). Finally, during closing and rebuttal argument, the trial counsel weaponized the SHARP program by invoking misstatements of law about consent, washing over weaknesses in his case, and urging members to

convict on a command program. (JA 727, 731-33, 746-47, 751, 755, 79, 795-97, 804).

In total, the government directly invoked SHARP five times throughout trial. Of the 46 pages of argument made by the government, 16 pages were dedicated to improper arguments. (JA 724, 731, 733, 742-43, 746, 751-52, 753, 794-98, 802, 804). These portions of closing arguments are peppered with improper arguments such as: (1) asking members to sit in the victim's shoes, (JA 724, 802); (2) burden shifting, (JA 747, 753, 796, 801); (3) invoking the command's prior inaction to punish the appellant, (JA 730); and (4) effects on re-victimizing VH if the panel acquitted PV2 Bodoh, (JA 751-2); among others. Most importantly, the last message the government sent to the panel invoked SHARP as a basis to convict: "You have the common sense. You have the training. Find him guilty of all charges and specifications." (JA 804).

The record further demonstrates these errors also infected panel deliberations. The panel only deliberated for approximately three hours and forty-five minutes despite a four-day trial. (JA 806, R. at 1154). However, evidence before the members consisted of an approximately 38 minutes recording of PV2 Bodoh's pretrial statements. (JA 187-92, 844). And despite the military judge providing specific instructions throughout trial, the military judge did not provide

any curative or other instructions about the trial counsel's misstatements of law or improper arguments.

Where three of the members acknowledged holding an improper view of the law on consent, the military judge had an obligation to correct the members. Due to the vague and unspecified definitions of non-consent provided by the military judge, (JA 711-12), it is reasonable that such biases and misunderstandings could bridge the gap in the holes provided by the military judge's standard instructions. The trial counsel's misstatements and improper argument further compounded the misunderstandings presented by the members.

As it relates to SHARP training and the trial counsel's invocation of command policy, there is no reason in light of *Kropf* and *Grady*, why the military judge did not *sua sponte* interrupt the proceedings to provide curative instructions to the members.

Although defense counsel did not interrupt the government closing argument, the defense counsel explained his reasoning to the members and addressed the improper arguments made by counsel. (JA 756). Additionally, the defense counsel objected during rebuttal, but did not prevail. (JA 801). Regardless, the military judge was well aware at the end of the rebuttal argument that the government waded into improper areas for argument.

2. The weight of the evidence supporting the conviction was weak and there was no apparent reason for the mixed findings.

Additional Facts

The government's evidence.

Private Bodoh was charged with sexually assaulting the wife of another Soldier under Article 120(b)(1)(B), UCMJ 10 U.S.C. § 920(b)(1)(B) (2012). The government alleged that PV2 Bodoh performed sexual acts on the alleged victim, VH, by causing bodily harm to her, "to wit: penetrating the vulva, anus and mouth of [the alleged victim] with his penis, without the consent of [the alleged victim]." (JA 023-24).

According to VH, PV2 Bodoh and another male Soldier were drinking and taking recreational doses of cough medicine in tablet form – popularly known as Triple C's – with her and her husband at her residence. (JA 260-65). This was not the first time VH had recreationally consumed Triple C's while socializing with her husband, DH, and his friends PV2 Bodoh and PVT JB. (JA 215). In fact, VH drank socially with these individuals frequently, sometimes daily. (JA 253).

On June 24, 2014, VH went to the gym with PV2 Bodoh and PVT JB. (JA 260). After the gym, VH and PV2 Bodoh purchased alcohol as well as cough medicine to make Triple C's. (JA 261). Later that afternoon, VH, PVT JB, and PV2 Bodoh each consumed eight Triple C's. (JA 262). They continued socializing with her husband, DH, while eating pizza and watching movies until

they left for the neighborhood pool. (JA 263). Prior to heading to the pool, VH testified as to feeling heavy and slow. (JA 263-64). Nonetheless, VH testified that she only consumed two mixed drinks at the pool, consisting of Powerade and vodka. (JA 265).

At some point later that night after returning from the pool, PV2 Bodoh walked into the married couple's bedroom while the couple was engaged in foreplay and sex. (JA 271, 837). When he entered the bedroom, the couple stopped and after PV2 Bodoh left the room, the couple fell asleep. (JA 273). VH claimed that PV2 Bodoh later woke her by forcefully pulling her out of bed by the arm, with her husband still asleep; dragging her into the adjacent bathroom. (JA 274, 276-79, 837).

Once in the bathroom, the alleged victim claimed PV2 Bodoh used his penis to vaginally and orally penetrate her without her consent. (JA 279, 282, 286, 836). VH did not say or do anything to PV2 Bodoh other than asking him to go to bed. (JA 283). She alleged he then pulled her by the arm into the kitchen. (JA 287). While she was walking to the kitchen with PV2 Bodoh, she saw PVT JB and mouthed to him a request to help her, (JA 288), but told the SANE Nurse that she verbalized, "help me." (JA 837).

According to VH, PV2 Bodoh anally penetrated her in the kitchen while the other male guest, PVT JB, simultaneously orally penetrated her with his penis. (JA

287-89, 837). She claimed the two Soldiers then switched positions, with PVT JB penetrating her vaginally while PV2 Bodoh penetrated her orally. (JA 290-91, 838). VH testified she cried during this event. (JA 292).

VH alleged PV2 Bodoh moved her to yet another room where he further penetrated her vaginally and orally. (JA 290-91). VH further alleged that, after PV2 Bodoh pulled her into the recliner, PV2 Bodoh slapped her face with his penis. (JA 293). Afterwards, VH testified that "I guess I wasn't doing it good enough, so he shoved me and told me to get my dirty ass to bed." (JA 294). The alleged victim stated she put her clothes back on, cleaned herself up in the bathroom, and walked to her bedroom where her husband still slept. (JA 292-93, 296-97, 838).

Remainder of the government's case.

The remainder of the government's case was an attempt to corroborate VH's narrative, which included multiple theories of nonconsent: incapacitation, fear, and bodily harm. For example, the government called an expert witness in medicine to testify about the effects of alcohol, (JA 200), a SANE nurse to corroborate VH's injuries, (JA 019, 328), and an expert in counterintuitive behavior. (JA 626).

Additionally, the government called PVT JB to corroborate portions of the evening. First, PVT JB testified that VH was impaired. (JA 685). Later in the evening, PVT JB witnessed VH leave her bedroom and walk into the bathroom.

(JA 615). When VH left the bathroom, she ran out of the house and into a field (JA 617-18). When PVT JB found her, she asked PVT JB for help, that PV2 Bodoh tried to have sex with her, and she told PV2 Bodoh to stop. (JA 621). Private JB then walked VH back to the house and put her to bed. (JA 624).

Later, PVT JB witnessed VH walk out of her bathroom and into the kitchen. (JA 627). When VH walked by, she did not say anything to PVT JB. (JA 654). According to PVT JB, PV2 Bodoh told VH to perform oral sex PVT JB. (JA 629-30). VH walked over to PVT JB on her own, got down on her knees, and pulled down PVT JB's pants. (JA 650, 665). Eventually PVT JB stopped VH and left the kitchen for the living room. (JA 630). Private JB denied other sexual acts with VH. (JA 494). Overwhelmed with guilt, PVT JB called his girlfriend, ML, to tell her about what happened over Skype. (JA 630-31). To explain the situation further, PVT JB turned the camera to broadcast ML the sexual acts PV2 Bodoh and VH engaged in. (JA 631).

Eventually, VH sat in the recliner, and PVT JB asked her what she was doing. (JA 632, 686-87). VH responded, "I don't know." (JA 632). Private JB witnessed PV2 Bodoh ask VH if she wanted to stop and she said yes. (JA 632, 675). While in the living room, PV2 Bodoh and VH engaged in different sexual acts. (JA 632-33). After they finished, PVT JB testified that PV2 Bodoh helped VH into her clothes and walked her back to the bedroom. (JA 640).

Not long after, VH messaged PVT JB and told her that she was coherent. (JA 678). Despite the allegations, VH told PVT JB that she loved PVT JB and PV2 Bodoh and described them as brothers and sisters. (JA 677). In fact, VH told PVT JB to keep what happened a secret because she didn't want her husband to find out. (JA 678).

Private Bodoh had waived a steak knife towards PVT JB in a playful manner the day prior, as well. (JA 651-52). Consistent with PV2 Bodoh's behavior, PVT JB testified that PV2 Bodoh "was always playing around, playing jokes." (JA 652). Private JB never felt the need to intervene between PV2 Bodoh and VH, even after talking to ML. (JA 672).

The defense's Case.

Private Bodoh denied penetrating the alleged victim anally. (JA 426). As for the allegation involving the bathroom, PV2 Bodoh testified that the alleged victim approached him, touched him, and took off her shirt, but PV2 Bodoh did not participate and left. (JA 461-62). Regarding the alleged assault in the kitchen, PV2 Bodoh stated he only engaged in oral sex with the alleged victim while the other male guests engaged in vaginal sex with her. (JA 491). When he and the alleged victim moved to the living room, he only engaged in vaginal and oral sex

with her. (JA 505).[3] Private Bodoh testified that the acts were consensual. (JA 408-09, 412-14).

Defense also called DH, VH's husband, to testify. DH told the panel that VH did not consume a normal amount of alcohol for her. (JA 572). Additionally, he stated that VH may have been a little bit drunk earlier in the evening, (JA 550), but she was not acting drunk, tipsy, (JA 551-52), or "too intoxicated." (JA 573).

ML stated VH appeared as though she was not resisting, but was participating and cooperating. (JA 588-89). She also clearly stated that there were "no indications she was not participating voluntarily," even describing a moment where PV2 Bodoh raised his hands in the air. (JA 588).

a. Evidence supporting non-consent is not enough to secure a conviction.

VH could recall all the events from the bedroom and onward. VH's summation of the acts that evening consisted of complying with PV2 Bodoh's words to engage in sexual acts. (JA 282, 286-87, 289-90, 355). VH's recollection, while clear, was not supported by other evidence presented by the government. (JA 338, 654). Although the government attempted to put on extrinsic evidence of VH's vaginal bleeding as evidence non-consent, (JA 345-46), the government's remaining evidence contradicted VH because at the time of her SANE exam, VH

[3] Private Bodoh was acquitted, through findings by exception, of sexually assaulting the alleged victim by penetrating her anus.

told the SANE nurse it was menstrual blood. (JA 176). Most importantly, however, VH told the panel that she "just listened to everything he told me to do, which was stupid." (JA 304).

b. The alleged victim was not incapacitated; VH appreciated the sexual conduct in issue and had the physical and mental ability to agree to it.

Most indicative of the alleged victim's competency is that she recalled specific events and details from the moment PV2 Bodoh allegedly pulled her out of her bed. (JA 244-361). In fact, VH testified that she was coherent, had no issues with her motor skills and displayed her ability to make decisions. (JA 279, 295-96). Based on the evidence presented at trial, VH appreciated the sexual conduct in issue and the evidence establishes that VH had the physical and mental ability to agree to sexual activity.

c. The alleged victim was not in fear.

To bridge the gap between the legal shortcomings of proving non-consent and incapacitation, the government also claimed that VH could not react verbally or physically to PV2 Bodoh because she was in fear. (JA 254, 257-58, 307). VH testified that she was afraid due to the tone of PV2 Bodoh's voice. (JA 282). VH also told the members that she thought he was a scary person because of "the fights he would get into, and how he would be happy to fight people and hurt people. He would hurt me." (JA 304). As to how PV2 Bodoh hurt other people, she described

a time PV2 Bodoh alleged turned the water to a hot temperature as a joke. (JA 307).

Despite providing this testimony, VH did not provide any specifics of how PV2 Bodoh hurt her. (JA 304). While the government attempted to mislead the members with regards to PV2 Bodoh joking around with PVT JB using a steak knife, VH told the members that "we didn't think it was that serious because it always happened." (JA 258). This testimony was consistent with PVT JB's, wherein PVT JB testified that PV2 Bodoh was always joking around. (JA 650-52).

Despite VH's contentions about PV2 Bodoh's previous behavior, her actions on and after June 24 contradict the government's exaggerated attempts to show fear. Most importantly, VH testified that shortly after the allegations she loved PV2 Bodoh and still described him as a brother. (JA 676).

3. This Court cannot have confidence that the members convicted PV2 Bodoh on the evidence alone.

The findings in this case are distinct from *Sewell*. *United States v. Sewell*, 76 M.J. 14, 14-15 (C.A.A.F. 2017). In *Sewell*, the government relied on extrinsic evidence to corroborate witness testimony, whereas the government in this case relied on conflicting witness testimony. In *Sewell*, the members acquitted the appellant of weak, uncorroborated specifications. *Id.* at 19. In this case, the members acquitted PV2 Bodoh, by exception, of the one specification with extrinsic evidence of non-consent. (JA 807). Specifically, the alleged victim

testified that she was penetrated anally and the government produced two pieces of evidence to corroborate this statement. However, the panel acquitted PV2 Bodoh of this specification. Where independent corroboration did not exist, the panel convicted; this begs the question of what influenced the members more – evidence before the court or their reliance on SHARP training and misstatements of law.

The evidence before the Court demonstrates that the alleged victim consented, or at least that PV2 Bodoh mistakenly believed she consented. To overcome evidentiary gaps within the government's evidence, to include PV2 Bodoh's pretrial statements, the government relied on alternative theories of non-consent. However, the evidence demonstrates that (1) the alleged victim did not verbally or physically demonstrate non-consent; (2) the alleged victim had the mental and physical capability to consent; (3) the alleged victim was not impaired by an intoxicant to the extent that rendered her incapable of consenting to sexual activity; and (4) the alleged victim was not in fear.

Due to the inconsistent evidence, the lack of corroboration, and the troubling motives and biases of the witnesses, the government relied on misstatements of the law and SHARP training to bridge the gaps in evidentiary shortcomings. Specifically, the trial counsel:

- Misstated the law as to consent to overcome the alleged victim's manifestations of consent and lack of impairment;

- Vouched for and invoked the command views of sexual assault through the Army's SHARP program by smuggling it in through "common sense and ways of the world" experience to overcome biases and motives of the alleged victim;

- Vouched and implored the command views of sexual assault through the Army's SHARP program to disparage the defense counsel; and

- Improperly invited the command into the deliberative process by references the SHARP program through every stage of trial, including the last statement to the panel wherein counsel asked the panel to use their SHARP training to convict.

Given the severity of the prosecutorial misconduct, the lack of any curative instructions, and the fact that the government's evidence was weak, this Court should dismiss the specifications of the Charge. Moreover, this is one of several cases in the last three terms admonishing prosecutorial misconduct. While much of the improper conduct appears similar to prior cases, this case is different because the trial counsel took the misconduct one-step further – he invited the command throughout the court-martial process.

Even worse, the trial counsel urged the panel to consider and evaluate the evidence using their SHARP training, rather than relying on the military judge's instructions regarding the law, and advocated that they convict on the same command program. What in prior cases was the action of one judge advocate, the actions of this judge advocate cascaded into inviting the command, the SHARP

program, and political pressures into the court-martial process while sacrificing the principles of justice, fairness, and the integrity of the military justice system.

Conclusion

The improper arguments of the trial counsel materially prejudiced PV2 Bodoh's substantial rights. As a result, this Court cannot be confident the members convicted PV2 Bodoh on the evidence alone. According, this Court should set aside and dismiss the charges.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(c) and 37

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 7604 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Bodoh*, Army Dkt. No. 20150218, USCA Dkt. No. 18-201/AR, was electronically filed with the Court and the Government Appellate Division on September 6, 2018.

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