27 January 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. No. 39003
Airman First Class (E-3), KRISHIL S. PRASAD, USAF, *Appellant.*	)	USCA Dkt. No. 19-0412/AF

BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

GRANTED ISSUE

WHETHER THE AIR FORCE COURT ERRED IN ITS FIRST REVIEW OF APPELLANT'S CASE BY AFFIRMING THE FINDINGS OF GUILT FOR SPECIFICATIONS 1 AND 3 OF CHARGE I WHEN IT FOUND PREJUDICIAL ERROR AS A RESULT OF A *HILLS* VIOLATION

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally correct. At trial, Appellant was charged with three specifications of sexual assault, five specifications of abusive sexual contact, one specification of attempted abusive sexual contact, and one specification of a battery. (JA at 58-63.) Of those specifications, the members found him guilty of a sexual assault and abusive sexual contact against KF, and sexual assault against KG. (JA at 42-44.)

STATEMENT OF FACTS

Appellant and KF met in the dorms at Grand Forks Air Force Base. (JA at 99.) They would occasionally talk in the dorms or hang out with groups. (JA at 100.) On 9 May 2014, KF attended an event at the chapel called "Spa Night." (JA at 101.) After returning from the event, she saw Appellant in the hallway in the dorms and they talked briefly about Spa Night. (JA at 100-101.) They continued to talk while KF followed Appellant to his dorm room. (JA at 101-102.) KF sat on Appellant's bed and began to watch TV. (JA at 102.) Eventually, Appellant also sat down on the bed beside her. (JA at 103.) Appellant then lifted up KF's feet and began to tickle them. (Id.) KF did not respond to the tickling, other than to say that she was not ticklish. (Id.)

Appellant then stopped tickling KF, laid down beside her, and started rubbing her back and stomach. (JA at 104.) KF was texting with DF, her ex-

boyfriend, while Appellant was rubbing her body. (Id.) KF ignored Appellant and focused on her phone as he continued to rub her back. (Id.)

Appellant then unclasped KF's bra and began rubbing her breasts. (Id.) She continued to ignore him and focus on her phone. (Id.) At that point, Appellant took her phone and hid it. (Id.) He then continued rubbing KF's stomach and breasts. (JA at 105.) KF did not say anything, but she pushed Appellant's hands away. (Id.) Appellant then put his hands down the waistband of KF's yoga pants. (JA at 106.) KF told Appellant to stop or she was going to hit him. (JA at 105-106.) After KF told Appellant to stop, he digitally penetrated her vagina. (Id.) When he did so, KF hit him. (Id.)

After KF hit Appellant, he pinned her hands down above her head, climbed on top of her, and rubbed his groin against her vaginal area. (JA at 106-107.) He tried to kiss KF, but she kept her face turned away from him and told him that she would not kiss him. (JA at 107.) Appellant pulled KF's sweatshirt up over her face and tried to kiss her through the sweatshirt. (Id.) At the same time, he also kissed her breasts. (JA at 108.)

As KF continued to resist, Appellant said, "you are not enjoying this, are you," and stopped. (JA at 108.) He lay down beside her and eventually fell asleep. (Id.) KF got up and began getting ready to leave. She asked for Appellant to return her phone, and, once she received the phone back, she left the room. (Id.)

Throughout the assault, KF told Appellant to stop three or four times and resisted by trying to push his hands away. (JA at 109.) On 20 May 2014, eleven days after the incident, KF reported the assault to the Sexual Assault Response Coordinator ("SARC") and to the Air Force Office of Special Investigations ("AFOSI"). (JA at 109-110.)

While she was at the AFOSI office, Appellant spontaneously contacted KF through a messaging service called "Snapchat." (JA at 110.) KF was surprised to receive the Snapchat from Appellant. (JA at 151.) Special Agent AC was interviewing KF at the time that she received the Snapchat and took photographs of the ensuing conversation between KF and Appellant. (JA at 151.) Special Agent AC guided the conversation, but KF used her own words when texting with Appellant. (JA at 151.) The following conversation occurred during that Snapchat conversation:

> KF: I thought you were my friend. Then you tried to have sex with me. But I would (sic) let you. I told you when you started to play with my boobs I didn't want to. Then you pined (sic) my hand after I hit you and rubbed yourself against me. And you hid my phone. I only stayed there because I didn't have my phone.
>
> Appellant: Im sorry
>
> KF: So your (sic) sorry for that and what that it. You pulled my jacket over my head and tried to kiss me. That just plain weird. I mean seriously. You would you do that. I just need you to say why you did what you did. I thought we were friends. Why would you betray my trust?

> Appellant: I had didn't mean to hurt you or betray your trust
>
> …
>
> Appellant: Talk to me 2day after work in.person. Hopefully I can explain better. Otherwise I understand what I did was wrong. And im.sorry I hurt you. I was pushing it….. idk I want to have sex and I wad.trying to get you in the.mood …..im.sorry
>
> KF: by fingering after I said no?
>
> Appellant: Yup. Idk.

(JA at 7; JA at 69 – 91.)

In addition to the testimony of KF and the Snapchat exchange, trial counsel also introduced the testimony of Senior Airman EC, who testified to KF's character for truthfulness. (JA at 161.)

Without objection, the military judge instructed the members:

> If you determine by a preponderance of the evidence any offense alleged in the Charge, Additional Charge I, or Additional Charge II occurred, even if you are not convinced beyond a reasonable doubt that the accused if guilty of that offense, you may nonetheless then consider the evidence of that offense for its bearing on any matter to which it is relevant in relation to the remaining offenses under the Charge, Additional Charge I and Additional Charge II. You may also consider the evidence of such other sexual offense for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual offenses.

(JA at 188.)

Appellant was convicted of sexually assaulting KF by digitally penetrating her vagina, and was found guilty of abusive sexual contact for touching her groin through her clothing with his penis. He was found not guilty of a charge of abusive sexual contact upon KF by kissing her breast.

The Air Force Court of Criminal Appeals found that the military judge had erred in permitting evidence of the charged sexual offenses to be used pursuant to Mil. R. Evid. 413. (JA at 12.) After analyzing the strength of the evidence in the case, the Court found that the error was harmless beyond a reasonable doubt as applied to the specification of sexual assault and abusive sexual contact involving KF. (Id.)

SUMMARY OF THE ARGUMENT

Although the military judge issued an erroneous instruction allowing the panel members in Appellant's case to use charged misconduct as propensity evidence, the erroneous instruction was not prejudicial to Appellant. The evidence of Appellant's guilt as to Specification 1 and Specification 3 of Charge I was overwhelming. In addition to the victim's credible testimony, Appellant corroborated her version of events through a text message exchange that he had with her. The victim directly confronted Appellant about having "fingered her" even after he heard her say no and Appellant admitted to both hearing her say no and to digitally penetrating her after that expression of non-consent. These

circumstances demonstrated beyond a reasonable doubt that Appellant did not have a reasonable mistake of fact as to consent. Given the strength of the evidence and Appellant's own admission, the erroneous instruction was harmless beyond a reasonable doubt as applied to these two specifications.

Further, the members could not have been confused by the propensity instruction. The military judge, in her instructions, was clear that the standard for conviction of an offense was evidence beyond a reasonable doubt. In addition to repeatedly reminding members that the standard was "beyond a reasonable doubt," the military judge also bracketed the erroneous propensity instruction with the instruction that each element of each offense must be determined by independent evidence. Given his own admissions, Appellant's only plausible defense to the two specifications was a mistake of fact defense. Neither the military judge nor trial counsel conflated the standards for mistake of fact or propensity, and even if the members had used the other charged acts to disregard Appellant's alleged mistake of fact as to consent with the victim, that would have been a non-propensity use of that evidence

Given the manner in which the instruction was applied in this case, and the overwhelming evidence of Appellant's guilt, the Air Force Court did not err in finding that there was no reasonable possibility that the erroneous instruction contributed to Appellant's conviction.

ARGUMENT

THE AIR FORCE COURT DID NOT ERR IN AFFIRMING APPELLANT'S CONVICTION SINCE THE ERRONEOUS INSTRUCTION WAS HARMLESS BEYOND A REASONABLE DOUBT

Standard of Review

Instructional errors are reviewed de novo. United States v. Hills, 75 M.J. 350, 357 (C.A.A.F. 2016). When the Appellant fails to preserve an objection at trial, this Court reviews for plain error. United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017). Plain error occurs when: (1) there was error; (2) such error was plain or obvious; and (3) the error materially prejudiced a substantial right of an accused. United States v. Guardado, 77 M.J. 90, 93 (C.A.A.F. 2017) (citing United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017). In assessing whether Appellant has demonstrated material prejudice for forfeited constitutional errors, the Court utilizes a "beyond a reasonable doubt" standard. United States v. Tovarchavez, 78 M.J. 458, 463 (C.A.A.F. 2019) (citing United States v. Jones, 78 M.J. 37, 45 (C.A.A.F. 2018). The burden lies with the government to prove that a constitutional error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967).

This Court May Affirm the Convictions Despite a Finding of Constitutional Error

In United States v. Hills, this Court held that charged offenses may not be used to prove propensity under Mil. R. Evid. 413. 75 M.J. 350, 357 (C.A.A.F. 2016). Furthermore, this Court held that improper use of the propensity instruction violates the Due Process Clause of the Constitution by "creating the risk that the members would apply an impermissibly low standard of proof." Id.

Though Hills was decided after Appellant's court-martial, he was entitled to the law in effect at the time of his appeal. United States v. Mullins, 69 M.J. 113, 116 (C.A.A.F. 2010). Therefore, the Air Force Court found that, in light of Hills, the propensity instruction issued by the military judge in this case was error, and the error was plain. The only contested issue before the Air Force Court on the issue of the propensity instruction was whether Appellant suffered a material prejudice to a substantial right where the military judge issued the erroneous instruction.

This Court has consistently addressed errors under Hills as being constitutional in nature. *See* Tovarchavez, 78 M.J. 456; Guardado, 77 M.J. 90, United States v. Williams, 77 M.J. 459, 462 (C.A.A.F. 2018); United States v. Hukill, 76 M.J. 219 (C.A.A.F. 2017). In assessing prejudice for forfeited constitutional errors, the standard is "harmless beyond a reasonable doubt."

Tovarchavez, 78 M.J. at 464. That is precisely the standard utilized by the Air Force Court in this case. (See JA at 11.)

This Court follows the Supreme Court's precedent in defining how to assess whether a constitutional error is "harmless beyond a reasonable doubt." Tovarchavez, 78 M.J. at 466. Harmless error is defined as "a reasonable possibility" that the error contributed to the conviction. Chapman, 386 U.S. at 24 (1967) (citing Fahy v. Connecticut, 375 U.S. 86 (1963)). As directly applied to the Hills instruction, this Court has held that there is material prejudice where the Court "cannot be certain that the erroneous propensity instruction did not taint the proceedings or otherwise contribute to the defendant's conviction or sentence." Williams, 77 M.J. 464.

The fact that there was a Hills violation does not automatically require a finding of prejudice. This Court has acknowledged that "[t]here are circumstances where the evidence is overwhelming, so we can rest assured that an erroneous propensity instruction did not contribute to the verdict." Guardado, 77 M.J. at 94. Where there is strong corroborating evidence, this Court may affirm a conviction despite the instructional error. *See* Williams, 77 M.J. at 464. For instance, in United States v. Hazelbower, this Court affirmed a charge and specifications despite erroneous use of charged misconduct for propensity purposes because "the

victims' accounts were corroborated by a wealth of independent supporting evidence." 78 M.J. 12 (C.A.A.F. 2018).

Though there may be prejudice as applied to some specifications, a finding of prejudice as to one specification does not require a finding of prejudice as to all specifications. For example, in Williams, this Court found prejudice for the specifications relating to two witnesses whose testimony was "largely uncorroborated by eyewitness testimony or any conclusive documentary or physical evidence." 77 M.J. at 464. However, the Court affirmed a separate specification for which there was corroborating evidence, such as photographs and witnesses to the victim's demeanor. Id. The Court also recognized that the Appellant issued a statement that, though it did not admit to the charged misconduct, confirmed and supported other aspects of the victim's account. Id.

Overwhelming Evidence of Appellant's Guilt Exists for Specifications 1 and 3

Here, there was overwhelming evidence of Appellant's guilt. First, KF was a credible witness who relayed all of the elements of the offense. Second, EC provided testimony that KF was a truthful person. Most importantly, however, Appellant corroborated the allegations with his own admissions. Appellant apologized multiple times for his conduct toward KF and conceded that he was aware she had said "no" but had proceeded to digitally penetrate her despite her manifested lack of consent.

In Tovarchavez, this Court found that text messages apologies could have been interpreted as either consciousness of guilt, or as evidence of inappropriate, if not criminal, behavior. 78 M.J. at 469. The first interpretation would support a conviction; the second would not. However, the text messages in this case go beyond mere apology. While Appellant did apologize several times, admitting that he "didn't mean to hurt" KF and didn't mean to "betray her trust," the most incriminating exchange happened when Appellant said "I understand what I did was wrong/And im.sorry I hurt you/I was pushing it….idk/I want to have sex and I wad.trying to get you in the mood." (JA at 7.) KF directly confronted him about the digital penetration, stating, "By fingering after I said no?" Appellant responded, "Yup."

Appellant's messages confirmed that he digitally penetrated KF, that he heard her express a lack of consent, and that the digital penetration occurred after KF had said "no." Such admission goes beyond mere "apology" as cautioned against in Tovarchavez and is more similar to the substantial corroboration provided by the Appellant in Williams. This was not an equivocating statement of apology that could be interpreted as non-criminal, but was a direct, criminal admission.

Additionally, the panel was presented with additional text messages, which this Court should also consider. In the same text message string, KF confronted

Appellant about having taken her phone. Appellant vehemently denied taking her phone, insisting she had access to it throughout the night. This evidence demonstrated that Appellant was not merely placating KF when he admitted to sexually assaulting her. His denial of her allegation of taking her phone established that Appellant's nature was to defend himself against accusations he found unwarranted. However, when asked about the digital penetration, he acquiesced. He admitted that he "was pushing it."

Appellant avers that the Air Force Court should not have evaluated the "strength" of the government's case, but that is precisely the standard that should be used. (*See* App. Br. at 10.) As stated in Guardado, appellate courts are to look to the evidence supporting the conviction in determining whether an erroneous propensity instruction tainted the proceedings. 77 M.J. at 94-95. Where the evidence of guilt is overwhelming, the instruction is harmless beyond a reasonable doubt. Id. In its holding in this case, the Air Force Court opined that it was "convinced that the members had overwhelming evidence as to each element of sexual assault and abusive sexual contact of KF beyond a reasonable doubt." (JA at 19.) The Court further found "no reasonable possibility that the military judge's instructions concerning propensity evidence and the members' consideration, if any, of the charged offenses of propensity evidence contributed to their findings . . ." (Id.)

While the Air Force Court acknowledged that KF had made inconsistent statements, none of those inconsistent statements were material to the offenses of which Appellant was convicted. The Air Force Court acknowledged an "inconsistency" in that at the Article 32 Hearing, KF had testified that "Appellant stopped when he realized I didn't want to participate." (JA at 6: *see also* JA at 119.) KF later clarified her "inconsistent statement" when she confirmed with civilian defense counsel that Appellant stopped after saying "You are not enjoying this." (JA at 143.)

While identified by the Air Force Court as an inconsistency, it is evident why the Court still found the evidence to be overwhelming despite the statement – the supposedly inconsistent statement had limited materiality. During her testimony on direct examination, KF testified that, after the digital penetration, and after Appellant had rubbed his groin against her vagina without her consent, while kissing her breasts, Appellant said, "'You are not enjoying this, are you' and stopped, and went back to laying beside me." (JA at 108.) KF's statement at the Article 32 Hearing was thus not truly inconsistent. She never testified that Appellant ceased his digital penetration when he realized she was not "enjoying" it. She never testified that Appellant stopped rubbing his groin against her vagina when he realized she was not "enjoying" it. She only testified that Appellant stopped kissing her breasts after making a statement that he realized she was not

consenting to the kissing of her breasts. Appellant was ultimately found not guilty of kissing KF's breasts. Therefore, any inconsistency related to Appellant "stopping" related only to the specification of abusive sexual contact by kissing her breasts.

The second inconsistency noted by the Air Force Court was whether KF said "no" once, or multiple times. (JA at 6: *See* JA at 142.) First, the inconsistency relates primarily to the specification of which Appellant was acquitted. KF admitted that she had previously testified that she did not say "no" to Appellant while he was kissing her breasts. (JA at 143.) However, during her text message conversation with Appellant days after the assault, KF said "I told you when you started to play with my boobs I didn't want to." (JA at 6; JA at 73.) Although KF had testified inconsistently about telling Appellant "no," her testimony at trial aligned with her memory only eleven days after the assault. To the extent that there was an inconsistency in her testimony, that inconsistency occurred at a prior hearing – her testimony at trial was consistent with her memory eleven days after the offense, and therefore the inconsistency from her testimony had less bearing on her overall credibility.

Further, KF was entirely consistent about her statement of saying "stop or I'll hit you" prior to the digital penetration – and, importantly, Appellant corroborated that KF told him to stop before the digital penetration. While the Air

Force Court noted that KF was inconsistent in the number of times she said no, the evidence is overwhelming that, as to the two offenses of which Appellant is convicted, KF *did* tell him to stop. There is no evidence of any reciprocation or action on the part of KF that indicated she consented to digital penetration, or to the abusive sexual contact committed by Appellant pressing his groin to her vagina.

The Evidence Overwhelmingly Showed Appellant Did Not Have a Mistake of Fact as to Consent

The military judge instructed on a reasonable mistake of fact. She instructed that a mistake of fact defense required that an accused have had a mistake that "existed in the mind of the accused" and the mistake "must have been reasonable under all the circumstances." *See also* R.C.M. 916(j)(1). But the evidence overwhelmingly showed beyond a reasonable doubt that Appellant did not have an honest and reasonable mistake of fact as to consent. Importantly, KF and Appellant did not have a previous sexual or romantic history. (JA 99-100.) The entire defense, then, had to materialize on the night of 9 May 2014. Further, the digital penetration occurred after KF had pushed Appellant away, demonstrating a clear lack of consent to any sexual conduct that followed. As Appellant continued, but still prior to the digital penetration, KF pushed him again and said "no." As he put his hands into her pants she told him "stop or I'm going to hit you." (JA at 105.) There is no reasonable possibility that, even without the propensity

instruction, the panel would have found persuasive an argument that Appellant still maintained a mistake of fact as to KF's consent after she told him no twice, and pushed him away twice – particularly in light of the fact that there was no preexisting relationship from which he could have inferred consent.

Even less likely is a contention that he would have been found to have had a reasonable mistake of fact as to the abusive sexual contact committed by touching KF's groin with his penis. This occurred after the digital penetration. After the digital penetration, KF "smacked" Appellant, at which point he pinned her hands above her head. (JA at 106.) The fact that Appellant felt the need to pin KF's hands down before rubbing his penis against her groin demonstrates that he did not believe, honestly or reasonably, that she was consenting to that sexual contact.

While Appellant stated in his text messages that "I thought you were being playful" that message refers only to KF slapping him. Nowhere does Appellant state that he believed that KF wanted him to digitally penetrate her, or to have him press his groin against her vagina. In order to establish a mistake of fact as to consent, there must be evidence that Appellant believed KF consented to sexual activity, not merely that she was being "playful" by hitting him on the head. Even assuming an "honest" belief that KF was joking when she hit him, the available evidence does not demonstrate that supposed belief extended to a belief that she

consented to digital penetration and sexual contact between his groin and her vagina.

As stated above, a mistake of fact as to consent would not have been objectively reasonable under the circumstances. Even if KF had a joking nature or sarcastic personality – as she admitted to having – no reasonable person would have believed that when she said "stop, or I'll hit you" when Appellant started putting his hand down her pants, it was a manifestation of consent for Appellant to digitally penetrate her.

And no reasonable person would have perceived KF smacking Appellant as a manifestation of consent for Appellant to rub his penis against her groin. This especially true when A1C KF had shown no prior sexual interest in Appellant and was not actively reciprocating any of his sexual advances. (JA at 109.) Mistake of fact must be based on some identifiable circumstances reasonably indicating the victim was consenting. Simply choosing to believe that the victim might have been joking when she said "no," or that "no" really meant "yes," would have been patently unreasonable under the circumstances.

Contrary to Appellant's position, Appellant did not stop his conduct "when A1C KF explicitly or implicitly signaled for him to stop." (App. Br. at 11.) Instead, he initiated his assault after she had said no and physically pushed his hands away twice. For the two crimes of which he was convicted, Appellant did

not stop any of the times that KF told him to stop. The fact that he did not proceed with an additional assault after having committed two does not excuse his earlier misconduct – or suggest that he must have mistakenly believed KF was consenting to the prior sexual conduct. Again, even assuming that was what Appellant honestly believed, such a belief was unreasonable.

The evidence that Appellant did not have a reasonable mistake of fact as to consent was overwhelming. The erroneous propensity instruction did not tip the balance in the members' ultimate determination, because the balance was already resolutely tipped to guilty. *See* Guardado, 77 M.J. at 94.

Additional Factors in This Case Ensured There was no Prejudice From The Erroneous Instruction

In Guardado, this Court was concerned by the possibility of members conflating the standard for consideration of propensity evidence with the standard of beyond a reasonable doubt necessary for a conviction. Here, however, the likelihood of this potential confusion was low. Importantly, the military judge in this case bracketed the propensity instruction with the beyond a reasonable doubt instruction. The military judge then gave the propensity instruction, and immediately after instructed:

> You may not, however, convict the accused of any offense solely because you believe the accused has a propensity or predisposition to engage in sexual offenses. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive

> any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element of that offense beyond a reasonable doubt.

(JA at 188.)

Taking these instructions as a whole, it seems highly unlikely that the members became confused and convicted Appellant on proof that was less than beyond a reasonable doubt. Furthermore, the trial counsel, in his findings argument, did not address the propensity instruction when he was arguing the strength of the evidence as it specifically related to KF. (*See* JA at 203-210.) In fact, he did not discuss propensity until he moves on to begin discussing the next victim in the case. (JA at 211 and JA at 213.)

Moreover, for Specifications 1 and 3 of Charge I, the only plausible defense was a mistake of fact defense. Given the text messages between Appellant and KF, the elements of penetration and consent were not in issue. The only real issue in controversy was whether Appellant had an honest and reasonable mistake of fact that KF consented to the sexual act and sexual contact. The panel members could not have considered propensity evidence in an improper way in this particular case. The only way in which they could have realistically considered the evidence of other sexual misconduct was to determine that Appellant had an "absence of mistake" which, in fact, would have been an appropriate, non-propensity use of the evidence. *See* United States v. Hyppolite, 79 M.J. 161 (C.A.A.F. 2019).

Given the state of the evidence and the true issues in controversy, this Court should be convinced that the members found Appellant guilty of Specifications 1 and 3 without reliance on an instruction allowing them to consider whether he had a "propensity" to commit sexual assault. The members were instructed to use the evidence of the other sexual assaults "for its bearing on any matter to which it is relevant in relation to the remaining offense" and that they had to be convinced beyond a reasonable doubt that the accused was not mistaken as to consent. (JA at 178, 188.) At most, the members would have used evidence of other sexual offenses to discount Appellant's mistake of fact defense, which is a lawful, non-propensity use of the evidence. This further diminishes any possibility that erroneous propensity instruction prejudiced Appellant. However, as argued above, the evidence in this case already weighed so strongly against a mistake of fact, that the member did not even need to use to the other charged acts to tip the balance to find Appellant guilty.

In sum, trial counsel's argument, in conjunction with the format of the military judge's instructions, provides further proof that the erroneous instruction did not contribute to the verdict.

The Air Force Court Did Not Err In Declining to Find Prejudice Following the Finding of Constitutional Error

Appellant has failed to demonstrate any error committed by the Air Force Court, but simply disagrees with the final finding. Appellant correctly notes that

the Air Force Court did not address the full test for nonconstitutional error – however, the lack of that test is because the Court applied the correct standard of review for constitutional error. Contrary to Appellant's contention, the Air Force Court did not apply the "substantial influence" test that was found erroneous in United States v. Kreutzer, 61 M.J. 293, 299 (C.A.A.F. 2005). In Kreutzer, the Army Court erroneously defined the test for prejudice in error of constitutional magnitude as testing "whether the error had a substantial influence on the trial results." 61 M.J. at 299. As this Court reiterated, the test is not whether there was a "substantial influence" on the results.

Rather than applying this erroneous test, the Air Force Court in this case applied the appropriate standard of determining whether there was a reasonable possibility that the error contributed to the result. As the Air Force Court stated, it was "convinced that there is no reasonable possibility that the military judge's instructions concerning propensity evidence . . . contributed to their findings that Appellant sexually assaulted KF by penetrating KF's vulva with his finger without her consent and committed abusive sexual contact by touching her groin through her clothing with his penis without her consent." (JA at 19.) Although Guardado was decided after the Air Force Court's holding in the present case, the Court followed those same principles and applied the appropriate prejudice standard.

Conclusion

The Air Force Court of Criminal Appeals applied the proper legal framework in this case. In reviewing this Court's guidance in Hills and Hukill, the Court found plain, obvious error in the military judge's issuance of a propensity instruction. In accordance with Chapman, the Court then applied a harmless beyond a reasonable doubt standard to assess prejudice. Based upon the overwhelming evidence presented in the case which supported Specifications 1 and 3, the Court did not err in affirming the charge and its specifications.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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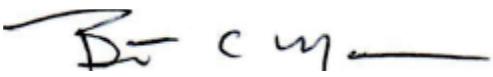

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian counsel, and the Air Force Appellate Defense Division on 27 January 2020 via electronic filing.

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/s/_____

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