IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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

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Statement of Statutory Jurisdiction and the Case

The government adopts appellant's statement of statutory jurisdiction and statement of the case.

Statement of Facts

I. Background.

Mrs. VH met appellant through her husband, Private (PV1) NH. (JA 246). At the time, she was nineteen years old and had recently moved to Fort Hood, Texas, with her husband. (JA 245–46). She had no friends of her own and met

people through her husband, including appellant. (JA 246). On 22 June 2014, appellant and PV1 Joshua Blazer were guests at Mrs. VH and PV1 NH's home. (JA 255). Numerous times before the sexual assault, Mrs. VH, PV1s Blazer and NH, and appellant took more than the recommended dose of cold and cough medicine ("Triple C") and consumed alcohol. (JA 250–55). Mrs. VH testified appellant became violent and scary when he took Triple C and drank alcohol. (JA 254). Specifically, he cursed a lot, talked fast, and was mean towards others. (JA 254).

Mrs. VH and PV1 Blazer testified that Mrs. VH and appellant consumed Triple C and alcohol on 22 June 2014. (JA 262–65, 634, 685). In contradiction, appellant testified he did not take Triple C that day. (JA 521). Private Blazer also testified Mrs. VH smoked marijuana and that Mrs. VH was not very coherent on the evening of 22 June 2014. (JA 685, 691).

Mrs. VH testified that while she and her husband were engaged in sexual acts in the bedroom, appellant flung the door open and asked if he could join. (JA 271). Private NH responded, "no," and told appellant to leave. (JA 271–72, 566–67). Eventually, Mrs. VH and her husband went to sleep, but Mrs. VH was awoken by appellant pulling her out of her bed by her arm. (JA 277).

Mrs. VH also testified appellant previously broke Mrs. VH's bedroom door, and later in the evening, threatened PV1 Blazer by holding up a knife to PV1

Blazer's head. (JA 256–58). Private Blazer testified that since the door was broken, he was able to witness appellant enter Mrs. VH's bedroom and interrupt oral sex between Mrs. VH and her husband. (JA 613–14). Private Blazer also heard PV1 NH tell appellant to leave and that PV1 NH was "not trying to have a threesome or anything with [Mrs. VH]." (JA 615).

Private Blazer testified that later in the evening Mrs. VH voluntarily entered the bathroom and was initially in there alone, but appellant followed her and continued trying to get into the bathroom by knocking on the door and whispering. (JA 615–16). When the door opened, appellant moved into the bathroom quickly and the lights went off. (JA 616). Private Blazer saw Mrs. VH try unsuccessfully to exit the bathroom before appellant entered, but appellant and Mrs. VH remained in the bathroom for five to ten minutes. (JA 616).

Private Blazer testified he then saw Mrs. VH leaving the bathroom. (JA 617). Although she always seemed happy, at that time Mrs. VH looked "sad," "expressionless," and "pretty dead." (JA 617). Private Blazer stated Mrs. VH sprinted out of the house and he later found her outside. (JA 618, 621). When PV1 Blazer found her, she asked him for help and told him appellant tried to have sex with her. (JA 621, 661). Mrs. VH eventually went back inside and returned to bed with Private NH. (JA 558, 626). Private NH testified when he asked her what happened regarding her running outside, Mrs. VH was crying and too upset to

answer. (JA 558). Concerning the knife, PV1 Blazer stated on two occasions appellant "played" with the knife and PV1 Blazer had to tell him to stop because it was not funny. (JA 651–52). Appellant testified that all sexual acts between himself and Mrs. VH happened after Mrs. VH ran outside. (JA 410–12).

II. Mrs. VH testified that the sexual assaults continued from the bathroom, to the kitchen, and then to the living room.[1]

A. Sexual assault in the bathroom.

Mrs. VH testified that when she was in bed, appellant pulled her hard, and led her to the bathroom. (JA 279). Appellant locked the bathroom door, turned off the lights, and told Mrs. VH to "pull down [her] F-ing pants" in a "mean" tone of voice. (JA 281–82). Appellant never used that tone with her before. (JA 282). Mrs. VH described appellant as "scary" and having a "blank" expression on his face as he bent her over the tub and forced his penis inside her vagina. (JA 282). Mrs. VH stated she never consented to the sexual act and she asked appellant if she could go to sleep. (JA 283). Appellant said no, and threatened her by stating "this is going to happen every time I come over." (JA 283).

Mrs. VH further testified that when appellant finished penetrating her vagina, he made Mrs. VH sit on the toilet and face him. (JA 286). Appellant then

[1] For clarity, each of the time periods below are relayed as described from each vantage point of the three relevant testifying witnesses: Mrs. VH, PV1 Blazer, and appellant.

shoved his penis into Mrs. VH's mouth with his hands, which was painful to her. (JA 286). Appellant then told her to pull herself up, grabbed her left wrist, and led her to the kitchen. (JA 287). Mrs. VH passed by PV1 Blazer and tried to mouth "please help me." (JA 288). Mrs. VH believed PV1 Blazer acknowledged her plea. (JA 338).

Private Blazer stated that after Mrs. VH returned to the house from outside and went back to bed, he saw appellant go back into Mrs. VH's bedroom. (JA 626–27). Appellant left the bedroom first, then approximately fifteen minutes later, Mrs. VH walked out of the bedroom naked. (JA 627). Mrs. VH gave PV1 Blazer a "weird" look. (JA 627). Private Blazer stayed in the living room until he heard noise coming from the kitchen. (JA 627–28).

According to appellant, after he left the bedroom of PV1 NH and Mrs. VH, he went to the bathroom. (JA 442–44). Then Mrs. VH "busted right through" the bathroom door while he was urinating and having a conversation on his cell phone. (JA 442–47). Appellant further testified that immediately after entering the bathroom, Mrs. VH began touching him, fondling him, holding him back, trying to pull his pants down, and taking her clothes off exposing her breasts. (JA 409, 451–58). Appellant stated he was ultimately able to maneuver away from Mrs. VH and exit the bathroom because he was not interested in engaging in sexual acts with her. (JA 458–62).

B. Sexual assault in the kitchen.

Mrs. VH testified that once in the kitchen, appellant told her to get on her hands and knees and then penetrated her anus with his penis. (JA 288). Mrs. VH started crying. (JA 292–93). Mrs. VH testified appellant then called PV1 Blazer to the kitchen, directed Mrs. VH to open her mouth, and PV1 Blazer placed his penis in her mouth. (JA 289). Appellant later said "switch," and he and PV1 Blazer alternated positions; PV1 Blazer placed his penis in Mrs. VH's vagina from behind while appellant placed his penis in her mouth. (JA 290). Appellant said "switch" again, and the two again switched positions. (JA 290). Eventually, PV1 Blazer stated "I can't do this," and left the kitchen. (JA 291).

Private Blazer testified when he entered the kitchen, he saw Mrs. VH and appellant having sex. (JA 628). At that point, appellant told Mrs. VH to perform oral sex on PV1 Blazer, and she did. (JA 629).

Appellant testified after he left the bathroom and returned to the living room, Mrs. VH walked out of the bathroom "pretty much naked," followed him into the living room, and began asking the two men to perform sex acts on her. (JA 409, 412, 465). Additionally, she asked appellant and PV1 Blazer if she could perform oral sex on them. (JA 409). Appellant stated Mrs. VH was crawling around on the floor naked, begging him to have sex with her. (JA 471, 476–77). Appellant then left the living room and went to the kitchen, but Mrs. VH pursued him and began

making advances on him again. (JA 481, 483–85). After initially resisting her advances, appellant said once in the kitchen, he "didn't fight it" and "gave in and let her" pull his pants down and perform oral sex on him. (JA 412, 485). While Mrs. VH performed oral sex on appellant in the kitchen, appellant testified she called to PV1 Blazer and asked him to "join in." (JA 413). Appellant denied penetrating her anus with his penis. (JA 413). After a few minutes of oral sex, appellant testified he and PV1 Blazer felt remorseful and ended the sexual encounter in the kitchen despite Mrs. VH's expressed desire to continue. (JA 492). Appellant testified he then returned to the living room with PV1 Blazer. (JA 493).

C. Sexual assault in the living room.

Mrs. VH testified appellant then pulled her into the living room from the kitchen. (JA 292). Appellant told her to open her legs, and he inserted his penis into her vagina. (JA 292). Mrs. VH asked appellant multiple times if she could go to bed, but appellant told her that she could not go "until [she] ma[d]e him come." (JA 292). Appellant then repositioned her to sit on the arm of a reclining chair. (JA 293). Appellant penetrated her mouth with his penis and slapped her face with his penis. (JA 293–94, 640–41). He also slapped her face two times with his hand. (JA 293). Eventually, appellant shoved her and told her to "get [her] dirty ass to bed." (JA 294).

Private Blazer observed this and testified that despite Mrs. VH asking to go

to bed, appellant held Mrs. VH's head like a basketball and thrust his penis hard into her mouth and at a pace that was so fast Mrs. VH struggled to "keep up." (JA 639–40). Private Blazer also observed appellant hit Mrs. VH in the face with his penis. (JA 640). Private Blazer testified he asked her what she was doing. (JA 632). When she stated that she just wanted to lay down with her husband, PV1 Blazer said she should go do that, but appellant told him to "shut up." (JA 632).

Appellant testified that after the sex acts in the kitchen, Mrs. VH walked toward PV1 Blazer to continue having sex with him. (JA 500). Appellant stated after PV1 Blazer showed no interest, she went to back appellant, and he had put his shorts back on and was now sitting in the recliner. (JA 502). Appellant testified after she made advances on him, he again gave in, removed his shorts, and penetrated her vagina with his penis for about five minutes. (JA 413–14, 502–04).

III. After the assaults.

Mrs. VH testified after the vaginal penetration in the living room stopped and appellant shoved her, she went to the bathroom and wiped the blood from her hands and thighs. (JA 295). She then put her bloody clothes underneath the sink and went to sleep with her husband. (JA 295–97). Later in the morning, Mrs. VH called her friend, Ms. TG, and told her appellant sexually assaulted her. (JA 298). Later in the day, Mrs. VH also told her husband appellant sexually assaulted her. (JA 310–11). Mrs. VH acknowledged she did not scream or fight during the

assaults because she froze and felt numb. (JA 304). PV1 Blazer testified appellant had to dress and escort Mrs. VH back to her room. (JA 641). Private Blazer also testified appellant had blood on his abdomen and genital area. (JA 641–42).

IV. Government expert witnesses.

Colonel (COL) Derek Linklater, a medical doctor, was called as an expert in drugs, emerging drugs, and alcohol. (JA 206). He testified the active drug in Triple C, dextromethorphan, has subtle effects, but after consumption of two-and-a-half to five milligrams per kilogram, it can have the same effects of being "drunk and stoned." (JA 213–14). If consumption exceeds five milligrams per kilogram, it can cause cognitive level impairment. (JA 214). Colonel Linklater also stated it can stay in someone's system for up to eight hours. (JA 221–23). An approximation of the amount of Triple C in Mrs. VH's system, based on her body weight, was four milligrams per kilogram. (JA 212).

The government also called Ms. Caitlin Sulley to testify as an expert in counterintuitive victim behavior. (JA 375). Ms. Sulley addressed "common myths" about sexual assault, including the misconception that victims automatically fight, cry out, or yell during the assault. (JA 377–82). Ms. Sulley testified it is common for victims to freeze during an assault because of a natural neurobiological response and that the victim commonly knows the offender. (JA 377). Ms. Sulley also discussed the fear victims have about not being believed, as

well as the continuing trauma and stigmatization they experience. (JA 379–80).

V. References to the Army SHARP Program.

Central to this appeal are the references to the Army Sexual Harassment/Assault Response and Prevention (SHARP) Program and alleged misstatements of the law that occurred over the course of appellant's four-day court-martial that produced a record of trial in excess of 1,200 pages.

A. References to the Army SHARP program during voir dire.

Voir dire began on 24 March 2015 at 0952. (JA 26). The military judge never mentioned the Army SHARP Program, though he provided standard instructions throughout the court-martial, including voir dire. He informed the panel they are "required to follow [his] instructions on the law and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence." (JA 27–28). The military judge instructed them not to "consult any source of law or information written or otherwise as to any matters involved in this case" and not to "conduct [their] own investigation or research." (JA 33).

1. Trial Counsel.

The first reference to the Army SHARP Program occurred during group voir dire, when the trial counsel asked a question about whether it was easier for a servicemember– or civilian–victim to report a sexual assault: "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?" All members responded in the negative. (JA 50). Next, the trial counsel asked about the panel members' opinions regarding whether verbal consent should be necessary before sexual intercourse. He said: "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 show of hands?" (JA 66) (emphasis added). Four members responded in the affirmative and neither counsel nor the military judge asked follow-up questions. (JA 66).

Shortly before concluding group voir dire, trial counsel asked four additional questions about SHARP:

> 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?
>
> Does anyone believe that just because the SHARP program or political environment that they could not listen to the evidence fairly?
>
> Has anyone been personally directed to find a certain outcome in sexual assault prosecutions, have you been given personal directions in any way, shape, of form?
>
> And, do you all understand that you have to follow the laws the judge instructs, apply the facts presented in court,

> and your common sense and life experience in making decisions, do you understand that?

(JA 73–74). The panel unanimously responded in the negative to the first three questions and affirmatively to the fourth.

2. Defense Counsel.

Defense counsel also discussed the issue of sexual assault training and political pressures surrounding the issue during voir dire. He posed the following question:

> You know, there has been a lot about assault in the military. It is just all over the place – up in Congress, it is in the news, and so on and so forth. Now – now, the Convening Authority detailed you all because you have got that, you know, you've got the education, *training*, and experience, but does anybody feel any kind of implied pressure just to feel that they have to find someone guilty just because of it is sexual assault case?

(JA 78–79) (emphasis added). The panel responded negatively. Later on in the context of punishments, defense counsel asked "[w]hat about sexual assault crimes, you know, Colonel [Gaydon], . . . Do you feel that there is a standard punishment or should be standard punishment for sexual assault?" After COL Gaydon responded in the negative, all panel members concurred with his answer. (JA 83–84). Voir dire concluded before noon on 24 March 2015. (JA 111).

B. References to the Army SHARP Program during the merits.

1. Appellant's direct and cross-examination testimony.

Approximately forty-eight hours elapsed before the Army SHARP Program was mentioned again, and it was introduced not by the trial counsel, but by appellant during his direct examination. The following exchange between defense counsel and appellant occurred on the morning of 26 March 2015:

> Q. You did not tell CID that you had sex. Why not?
>
> A. I was – again, I was very frightened, scared, didn't know what was going to happen, didn't know why these accusations were coming at me . . . so I was very frightened when they told me that [Mrs. VH] pulled the SHARP defense.
>
> Q. Okay. The – by SHARP defense, you mean a rape complaint?
>
> A. The rape complaint; yes, sir.

(JA 403). After appellant mentioned "the SHARP defense," during direct examination, trial counsel cross-examined him on, among other things, his experience with Army SHARP training.

> [Trial Counsel] Q. You've gone through SHARP training in AIT training prep?
>
> [Appellant] A. I went through SHARP training when I very first arrived to Fort Hood, which was January 24th of 2014.
>
> [Trial Counsel] Q. And in AIT training, you went through it again?
>
> [Appellant] A. No . . . .

[Trial Counsel] Q. You were trained once you got to Fort Hood. You had to go to SHARP classes, correct?

[Appellant] A. Yes, for reception from January 24th to about a week, but it wasn't [sic] all SHARP classes. We had one day – one class that was about SHARP.

[Trial Counsel] Q. And you know about not having sex with people when they've had drugs and alcohol, correct?

[Appellant] A. To the best of my knowledge, she wasn't-

[Trial Counsel] Q. You know about not having sex with people that are on drugs and alcohol, correct? You are not supposed to do that.

[Appellant] A. Yes, sir.

[Trial Counsel] Q. And you know you are not supposed to sleep with other peoples' wives in the military?

[Appellant] A. Yes, sir.

[Trial Counsel] Q. You are not supposed to sleep with someone when they are on Triple C's, correct?

[Appellant] A. Yes, sir.

[Trial Counsel] Q. Especially when they are ---

[Defense Counsel] Objection, Your Honor.

[Military Judge] Basis?

[Defense Counsel] Now, first of all, he's badgering the witness . . . .

[Trial Counsel] I disagree with that interpretation of the evidence, Your Honor. Especially given [Appellant's]

statement that is already in evidence and what he says her actions were as well as her actions and the – COL Linklater saying the duration of the drugs would be up to eight hours.

[Military Judge] 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.

[Trial Counsel] Q. Private Bodoh, do you *feel* it's inappropriate to have sex with someone when they are on alcohol, correct? When they are drunk?

[Appellant] A. Depends if there is consent or if there is no consent.

[Trial Counsel] Q. And you *feel* that it is inappropriate to have sex with them when they are on drugs?

[Appellant] A. Again, if there is consent or if there is no consent.

[Defense Counsel] Objection again, Your Honor.

[Military Judge] Basis?

[Defense Counsel] That's basis of the law. If they are intoxicated to the point where they cannot consent, that's one thing.

[Trial Counsel] Mistake of fact, Your Honor.

[Military Judge] Sustained.

(JA 422–24) (emphasis added).

2. Testimony of Ms. AH.

Later that day, the Army SHARP Program was introduced through the testimony of Ms. AH, and again, it was raised by the defense. Ms. AH was an outcry witness for Mrs. VH and accompanied her to the SANE exam, but she had never been questioned by law enforcement. (JA 602–04, 606–07). Attempting to impugn Ms. AH's credibility on the issue of her not taking it upon herself to contact law enforcement about the sexual assault, defense counsel posed the following question to Ms. AH on cross-examination: "You're fully aware of the Army SHARP program, correct?" (JA 608).

C. References to the Army SHARP Program during closing argument and rebuttal, and relevant instructions from the military judge.

1. Military judge's instructions prior to and after closing arguments.

The Army SHARP Program was next mentioned during closing arguments on the morning of 27 March 2015. Prior to the government's closing argument, the military judge instructed the members that "arguments of counsel are not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you." (JA 717). Immediately following trial counsel's rebuttal, the military judge again reminded the panel that if "there is any inconsistency between what counsel have

said about the instructions which I gave you, you must accept my statement as being correct. Again, argument by counsel is not evidence." (JA 804).

2. Trial Counsel's closing argument and rebuttal.

Trial counsel's closing argument spans thirty-eight pages and is followed by a twelve-page rebuttal. (JA 718–56, 793–804). Trial counsel's argument followed a thirty-nine page PowerPoint presentation and utilized a formulaic approach of providing a brief summary of the facts, listing the elements of the offenses, and then applying the facts to the elements. (JA 718–20, 848–886). Nowhere did the PowerPoint slides mention or refer to the Army Sharp Program.

During closing argument, trial counsel mentioned the Army SHARP Program three times over the course of twenty-five pages. (JA 731, 746, 755). Turning to rebuttal, trial counsel stated:

> The fact that she coped differently than what everyone else expected is why we have counterintuitive behavior; that's why we have implemented the SHARP program, because those things happen. We're taught that counterintuitive behavior, as leaders, is normal to experience and they can't expect them to cope the same[.]

(JA 797). Trial counsel concluded rebuttal by stating "[y]ou have the evidence. You have the common sense. You have the training. Find him guilty of all charges and specifications." (JA 804). Defense counsel did not object to the trial counsel's argument on this issue, nor did the military judge intervene sua sponte.

Defense counsel, as he did during appellant's case-in-chief, referenced SHARP in closing argument in his effort to discredit Ms. Sulley. (JA 762–63).

Standard of Review

This court reviews "prosecutorial misconduct and improper argument de novo." *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (citing *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017)). "If proper objection is made, [this court] review[s] for prejudicial error." *Id.* (citing *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). If appellant failed to object, he "has forfeited his right to appeal" and the proper standard of review is "for plain error." *Id.* "The burden of proof under plain error review is on the appellant." *Id.* (citing *Sewell*, 76 M.J. at 18). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (citing *Fletcher*, 62 M.J. at 179).

Summary of Argument

Trial counsel did not argue for the panel members to convict appellant based on their Army SHARP training. His references to the Army SHARP Program, when considered in proper context, do not constitute misconduct. Accordingly, the military judge did not plainly err by not intervening sua sponte because there was no plain or obvious error to remedy. The military judge properly sustained defense counsel's objection and admonished the trial counsel when he misstated the law on

three cross-examination questions. However, those questions were not directly related to the Army SHARP Program. Trial counsel did not improperly invoke the convening authority or Army policy, nor did he ask the panel to apply a definition of consent inconsistent with the military judge's instruction. Even if all of the trial counsel's references to the Army SHARP Program, together with the improper cross-examination questions, constituted plain or obvious error, appellant suffered no material prejudice based on the weight of evidence presented against him and the panel's findings.

Argument

I. Trial counsel did not argue that the panel should base its verdict on SHARP training.

Appellant suggests trial counsel purposefully and strategically weaved the Army SHARP Program throughout the entire court-martial inviting the panel to convict appellant based on SHARP training rather than the law. This is not supported by the record. It would have been plain or obvious error for the trial counsel to argue that the panel members should convict appellant on the basis of their Army SHARP training rather than the military judge's instructions, but that did not happen in this case.

To the contrary, during voir dire, the trial counsel specifically inquired about the members' ability to put aside their Army SHARP training and follow the

military judge's instructions. None of trial counsel's voir dire questions misstated the law or suggested that the members ought to decide appellant's case based upon their SHARP training rather than the law provided by the military judge. It was permissible for trial counsel to reference the Army SHARP Program and ask the panel members for their thoughts on various issues concerning the program. This is reasonable and indeed expected given that voir dire is "the principal legal instrument used to ensure that those members who qualify for service as panel members can do so free from conflict and bias." *United States v. Gooch*, 69 M.J. 353, 357 (C.A.A.F. 2011). Defense counsel also asked questions in the same vein, which was reasonable under the circumstances.

Turning to the merits, it is apparent from the record that the Army SHARP Program was not a factor in the government's case. The Army SHARP Program was not mentioned a single time during the government's case-in-chief. In fact, after voir dire, the next person to mention "SHARP" was appellant himself on direct examination, where he claimed that Mrs. VH "pulled the SHARP defense," insinuating that she was a liar and made a false rape allegation. (JA 403). After appellant raised the Army SHARP Program on direct examination, it was permissible for the trial counsel to explore appellant's knowledge of the topic on cross-examination. He did so by questioning appellant about his personal experiences with Army SHARP training in an effort to counter the foreseeable

defense claim of mistake of fact as to consent. The defense counsel did not object to the questions about appellant's SHARP training, nor did the military judge intervene.

Trial counsel's cross-examination questions concerning appellant's history of Army SHARP training then transitioned into questions about the propriety and legality of engaging in sexual activities with a person who is under the influence of drugs or alcohol. As discussed *infra*, this second line of questioning was improper, drew a defense objection, and a chastisement from the military judge. However, this portion of questioning was not inextricably linked to the cross-examination questions concerning appellant's experience with the Army SHARP Program.

Trial counsel did not mention the Army SHARP Program again until closing argument, despite the defense counsel raising it during the cross-examination of Ms. AH. The record does not support appellant's claim that trial counsel deliberately and strategically weaved Army SHARP training throughout the government's case. It was appellant—not trial counsel—who affirmatively raised Army SHARP training two times during his case-in-chief. Indeed, the word "SHARP" came first from appellant's mouth and then from his attorney's. Appellant cannot use the Army SHARP Program as a sword at trial to discredit government witnesses and then as a shield on appeal.

During thirty-eight pages of closing argument and twelve pages of rebuttal, the trial counsel referred to the Army SHARP Program, at most, five times. Given that the Army SHARP Program was raised during the court-martial by appellant, it was permissible for the trial counsel to mention the issue, in appropriate context, during closing argument and rebuttal. Trial counsel did not argue to the panel that they should convict on the basis of Army SHARP training. Instead, trial counsel mentioned the Army SHARP Program in conjunction with proper arguments and inferences and should be read in that context.

The first statement highlighted Mrs. VH's vulnerability and, as discussed by Ms. Sulley, the continuing trauma sexual assault victims experience throughout their lives. (JA 380, 731–32). Trial counsel discussed Mrs. VH's youth and drug use in the same section. (JA 731). The second statement referred to the effect of drugs on her memory, which was also established by COL Linklater. (JA 223, 746). The third statement referred to Ms. Sulley's expert opinion that a victim freezing during a sexual assault was commonplace. (JA 377–82, 755). Although trial counsel mentioned "SHARP," evidence broadly supporting the proposition that victims freeze during sexual assaults was in evidence. (JA 377–82, 755).

The fourth reference to SHARP occurred on rebuttal and was inserted between a discussion of Ms. Sulley's testimony that Mrs. VH acted contrary to "common myths," but consistently with other victims. (JA 797). Trial counsel

further stated "that's why we have implemented the SHARP program, because those things happen." (JA 797). It is a reasonable inference that the Army SHARP Program was established, in part, to educate Soldiers about these kinds of victim behaviors. (JA 797). The final statement did not specifically mention the Army SHARP Program, but instead was a generic reminder to the panel to apply the evidence, and their training, experience, and common sense in deliberations. (JA 804). This is indistinguishable from the "education, *training*, and experience" defense counsel himself mentioned during group voir dire. (JA 78–79) (emphasis added). When considering the context around every reference, the overall message was not to consider an extrajudicial source of law, but the matters already before the court.

Unlike other forms of prosecutorial misconduct discussed *infra*, the government is unaware of any clear view about the impropriety of referencing Army SHARP training in courts-martial. It has no history of "condemnation," which, as this court said in *United States v. Knapp*, is a relevant factor when determining whether an error is plain or obvious. 73 M.J. 33, 37 (C.A.A.F. 2014). Given that training on the Army SHARP Program is mandatory for all Soldiers and the issue is frequently discussed during both government and defense voir dire, it is reasonable to consider it an issue of "common knowledge" previously discussed by this court. *See Fletcher*, 62 M.J. at 183.

In this case, after considering the entire record and context, trial counsel's references to SHARP do not amount to plain or obvious error. Trial counsel did not argue that panel members should substitute their Army SHARP training for the military judge's instructions. Nor did trial counsel repeatedly or persistently raise the Army SHARP Program in violation of sustained objections or instructions from the military judge. Indeed, the fact that both the defense counsel and the military judge "failed to recognize" the alleged error of mentioning the Army SHARP Program suggests that if it was error at all, it certainly was not plain or obvious. *See United States v. Short*, 73 M.J. 148, 151 (C.A.A.F. 2018).

II. The military judge appropriately responded to trial counsel's cross-examination questions that misstated the law.

Three of the trial counsel's questions misstated—or at least appeared to misstate—the law and were therefore improper. Specifically, trial counsel suggested that it was illegal or *per se* inappropriate to engage in sexual activity with a person who is under the influence of drugs, alcohol, or Triple C. (JA 422–24). After the defense objection, the military judge responded by admonishing the trial counsel and stating "[t]here's nothing that says you can't have sex with somebody who has taken alcohol or Triple C." (JA 423). Trial counsel then rephrased the questions. Rather than asserting or suggesting it was inappropriate,

trial counsel asked appellant whether appellant felt it was appropriate to engage in sexual activity with a person under the influence of the substances. (JA 424).

This brief interchange constituted five questions out of a cross-examination that exceeded one-hundred pages. (JA 417–530). Assuming this limited line of questioning constitutes plain or obvious error, for reasons discussed *infra*, appellant suffered no prejudice. Additionally, these limited questions did not mention the Army SHARP Program. Cross-examination questions referencing the Army SHARP Program immediately preceded these particular questions, but it is clear that trial counsel had moved on to a separate line of inquiry distinct from appellant's experience with the Army SHARP Program. As stated by the trial counsel during the objection colloquy with the military judge, the line of questioning was an effort to counter appellant's foreseeable argument of mistake of fact as to consent. (JA 424).

Appellant's other arguments concerning trial counsel allegedly vouching for and invoking the command's support of the Army SHARP Program are not supported by the record. Trial counsel never suggested the Army as a whole or the particular convening authority in appellant's case expected a certain outcome based upon the nature of the charges. Additionally, there is no evidence that the panel's SHARP training made them unable to follow the military judge's instructions. The members stated exactly the opposite during voir dire. (JA 73–

74). Appellant submits that, at trial counsel's invitation, the panel relied on SHARP training rather than the military judge's instructions. The law, however, requires actual "evidence to the contrary." *See United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014). Here, none exists.

III. Even if the military judge plainly erred, appellant suffered no prejudice.

A. Trial counsel's references did not constitute severe misconduct.

Considering the *Fletcher* severity factors, the trial counsel's misconduct was not severe. During a thirty-eight page closing argument and twelve-page rebuttal, trial counsel made, at most, five erroneous references to the Army SHARP Program. While the references were made in both the findings and rebuttal arguments, the references were inconsequential in light of the context and overall length of the argument. Additionally, during appellant's four-day court-martial that produced a record of trial in excess of 1,200 pages, the government did not make the Army SHARP Program part of its case-in-chief, other than to cross-examine appellant after he testified about the "SHARP defense."

Turning to the panel's deliberations, they deliberated for over three hours and returned mixed findings, indicating that they did not feel compelled by the Army SHARP Program to return guilty findings on all charges as requested by trial counsel. Notably, even though Mrs. VH testified she was anally assaulted by appellant, and there was physical evidence supporting an anal assault, the panel

acquitted appellant of the anal penetration, consistent with his testimony that he never penetrated her anus. (JA 413). The panel also acquitted appellant of assault consummated by a battery for pulling Mrs. VH by her arm out of her bed as alleged by Mrs. VH. (JA 277). However, the panel found appellant guilty of slapping Mrs. VH's face with his penis and not his hand. Only Mrs. VH testified about appellant slapping her face with his hand, but both Mrs. VH and PV1 Blazer testified appellant slapped her face with his penis. (JA 293–94, 640–41). It is clear the panel carefully evaluated the evidence and valued corroboration.

Furthermore, the trial counsel did not "repeatedly and persistently" violate any Rule for Court Martial, Military Rule of Evidence, or ruling from the military judge. *See Hornback*, 73 M.J. at 160. Indeed, after being admonished and in the wake of a sustained objection, trial counsel moved on to other cross-examination questions. Without question, trial counsel forcefully asserted reasonable inferences from the evidence, but rather than being "unsupported by any rational justification," the assertions were appropriately "coupled with a more detailed analysis of the evidence actually adduced at trial." *Hodge v. Hurley*, 426 F.3d 368, 378 (6th Cir. 2005). Finally, trial counsel's alleged improper conduct in this case pales in comparison to the sustained and severe prosecutorial misconduct displayed in other cases. *See, e.g.*, *United States v. Pabelona*, 76 M.J. 9, 11–12 (C.A.A.F. 2017) (affirming the findings and sentence despite trial counsel accusing the

appellant of "using [stolen] money to attend strip clubs based on records (not in evidence) that he had withdrawn money from an ATM located at a strip club," insinuating that the appellant "might be schizophrenic," and calling the appellant "an idiot, a deadbeat," a "con artist," and "a liar who 'sleeps in a bed of lies'"); *Sewell*, 76 M.J. at 14, 20–21 (Ohlson, J., concurring in part, dissenting in part) (affirming the findings and sentence despite trial counsel likening the appellant to an "old dirty man in a trench coat," calling him a "sexual predator," implying he "had psychological problems," and making "an inflammatory comment regarding defense counsel" suggesting that the defense team knew its client was guilty"). This is not to excuse any prosecutorial misconduct, but rather to put the severity of the conduct at issue in context with other cases.

B. The military judge appropriately responded to defense counsel's objection concerning trial counsel's cross-examination questions.

The military judge did not have reason to intervene concerning trial counsel's references to the Army SHARP Program because there was no defense objection and, as discussed above, the references were not improper. The military judge did, however, appropriately respond to the defense objection concerning trial counsel's cross-examination questions of appellant that misstated the law. Additionally, the military judge issued all appropriate instructions to the panel in this case, and there is no evidence suggesting the panel did not follow them.

C. The government presented a strong case and appellant's testimony at trial was not credible in light of his previous inconsistent statements.

Appellant did not contest that he penetrated Mrs. VH's vagina and mouth with his penis. The only contested issue was the surrounding circumstances indicative of non-consent. Contrary to appellant's claims, trial counsel did not ask the panel to apply a definition of consent inconsistent with the military judge's proper instruction. The government did, however, present a compelling case on this issue, including evidence of Mrs. VH's drug use, alcohol use, injuries, and fear of appellant. Further, the government presented evidence about appellant intimidating Mrs. VH, telling her he was going to assault her every time he came over, and that she could not return to her husband until she "made him come." She also testified about his previous acts of aggression including breaking their bedroom door and threatening PV1 Blazer with a knife. After the incident in the bathroom, she fled the house, and when found by PV1 Blazer, told him appellant tried to have sex with her.

Additionally, appellant provided damning evidence against himself long before the court-martial began through his divers prior inconsistent statements. His testimony at trial did not help. An accused who testifies at trial does so "at his own peril." *United States v. Pleasant*, 71 M.J. 709, 712–13 (Army Ct. Crim. App. 2012); *see United States v. Williams*, 390 F.3d 1319, 1325 (11th Cir. 2004)

("[W]hen a defendant chooses to testify, he runs the risk that if disbelieved the jury might conclude the opposite of his testimony is true."). It is likely appellant's testimony about Mrs. VH's sexually predacious and aggressive pursuit of him throughout the house, including crawling around naked, begging him for sex using vulgar language, and him finally "giving in," was simply deemed incredible. Not only is it dubious on its face, but it was inconsistent with his previous statements and directly refuted in many instances by Mrs. VH and PV1 Blazer. For these reasons, this court can be "confident that the members convicted . . . appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence.

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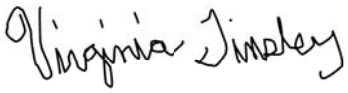

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 7,494 words.

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

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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 October 9, 2018.

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