IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201900115
Jonathan QUEZADA Lance Corporal (E-3) U. S. Marine Corps Appellant	)	USCA Dkt. No. 21-0089/MC

JENNIFER JOSEPH
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-4623, fax -7687
Bar no. 37262

KERRY E. FRIEDEWALD
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679, fax -7687
Bar no. 37261

CHRISTOPHER G. BLOSSER
Lieutenant Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax -7687
Bar no. 36105

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682 , fax -7687
Bar no. 31714

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UNITED STATES CIRCUIT COURT OF APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

REGULATIONS, RULES, OTHER SOURCES

Issue Presented

BY INSTRUCTING THE MEMBERS ON FALSE EXCULPATORY STATEMENTS IN A CASE WHERE APPELLANT WAS CHARGED WITH A FALSE OFFICIAL STATEMENT FOR THE SAME STATEMENT, DID THE MILITARY JUDGE UNDERMINE APPELLANT'S PRESUMPTION OF INNOCENCE UNDER THE DUE PROCESS CLAUSE?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2012), because Appellant's sentence included a dishonorable discharge and one or more years of confinement. This Court has jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867 (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of violation of a lawful general order, false official statement, and sexual assault, in violation of Articles 92, 107, and 120, UCMJ, 10 U.S.C. §§ 892, 907, 920 (2012). The Members sentenced Appellant to six years of confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

Appellant raised four Assignments of Error before the lower court, alleging: (1) the Military Judge's false exculpatory statements instruction violated his presumption of innocence; (2) the Military Judge erroneously instructed Members to disregard Appellant's deportation as a result of conviction; (3) the Military Judge erred in admitting the Victim's prior consistent statement; and (4) the promulgating order was incorrect. *United States v. Quezada*, No. 201900115, 2020 CCA LEXIS 378, at *1–2 (N-M. Ct. Crim. App. Oct. 26, 2020). The Navy-Marine Corps Court of Criminal Appeals corrected the promulgating order in its decretal paragraph, found no error in the remaining Assignments of Error, and affirmed the findings and the sentence as correct in law and fact. *Id*. at *2.

This Court granted Appellant's petition for review on the false exculpatory statement issue. *See* Order, *United States v. Quezada*, No. 21-0089/MC (C.A.A.F. Mar. 23, 2021).

Statement of Facts

A. The United States charged Appellant with violating a general order, making a false official statement, and sexual assault.

In Charge I, the United States charged Appellant with violating a lawful general order by providing alcohol to the Victim, who was under twenty-one years old. (J.A. 43.) In Charge II, the United States charged Appellant with making a false official statement to an NCIS Agent by stating that he did not lick and touch the Victim's vagina, or words to that effect. (*Id*.)

In Charge III, the United States charged Appellant with, inter alia, two Specifications of sexual assault of the Victim by causing bodily harm for: penetrating her vulva with his tongue (Specification 1); and touching her breasts, hips, and inner thigh with his hands, her ear with his mouth, and her anus with his tongue (Specification 2). (J.A. 45.)

B. At trial, the United States presented evidence that Appellant gave alcohol to the underage Victim, sexually assaulted her, and then lied to law enforcement about it.

The United States' primary evidence was the testimony of the Victim and the Victim's sister at trial, as well as Appellant's interrogation. (J.A. 46–116, 118–51; Prosecution (Pros.) Ex. 19[1].)

1. The Victim—Appellant's sister-in-law—spent the summer at Appellant and her sister's house in California.

The Victim's sister was married to Appellant. (J.A. 48.) The Victim stayed with her sister, Appellant, and their son at their home in California during the summer of 2017, when the Victim was seventeen years old. (J.A. 47, 62; *see* J.A. 197, 257.) The Victim slept in Appellant's son's room during her stay. (J.A. 53.)

[1] *See also* J.A. 249.

2. Appellant hosted a cookout at the house, at which he provided alcohol to the Victim, who drank nearly a dozen shots of Jack Daniel's whiskey.

Appellant hosted a cookout for several friends at the house. (J.A. 55–56.) Appellant bought alcohol for the party, including Jack Daniel's whiskey. (J.A. 58–59.) The Victim drank eleven shots of Jack Daniel's whiskey, several of which were with Appellant after he suggested they have a drinking competition. (J.A. 59–60; *see also* J.A. 122.) At the end of the evening, after most of the guests left, the Victim vomited in the downstairs bathroom and lay down on the couch. (J.A. 68–69.) Despite telling him she wanted to sleep on the couch, Appellant made the Victim go upstairs to sleep. (J.A. 69.)

3. Appellant sexually assaulted the Victim by penetrating her vulva with his tongue and by touching her breasts, hips, and inner thighs with his hands, touching her ear with his mouth, and touching her anus with his tongue.

Appellant followed the Victim upstairs and into his son's room. (J.A. 70.) The Victim lay down on the bed and faced the wall, and Appellant crawled into bed next to her. (J.A. 71.) Appellant soon got out of the bed and went downstairs; he returned with a bottle of liquor and shot glasses. (J.A. 72.) The Victim took another shot and immediately threw up on the floor in the bedroom and in the bathroom. (J.A. 72–73, 246.)

When she finished vomiting, the Victim lay back down on the bed and faced the wall. (J.A. 75.) Appellant again got into bed with her. (J.A. 76.) Appellant

bit the top of her left ear while holding her around her waist with his hands. (J.A. 76–77.) He then painfully grabbed the Victim's breasts under her bra. (J.A. 77.) The Victim told him to stop, reminding him that he was married to her sister and had a child with her. (J.A. 77–78.)

Ignoring her, Appellant moved his hands to her shorts and tried to pull them down, which the Victim resisted. (J.A. 78.) Appellant repositioned himself underneath the covers, pushed aside the Victim's underwear, licked the Victim's vagina and anus, and penetrated the Victim's vagina with his tongue. (J.A. 79–80.)

The Victim began crying when Appellant grabbed her breasts and was crying loudly by the time Appellant licked her vagina. (J.A. 81.) After she tried to push him off, Appellant got off her and lay down on the floor. (J.A. 81–82.) He told the Victim to keep what happened a secret, but she told him she could not keep secrets that big. (J.A. 82.)

4. Soon after, the Victim told her sister about Appellant's assault. Her sister angrily confronted Appellant, who called military police.

A few minutes after the assault, the Victim's sister walked into the bedroom; Appellant was on the floor and the Victim was in the bed. (J.A. 83, 124.) The sister had a brief conversation with Appellant and went downstairs. (J.A. 83, 124.) The Victim followed her downstairs, telling her sister she needed to talk to her outside, in private. (J.A. 84–85, 125.)

The Victim, crying and upset, told her sister that Appellant "was trying to get with [her]" and that "he went down on her." (J.A. 84–85, 125.) Her sister went inside and angrily confronted Appellant, accusing him "of committing sexual acts with her sister." (J.A. 158, 126–27; *see also* J.A. 85.) Because she was being loud, Appellant called military police to come to the house. (J.A. 158; *see also* J.A. 126–27; Pros. Exs. 8, 9.[2])

Appellant asked military police to come to the house because his underage sister-in-law accused him of "some kind of like sexual abuse." (Pros. Ex. 9 at 0:45; *see also* Pros. Ex. 8 at 0:23.) Appellant denied sexually abusing her, telling the dispatcher that he took the Victim to bed and lay down on the floor. (Pros. Ex. 8 at 2:20; Pros. Ex. 9 at 1:39.) He also told the dispatcher that the Victim had been sexually abused in the past. (Pros. Ex. 9 at 1:22.)

When the responding officer came to the house, Appellant told him that, "if I raped her, I wouldn't know about it" or "I wouldn't remember it." (J.A. 161.)

5. In a later statement to law enforcement, Appellant denied licking and touching the Victim's vagina, claimed he only took the Victim to bed and lay down next to her, and repeatedly denied that anything happened.

During a law enforcement interrogation, Appellant said he had friends over for a cookout and that his seventeen-year-old sister-in-law was drinking. (Pros.

[2] *See also* J.A. 247–48.

Ex. 16 at 13:45–17:25.) At the end of the evening, the Victim threw up and was crying, so he took her upstairs. (*Id*.) He put the Victim in the bed and lay down for a second and closed his eyes. (*Id*.) The Victim then jumped out of bed and threw up in the bedroom and the bathroom, and Appellant went to the bathroom to help her. (*Id*.)

When they came back from the bathroom, Appellant claimed he lay down on the floor and the Victim lay down in the bed. (*Id*.) Appellant's wife came in and talked to both of them, "like normal," and he fell asleep on the floor. (*Id*.) A while later, his wife came back "really mad and kind of aggressively," accusing him of taking advantage of the Victim. (*Id*.) Appellant said the Victim had told his wife in the car outside that he "did things to her sexually," and Appellant told his wife, "that's not true." (*Id*.)

Appellant said he felt bad for lying down next to the Victim in the bed and that that was his "mistake as a man." (*Id*. at 17:45–18:07.) He said he felt bad because the Victim was sexually abused by her stepfather. (*Id*.)

When law enforcement confronted Appellant with the Victim's accusation that he "went down on her and licked her vagina," Appellant shook his head "no." (*Id*. at 31:48.) Appellant similarly shook his head "no" when law enforcement again accused him of licking the Victim's vagina. (*Id*. at 38:00.)

Appellant repeatedly denied that anything happened and said he "can't say anything happened," and that "if it happened, I would remember." (*See id*. at 38:50–1:26:00.)

6. The night of the assault, the Victim had a sexual assault forensic exam and reported the assault to law enforcement. She worried her family would pressure her to drop the case.

After the Victim talked to the officers who responded to Appellant's call, her sister took her to the hospital and she had a sexual assault forensic examination. (J.A. 86.) The nurse took samples from the Victim's vagina, anus, and ear. (J.A. 86–87, 175, 178.) Analysis revealed Appellant's DNA in all three samples. (J.A. 169, 171, 173.)

After the exam, the Victim went to law enforcement to formally report the assault. (J.A. 86.) She said that her family previously pressured her to back out of participating in a case, and she worried the same may happen again. (J.A. 110–11; *see also* J.A. 94.)

7. Appellant claimed the DNA tests would "come out negative."

Later, Appellant told his wife, the Victim's sister, that the DNA tests were "going to come out negative, he didn't do anything." (J.A. 132.) Once he learned the DNA test confirmed the presence of his DNA on the Victim, he told his wife he "didn't believe it." (J.A. 132.)

8. On cross-examination, the Victim admitted that she later told law enforcement the encounter was consensual.

The Victim admitted that, after initially reporting the assault, she later told law enforcement she wanted to "stop the whole case" and that the encounter was consensual. (J.A. 93–94.) Although she told law enforcement that no one pressured her to recant, the Victim testified that her sister and family pressured her to lie and say it was consensual. (J.A. 93–94, 111.)

9. The Victim's sister denied pressuring the Victim to lie.

The Victim's sister testified that she did not pressure the Victim to lie, and instead only urged the Victim to tell law enforcement the truth. (J.A. 134.) She said she would never pressure the Victim to lie because that was what their mom made them do in the previous case. (J.A. 134.)

C. Over Appellant's objection, the Military Judge instructed the Members on Appellant's false exculpatory statements.

The parties discussed the inclusion of the false exculpatory statements instruction. (J.A. 179–81.) Appellant objected to its inclusion "because of the potential confusion with the Article 107, false official." (J.A. 181.) The Military Judge denied the objection, ruling on the Record:

> I do find that the false exculpatory statement instruction, from the bench book is reasonably raised by the evidence in this case because the contents of the video recording of the accused's interview with NCIS, and it's the Court's opinion that it gives rise to that instruction. The members are specifically directed that whether any statement that was made was voluntary or false is for them to decide, and whether it points

> to a consciousness of guilt and the significance to, if any, to be attached to such evidence are matters for them, the Court members.
>
> I do find that the instructions are clear to the members about the difference between how they should deliberate on the Specification of Charge II, violation of Article 107, and the elements of the offense that they must find beyond a reasonable doubt in order to find the accused guilty of that offense. And then, the difference in how they could use the false exculpatory statement instruction on that evidence in order to determine whether the accused had a consciousness of guilt.

(J.A. 181–82.)

The Military Judge gave the Members the standard instruction on false exculpatory statements, without specifically identifying the false statements:

> There has been evidence that after the offenses were allegedly committed, the accused may have made a false statement or given a false explanation about the alleged offenses.
>
> Conduct of an accused, including statements made and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused.
>
> If an accused voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, you may consider whether the circumstantial evidence points to consciousness of guilt. You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. The drawing of this inference is not required.
>
> Whether the statement that was made was voluntary or false is for you to decide.
>
> You may also properly consider the circumstances under which the statements were given, such as whether they were given under oath, and the environment under which they were given.

> Whether evidence as to an accused's voluntary explanation or statements point to a consciousness of guilt, and the significance, if any, to be attached to any such evidence are matters for determination by you, court members.

(J.A. 196–97, 256–57; *see also* J.A. 263–64.)

The Military Judge then instructed the Members that they must find "each and every element of each offense beyond a reasonable doubt," (J.A. 199; *see also* J.A. 186–89), and that they could not use a finding of guilty for one offense to infer guilt for another, (J.A. 199).

D. The Members convicted Appellant and sentenced him.

The Members convicted Appellant of all Charges and Specifications and sentenced him to six years' confinement and a dishonorable discharge. (J.A. 242–43, 244–45.)

E. The lower court found the Military Judge did not err in giving the standard false exculpatory statement instruction.

Citing *United States v. Colcol*, 16 M.J. 479 (C.M.A. 1983), *United States v. Mahone,* 14 M.J. 521 (A.F.C.M.R. 1982), and *United States v. Opalka*, 36 C.M.R. 938 (A.F.B.R. 1966), the lower court held that the Military Judge did not err giving the standard false exculpatory statement instruction because Appellant made specific denials rather than general denials of criminal wrongdoing, *Quezada*, 2020 CCA LEXIS 378, at *9–10.

The court found no circularity problem because Appellant's specific denials that he did not lick or penetrate the Victim's vagina with his tongue were only elements of the sexual assault charge, and additional evidence would be needed on the issue of consent. *Id.* at *11.

Argument

THE MILITARY JUDGE DID NOT ERR GIVING A FALSE EXCULPATORY STATEMENTS INSTRUCTION. THE INSTRUCTION NEITHER CONFLATED STANDARDS OF PROOF NOR UNDERMINED APPELLANT'S PRESUMPTION OF INNOCENCE. EVEN IF ERROR, APPELLANT SUFFERED NO PREJUDICE.

A. Standard of review.

Whether the members were properly instructed is a question of law reviewed de novo. *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019).

B. The military judge shall give members appropriate instructions on findings and has wide discretion choosing instructions.

"The military judge shall give the members appropriate instructions on findings." R.C.M. 920(a). A military judge has wide discretion in choosing which instructions to give, as long as the instructions provide an "accurate, complete, and intelligible statement of the law." *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012); *see also United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006) (stating military judge has duty to provide appropriate legal guidelines in findings instructions).

C. Where evidence of charged offenses is used in relation to other charged offenses, instructions do not violate an accused's presumption of innocence if they do not conflate the standards of proof or invite members to impermissibly use propensity evidence.

Appellate courts distinguish between charged conduct used as propensity evidence and charged conduct admitted for other purposes, like intent. *Compare United States v. Hills*, 75 M.J. 350, 355 (C.A.A.F. 2016) (error to instruct members to use charged offenses as propensity to commit other charged offenses), *with United States v. Hyppolite*, 79 M.J. 161, 165 (C.A.A.F. 2019) (United States' use of charged conduct to prove plan or scheme was not propensity evidence), *and Hills*, 75 M.J. at 355 ("[c]harged misconduct is already admissible at trial under M.R.E. 401 and 402"), *and United States v. Vela*, 71 M.J. 283, 286 (C.A.A.F. 2012) (instruction legally accurate that "[i]f evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant"); *see also United States v. Jeter*, 78 M.J. 754, 770 (N-M. Ct. Crim. App. 2019) (evidence related to one charged offense may be used to prove motive or intent for another charged offense).

Appellate courts evaluate a military judge's instructions "'in the context of the overall message conveyed' to the members." *Hills*, 75 M.J. at 357 (citations omitted). When a military judge gives a "'propensity instruction that explicitly refer[s] to the preponderance of the evidence standard,'" such "muddled" instructions implicate fundamental conceptions of due process and heighten the

risk that the members will apply an impermissibly low standard of proof. *United States v. Prasad*, 80 M.J. 23, 30 (C.A.A.F. 2020) (quoting *United States v. Williams*, 77 M.J. 459, 463–64 (C.A.A.F. 2018)).

Conversely, when an "instruction 'clearly [tells] the [members] that all offenses must be proven beyond a reasonable doubt, even those used to draw an inference of propensity,'" there is "'no risk the [members will] apply an impermissibly low standard of proof." *Prasad*, 80 M.J. at 30 (quoting *Williams*, 77 M.J.at 463).

D. Unlike *Hills*, the Military Judge's instructions never lowered the United States' burden below beyond a reasonable doubt. Thus, the false exculpatory statement instruction did not create a *Hills* error.

Absent evidence to the contrary, members are presumed to follow the military judge's instructions. *United States v. Short*, 77 M.J. 148, 151 (C.A.A.F. 2018).

In *Hills*, the military judge granted the United States' Mil. R. Evid 413 motion and instructed the members that, if they determined by a preponderance of the evidence that the appellant committed the offenses alleged in one of the sexual assault specifications, they could then use that finding "on any matter" relevant to the remaining specifications. 75 M.J. at 356. Although the military judge "went on to tell the members" that the United States had to prove each element beyond a reasonable doubt and that one offense could not carry an inference that the

appellant was guilty of another offense, he nevertheless concluded the spillover instruction by telling the members that the United States "may demonstrate that the accused has a propensity to commit that type of offense." *Id.* at 356–57.

As such, the context of the overall message conveyed by the instructions in *Hills* "provided the members with directly contradictory statements about the bearing that one charged offense could have on another" which "required the members to discard the accused's presumption of innocence" using two different standards of proof—preponderance of the evidence and beyond a reasonable doubt. *Id.* The instruction therefore "invited the members to bootstrap their ultimate determination of the accused's guilt" of one charged offense to their determination, using the preponderance of the evidence standard, that he was predisposed to commit another charged offense. *Id*. at 357.

The Court held the military judge erred in giving the instruction because it "creat[ed] the risk that the members would apply an impermissibly low standard of proof, undermining both the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). The Court distinguished this risk from the propensity instruction given in *People v. Villatoro*, 281 P.3d 390, 400 (Cal. 2012), where the judge "clearly told the jury that all offenses must be proven beyond a reasonable doubt" and never provided the preponderance of the evidence standard. *Hills*, 75

M.J. at 357. Thus, in *Villatoro*, there was no risk that the jury would apply an impermissibly low standard of proof. *See id.*

Here, the Military Judge first instructed the Members that it was their prerogative to decide if Appellant's exculpatory statements were false, whether to infer a consciousness of guilt from the statements, and what significance, if any, to attribute to that inference. (J.A. 196–97.) Second, the Military Judge instructed the Members that they needed to find each element beyond a reasonable doubt. (J.A. 187–89, 199.) Third, the Military Judge gave a spillover instruction, instructing the Members that they could not infer guilt from one offense to another. (J.A. 199.)

Unlike *Hills*, where the military judge explicitly instructed members on the preponderance of the evidence standard, *see* 75 M.J. at 353, the Military Judge here never instructed on a lower standard of proof that might have confused the Members about the ultimate burden as to the elements of the crimes, (*see* J.A. 196–97). That is, unlike the *Hills* instruction, the Military Judge's instruction did not provide the members with "directly contradictory statements" about the burden of proof, nor did it invite Members to use any false statements as propensity evidence. *See* 75 M.J. at 357. Because the instructions "'clearly [told] the [Members] that all offenses must be proven beyond a reasonable doubt'" and did not "muddle[]"

standards of proof, there is "'no risk the [Members]'" impermissibly applied a lower standard of proof. *See Prasad*, 80 M.J. at 30.

Thus, the false exculpatory statement instruction did not change the Members' process for determining the falsity of Appellant's statements underlying the Article 107 charge, an element that they were instructed they must find beyond a reasonable doubt. (*See* J.A. 187–88, 199.) Moreover, the Members were instructed that proof of one offense could not carry over as inference of guilt for another offense, (J.A. 199), and the Members are presumed to have followed these instructions absent evidence to the contrary, *see Short*, 77 M.J. at 151 (presuming members follow instructions). Therefore, there was no *Hills* error because the exculpatory statements instruction never lowered the United States' burden to prove every element beyond a reasonable doubt.

E. The Military Judge did not err giving a false exculpatory statements instruction because: (1) Appellant made specific rather than general denials of guilt; (2) the instruction did not create a circularity problem; and (3) the instruction did not undermine Appellant's presumption of innocence.

"[F]alse statements by an accused in explaining an alleged offense may themselves tend to show guilt." *Colcol*, 16 M.J. at 484 (citing *Wilson v. United States*, 162 U.S. 613 (1896)). However, a "general denial of guilt does not demonstrate any consciousness of guilt." *Id*. To infer consciousness of guilt from a general denial of illegal activity, "the factfinder must decide the very issue of

guilt or innocence; and so the instruction would only tend to produce confusion because of its circularity." *Id*.

1. Unlike *Colcol*, Appellant's exculpatory statements were specific denials of guilt and fabricated explanations—not general denials.

In *Colcol*, the appellant made a general denial of guilt: when first interviewed by law enforcement, he broadly stated that "he was not involved in any illegal activity." 16 M.J. at 482. The court reasoned that to infer a consciousness of guilt from the appellant's general denial of any illegal activity, the factfinder would first have to determine he engaged in illegal activity. *Id.* at 484. Because the factfinder would have already determined the issue of the appellant's guilt or innocence before being able to infer a consciousness of guilt, the instruction would "only tend to produce confusion because of its circularity." *Id*. Thus, the court held that a general denial like this "does not demonstrate any consciousness of guilt" and that the appellant's general denial of guilt did not justify the judge's "consciousness of guilt" instruction. *Id*.

In contrast, in *United States v. Scogin*, No. 201200003, 2012 CCA LEXIS 714 (N-M. Ct. Crim. App. Aug. 31, 2012), the appellant's six false explanations of what happened were not general denials because he "invented scenarios that, if believed, would exonerate him of any wrongdoing," *id.* at *9; *see also United States v. Francis*, No. 33080, 2000 CCA LEXIS 177, at *6 (A. F. Ct. Crim. App.

July 25, 2000) (finding appellant's numerous specific statements that he was not involved with compromised material went beyond general denials of guilt).

Here, Appellant's exculpatory statements were not general denials of guilt like *Colcol*; rather, as the lower court correctly found, Appellant made specific denials and explanations. *See Quezada*, 202 CCA LEXIS 378, at *10. Appellant made specific false explanations to the responding military police officers, the interrogating agents, and his wife. (*See* J.A. 132; Pros. Exs. 8, 9, 16); *see also* Statement of Facts *supra* Sections B.4–5, B.7.

According to Appellant, all he did was lay down on the floor when the Victim was in bed and his only "mistake as a man" was briefly lying down next to the Victim on the bed. (J.A. 247–49.) These were calculated to exonerate him of wrongdoing. *See Scogin*, 2012 CCA LEXIS 714, at *9. Contrary to Appellant's assertion, the exculpatory statements went beyond general denials of guilt and were appropriate for a false exculpatory statements instruction. (Appellant's Br. at 9, May 24, 2021.)

2. Moreover, unlike the circularity created by the general denials in *Colcol*, *Durham* and *Littlefield*, the instruction here presented no circularity because it did not require the Members to first determine Appellant's guilt of the offense to infer a consciousness of guilt.

In *United States v. Durham*, 139 F.3d 1325 (10th Cir. 1998), the Tenth Circuit examined the nature of the exculpatory statement in relation to the charged

offense to hold that, where the defendant's exculpatory statement was a denial of the charged conspiracy, the false exculpatory statement instruction created a circularity problem, *id.* at 1332.

Similarly, in *United States v. Littlefield*, 840 F.2d 143 (1st Cir. 1988), the First Circuit examined the defendant's exculpatory statement in light of the charged offense, holding that the false exculpatory statement instruction was circular where the defendant denied the charged scheme to file false unemployment claims, *id.* at 148–49.

In both cases, the courts found the instruction erroneously circular because the jury would have already had to believe the evidence directly establishing the defendant's guilt to infer a consciousness of guilt. *Durham*, 139 F.3d at 1332; *Littlefield*, 840 F.2d at 149; *see also Colcol*, 16 M.J. at 484 (same).

Unlike *Durham*, *Littlefield*, and *Colcol*, comparison of Appellant's specific denials and the charged offenses here shows that the Members did not have to determine Appellant's ultimate guilt on the offenses in order to infer a consciousness of guilt. Appellant here denied specific acts, claiming, inter alia, he never engaged in any sexual activity with the Victim, only lay down next to her, and that DNA test would be negative. *See supra* Statement of Facts B.4–5, B.7. These specific denials touched on only one or two elements of the offenses. For example, the sexual activity itself was only one element of the Article 120

offenses, (J.A. 21, 45, 188–89, 252–53), so the Members could find that Appellant's denials were false without determining his ultimate guilt of the Article 120 offenses. The Members could have then used an inference of a consciousness of guilt from Appellant's specific denials that he did not engage in sexual activity with the Victim as circumstantial evidence that the activity was nonconsensual.

As for the false official statement offense, the falsity of Appellant's denials encompassed only two of the four elements of the offense, (J.A. 19, 43, 187–88–54, 252), and the Members could find Appellant's specific denials of sexual activity with the Victim false without determining Appellant's ultimate guilt of the false official statement offense. The Members could then have used an inference of consciousness of guilt to determine if Appellant had the specific intent to deceive.

As the lower court correctly found, *see Quezada*, 202 CCA LEXIS 378, at *11, there was no circularity problem because the instruction, unlike those in *Colcol*, *Durham*, and *Littlefield*, did not require the Members to determine Appellant's ultimate guilt or innocence of the offenses before being able to infer a consciousness of guilt. This comparison of the elements with the denials shows why Appellant's specific denials—touching on only one or two of the elements of the offenses—were appropriate for consideration in a false exculpatory statements instruction.

3. The false exculpatory statement instruction did not violate Appellant's presumption of innocence simply because he was also charged with false official statement. To the extent the instruction was redundant as to some elements of the offenses, it did not allow for any inference of propensity.

Consideration of whether instructions violated an accused's presumption of innocence may involve more than just conflating standards of proof. *See Hills*, 75 M.J. at 357 (noting *Villatoro* only considered conflicting burdens of proof).

In *Francis*, where the appellant was charged with making a false official statement, the military judge tailored the false exculpatory statements instruction to eliminate any redundancy as to the falsity of the statement. 2000 CCA LEXIS 177, at *5. The tailored instruction specified that the members could infer a consciousness of guilt only "as it relates to the intent to deceive" element of the false official statement offense. *Id.*

But redundancy posed by an untailored instruction only asks the factfinder to "re-prove the conclusion [they] had already reached." *Littlefield*, 840 F.2d at 150. To the extent that the instruction called the Members to determine if certain elements of the offenses were proven in order to infer a consciousness of guilt, that resulted in redundancy, not propensity. (*Contra* Appellant's Br. at 17.)

Moreover, evidence of one charged offense may be relevant to other charges. *See Hyppolite*, 79 M.J. at 165; *Vela*, 71 M.J. at 286. And unlike *Hills*, the Members were never instructed to improperly consider propensity evidence and

were only ever instructed on the beyond a reasonable doubt standard. (J.A. 187–89.) This is unlike *Williams*, where this Court found that the "muddled" instructions allowed the members to impermissibly rely on propensity evidence for one specification before voting on the other. *See* 77 M.J. at 464.

Even though the nature of deliberations may be "inherently mysterious," *see id.*, there was no danger here that the Members "bootstrapped their ultimate determination of [Appellant's] guilt" with an inference of a consciousness of guilt, *see Hills*, 75 M.J. at 357. The untailored instruction at most presented redundancy in relation to some elements, but did not invite the Members to consider Appellant's false statements as propensity to commit sexual assault. Thus, there was no need for any additional tailoring of the instruction as Appellant argues. (*See* Appellant's Br. at 17–20.)

Because the exculpatory statements instruction here merely provided for a permissive inference of "consciousness of guilt," (J.A. 197), nothing in the instruction could have undermined Appellant's presumption of innocence as in *Hills*. This Court need not expand *Hills* to find error in any case where a false exculpatory statement instruction was given simply because an accused was also charged with false official statement. Rather, this Court should validate the instruction post-*Hills*.

F. Even if the Military Judge erred in giving the false exculpatory statements instruction, Appellant cannot demonstrate prejudice. A circular instruction results in redundancy, not prejudice.

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. Because the instruction neither conflated standards of proof nor undermined Appellant's presumption of innocence, any error is non-constitutional, and this Court tests for material prejudice. *Cf. Hills*, 75 M.J. at 356–57.

In *Littlefield*, the court found that, although the trial court erred giving a circular false exculpatory statements instruction, the error was harmless. 840 F.2d at 150. The court stated the "most serious problem" with a circular false exculpatory statements instruction "is the potential for confusing the jury because the instruction is unnecessary." *Id*. After the jury determines the guilt or innocence of the accused, the instruction on consciousness of guilt simply asks the jury to "re-prove the conclusion [it] had already reached." *Id*. Thus, the instruction's effect was redundancy, but not prejudice. *Id*.

The *Littlefield* court concluded that, because the context of the entire charge made clear the government's burden to prove guilt beyond a reasonable doubt, the instruction did not constitute reversible error. *Id*.; *see also Durham*, 139 F.3d at 1332 (finding circular false exculpatory statements instruction harmless because it

was redundant); *United States v. Bailey*, 743 F.3d 322, 345 (2d Cir. 2014) ("Thus, before the jury could consider Bailey's disclaimers as false exculpatory statements indicating consciousness of guilt, the government effectively had to prove his guilt. In such circumstances, erroneous admission of false exculpatory evidence can be deemed harmless beyond a reasonable doubt.").

Here, like *Littlefield*, if the instruction created a circularity problem, it was harmless because the context of the entire instructions made clear that the Members had to find the elements of the charged offenses beyond a reasonable doubt to convict. (J.A. 187–89.) Appellant points to no evidence in the Record that the Members did not follow these instructions. *See Short*, 77 M.J. at 151. Thus, there is no prejudice.

G. Even if the standard false exculpatory statements instruction violated Appellant's presumption of innocence, any prejudice was harmless beyond a reasonable doubt.

Appellate courts test for prejudice under the harmless beyond a reasonable doubt standard where the instructional error has constitutional dimensions. *United States v. Upshaw*, No. 20-0176, 2021 CAAF LEXIS 278, at *9 (C.A.A.F. Mar. 24, 2021) (citation omitted). Appellate courts must be "'confident that there was no reasonable possibility that the error might have contributed to the conviction.'" *Prasad*, 80 M.J. at 29 (quoting *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019)). There may be "circumstances where the evidence is" so

overwhelming that courts can "rest assured that an [erroneous instruction] did not contribute to the verdict by 'tipp[ing] the balance in the members' ultimate determination." *United States v. Guardado*, 77 M.J. 90, 94 (C.A.A.F. 2017) (alteration in original) (quoting *Hills*, 75 M.J. at 358).

In *Williams*, this Court found no prejudice from a *Hills* error for a conviction that was supported by physical and medical evidence and corroborated by witness testimony about the victim's upset demeanor. 77 M.J. at 464; *see also United States v. Hazelbower*, 78 M.J. 12, 12 (C.A.A.F. 2018) (finding erroneous *Hills* instruction harmless beyond a reasonable doubt when victims' accounts were "corroborated by a wealth of independent supporting evidence"); *cf. Tovarchavez*, 78 M.J. at (finding prejudice when members were given preponderance of evidence instruction and text messages and forensic evidence supported defense theory of consent).

Conversely, in *Prasad*, this Court found prejudice where the evidence consisted only of the victim's testimony and messages in which the appellant apologized for doing something wrong without any physical, forensic, or otherwise corroborating evidence of the victim's account. 80 M.J. at 30–32. Similarly, in *Guardado*, this Court found the appellant was prejudiced because there was no supporting evidence other than the victim's testimony. 77 M.J. at 94–95.

Here, the Victim provided substantial, detailed testimony that Appellant sexually assaulted her by touching her breast, hips, and inner thigh; biting her ear; and licking her vagina and anus. (J.A. 75–82.) Forensic evaluation confirmed the presence of Appellant's DNA on the Victim's vagina, anus, and ear. (J.A. 169, 171, 173.) The Victim's compelling testimony that she recanted because her sister pressured her to lie, as well as her prior consistent statement to the Nurse Examiner, *see Quezada*, 2020 CCA LEXIS 378, at *20, overcame the evidence of her recantation, (J.A. 91–93, 111; *see also* Pros. Ex. 19[4]). Like *Williams* and *Hazelbower* and unlike *Prasad* and *Guardado*, the Victim's account was supported by forensic evidence and evidence of her immediate report and demeanor after the assault. Thus, even without the instruction, the evidence against Appellant was overwhelming for the sexual assault Specifications.

The evidence for Appellant's false official statement conviction was similarly overwhelming, as Members could have convicted Appellant on this charge using the DNA evidence, (*see* J.A. 169, 171, 173), regardless of their findings on the sexual assault Specifications.

Additionally, unlike cases where the military judge's instructions explicitly referred to the preponderance of evidence standard, *Upshaw*, 2021 CAAF LEXIS 278, at *11–12 (quoting *Prasad*, 80 M.J. at 30), the Military Judge's instructions

[4] J.A. 250.

here contained no such explicit reference that would invite the members to apply an impermissibly low standard or proof, (*see* J.A. 256–57). Nor did the United States repeatedly argue the statements as propensity evidence, (*see* J.A. at 205–17), unlike *Upshaw*, 2021 CAAF LEXIS 278, at *12. Thus, this Court can be convinced under these circumstances that the instruction, if erroneous, did not contribute to the Members' verdict. *See Guardado*, 77 M.J. at 94. Any error was harmless beyond a reasonable doubt.

Conclusion

The United States respectfully requests that this Court affirm the lower court's decision.

JENNIFER JOSEPH
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-4623
Bar no. 37262

KERRY E. FRIEDEWALD
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433
Bar no. 37261

CHRISTOPHER G. BLOSSER
Lieutenant Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate

BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate

Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 36105

Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

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I certify that I delivered a copy of the foregoing electronically to the Court and opposing Counsel, Lieutenant Daniel O. MOORE, JAGC, U.S. Navy, on June 23, 2021.

JENNIFER JOSEPH
Lieutenant, U.S. Navy
Appellate Government Counsel

United States v. Upshaw

United States Court of Appeals for the Armed Forces

December 1, 2020, Argued; March 24, 2021, Decided

No. 20-0176

Reporter
2021 CAAF LEXIS 278 *; __ M.J. __; 2021 WL 1178558

UNITED STATES, Appellee v. Darrius D. UPSHAW, Hospital Corpsman Third Class United States Navy, Appellant

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL PUBLICATION

Subsequent History: Modified by, in part, Reconsideration granted by United States v. Upshaw, 2021 CAAF LEXIS 505 (C.A.A.F., June 1, 2021)

Prior History: **[*1]** Crim. App. No. 201600053. Military Judges: Mark D. Sameit and Jeffrey V. Munoz.

United States v. Upshaw, 79 M.J. 728, 2019 CCA LEXIS 480, 2019 WL 6521034 (N-M.C.C.A., Dec. 4, 2019)

Counsel: For Appellant: Lieutenant Clifton E. Morgan III, JAGC, USN (argued).

For Appellee: Lieutenant Joshua C. Fiveson, JAGC, USN (argued); Lieutenant Colonel Nicholas L. Gannon, USMC, Major Clayton L. Wiggins, USMC, and Brian K. Keller, Esq. (on brief).

Judges: Judge SPARKS delivered the opinion of the Court, in which Chief Judge STUCKY and Judge OHLSON joined. Judge MAGGS filed a separate dissenting opinion, in which Senior Judge CRAWFORD joined.

Opinion by: SPARKS

Opinion

Judge SPARKS delivered the opinion of the Court.

A general court-martial composed of members convicted Hospital Corpsman Third Class Darrius D. Upshaw (Appellant), contrary to his pleas, of two specifications of abusive sexual contact and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). Appellant was originally sentenced to a dishonorable discharge, ten years of confinement, forfeiture of all pay and allowances, and a reduction to grade E-1. The convening authority approved the adjudged sentence.

The United States Navy-Marine Corps Court of Criminal Appeals set aside the sexual assault conviction due to a violation of *United States v. Hills*, 75 M.J. 350, 354 (C.A.A.F. 2016), but determined that the **[*2]** two abusive sexual contact convictions could stand. Appellant then petitioned this Court and that petition was denied without prejudice.

After arraignment and pretrial motions, the Government opted not to pursue a rehearing on the set aside charge due to the victim's unwillingness to cooperate. The sexual assault charge was dismissed. The convening authority then ordered a sentence rehearing on the remaining convictions. On rehearing, members sentenced Appellant to a dishonorable discharge, thirty-six months of confinement, and a reduction to E-l. The convening authority approved the sentence. The Navy-Marine Corps Court of Criminal Appeals affirmed the modified sentence. This Court granted review in order to consider the following issues:

> I. Was the military judge's improper propensity instruction in violation of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), harmless error beyond a reasonable doubt?
> II. Was a recused judge's substantive participation in Appellant's case after he recused himself harmless error?

After assessing the circumstances surrounding this *Hills* violation in light of our previous decisions, we conclude that the military judge's improper instruction was not harmless beyond a reasonable doubt. Given this decision, **[*3]** it is unnecessary for us to address Issue II.

I. Background

The original convictions in this case stemmed from two incidents between Appellant and separate and unconnected male servicemembers, Lance Corporal KLM and Corporal KI.

1. KLM

Appellant and KLM met at a bar in Oceanside, California, on October 30, 2014. KLM spent the afternoon and evening drinking with Appellant and by midnight was extremely intoxicated and ready to leave. Appellant offered to drive him back to barracks. Appellant helped KLM into the front seat of his car and reclined the seat so he could sleep. At the base gate, Appellant had to shake KLM awake to show consciousness but KLM immediately fell back to sleep. The next time KLM woke up his belt buckle was still fastened but his jeans had been unzipped and Appellant was rubbing KLM's penis while continuing to drive the car. KLM wasn't able to push away Appellant's hand so instead he curled his body toward the window and Appellant then began rubbing KLM's leg. KLM began "freaking out" and demanded Appellant stop the car. KLM crawled out of the car on his hands and knees, still severely intoxicated. He texted his roommate that "[t]his fuses [sic] trying to rape me man **[*4]** I need help." He then called his squad leader, sobbing, and told him that a fellow servicemember had given him a ride then tried to rape him. When the squad leader responded half an hour later that he was on his way, KLM texted back "[p]lease hurry."

While waiting to be picked up, KLM vomited in the parking lot. Appellant rubbed his back and shoulders and his crotch area over his jeans. In repeated calls to his squad leader, KLM urged him "'Just pick me up.'" When the squad leader finally arrived, KLM hugged him, crying and thanking him for picking him up. Appellant told the squad leader that KLM had "'the strongest case of survivor syndrome that I've ever seen to that extent,'" though KLM had no combat history or known history of post-traumatic stress disorder.

2. KI

On March 1, 2015, Appellant met KI and one of his buddies drinking at the same bar where he met KLM. KI had been drinking since breakfast. Mid-afternoon, Appellant offered to let KI and his friend sleep it off at his place. KI's memories of the evening were hazy due to the amount of alcohol he had consumed. He recalled a car ride, going upstairs to Appellant's apartment, and accepting a red drink from Appellant. The next **[*5]** thing he remembered was waking up in the dark to something inside his anus. He fell back asleep and when he woke again he was naked. He dressed and woke his buddy, crying hysterically and saying he had been raped and they needed to leave. KI continued crying as a friend arrived to pick him up.

KI told his friend what had happened and they reported the incident. KI went to the hospital for a sexual assault forensic exam. The forensic evidence revealed Appellant's DNA around KI's anus, on his genitals, in his mouth, and on his chest. He also had abrasions in the anal area. His blood alcohol level at the time of the incident was estimated to be .26.

3. Original Court-Martial

At trial, the Government filed a motion to admit evidence of both incidents under Military Rule of Evidence (M.R.E.) 413. Over defense objection, the military judge allowed the M.R.E. 413 material to come in as propensity evidence and instructed the members accordingly. Appellant was convicted of touching KLM's groin and touching KLM's penis when he was unable to consent due to impairment by alcohol and of penetrating KI's anus when he was unable to consent due to impairment by alcohol.

As explained by the Navy-Marine Corps Court of Criminal Appeals during their second **[*6]** Article 66, UCMJ, 10 U.S.C. § 866, review:

> Between Appellant's initial trial and his first appeal, the Court of Appeals for the Armed Forces (CAAF) issued its decision in *United States v. Hills*, holding the use of charged offenses as propensity evidence under Military Rule of Evidence (Mil. R. Evid.) 413 undermines an accused's right to the presumption of innocence and the corresponding propensity instruction is constitutional error. This Court applied that ruling to Appellant's case, upheld his conviction of the offenses against Victim 1 [KLM], set aside his conviction of the offenses against Victim 2 [KI], set aside the sentence, remanded the case to the convening authority (CA), and authorized a rehearing. Because Victim 2 subsequently decided not to participate in the rehearing, the CA dismissed the charges pertaining to him and ordered a sentencing rehearing for the convictions involving Victim 1.

United States v. Upshaw, 79 M.J. 728, 731 (N-M. Ct. Crim. App. 2019) (citations omitted).

4. Rehearing

The military judge initially assigned to the rehearing, Judge Sameit, was the same judge who had conducted the previous court-martial and delivered the erroneous *Hills* instruction. During arraignment, defense counsel challenged Judge Sameit **[*7]** to recuse himself. Judge Sameit did not rule on the recusal motion but said that he would do so if he remained on the case after consulting with the detailing judge. Judge Sameit was then replaced with a new judge, Judge Munoz. During pretrial motions, Judge Munoz disclosed that he had consulted with Judge Sameit about trial counsel's request to admit the incidents between Appellant and KLM as M.R.E. 413 evidence.

Defense counsel then filed a motion requesting that Judge Munoz recuse himself. Judge Munoz denied the motion. Given KI's subsequent decision not to participate in another court-martial, Judge Munoz presided instead over a sentencing rehearing before members for the remaining convictions.

II. Analysis

M.R.E. 413 addresses the admission of evidence of similar crimes in sexual assault cases and states in relevant part that: "[i]n a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." M.R.E. 413(a)(2012). [1] It provides an exception to M.R.E. 404(b) and the general concept that prior convictions or uncharged misconduct are not admissible **[*8]** to show an accused's propensity towards bad acts or bad character. The constitutionality of permitting admission of such propensity evidence was upheld by this Court in *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000).

In *Hills*, this Court determined that the government could not use charged sexual misconduct to prove propensity to commit other charged sexual misconduct under M.R.E. 413. 75 M.J. at 352. We held that "[n]either the text of M.R.E. 413 nor the legislative history of its federal counterpart suggests that the rule was intended to permit the government to show propensity by relying on the very acts the government needs to prove beyond a reasonable doubt in the same case." *Id.* The *Hills* decision also highlighted the problematic nature of instructions that provided members with "directly contradictory statements about the bearing that one charged offense could have on another, one of which requires the members to discard the accused's presumption of innocence, and with two different burdens of proof—preponderance of the evidence and beyond a reasonable doubt." *Id.* at 357.

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *Id.* at 354. Neither party challenges the fact that Judge Sameit abused his discretion in delivering **[*9]** the M.R.E. 413 propensity instruction. The only question before this Court is to what extent that error prejudiced Appellant.

Where there is instructional error with constitutional dimensions, we test for prejudice under the standard of harmless beyond a reasonable doubt. *Id.* at 357. This standard is met "where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (internal quotation marks omitted) (quoting *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019)). However, prejudice occurs where a court "cannot be certain that the erroneous propensity instruction did not taint the proceedings or otherwise contribute to the defendant's conviction or sentence." *Id.* (internal quotation marks omitted) (quoting *United States v. Williams*, 77 M.J. 459, 464 (C.A.A.F. 2018)). If it is just "certainly possible" that the accused was convicted based on properly admitted evidence alone, a *Hills* error cannot be determined harmless. *Id.* at 30 (internal quotation marks omitted) (citation omitted). However, there may be circumstances "where the evidence is overwhelming, so we can rest assured that an erroneous propensity instruction did not contribute to the verdict by tipp[ing] the balance in the members' ultimate determination." *United States v. Guardado*, 77 M.J. 90, 94 (C.A.A.F. 2017) (alteration in original) (internal quotation **[*10]** marks omitted) (quoting *Hills*, 75 M.J. at 358).

Since *Hills*, this Court has attempted to carve a path

[1] The language of M.R.E. 413(a) that appears in the 2016 edition of the *Manual for Courts-Martial* was changed to read, "In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant."

through the question of prejudice by determining just how much evidence is enough to tip that balance. In *Guardado*, we concluded that the appellant had been prejudiced by the *Hills* instruction because, despite the young victim's credible testimony, there was no supporting evidence. *Id.* In *Prasad*, where evidence consisted of victim testimony and a series of Snapchat messages in which the appellant apologized and admitted he had done something wrong, we found prejudice due to the lack of physical or forensic evidence or witnesses who could support the victim's version of events, as well as her well-developed motive to fabricate such an allegation. *Prasad*, 80 M.J. at 30-32. We also found prejudice in *United States v. Hukill*, 76 M.J. 219, 220 (C.A.A.F. 2017), a military judge-alone case in which the appellant was accused of assaulting two women who were friends of his fiancée's. Evidence consisted of the testimony of the two women and his fiancée's assertion that when confronted about the first assault he told her that he did it. *Id.* at 223. In addition, we concluded that the appellant had been prejudiced in *Tovarchavez* where evidence included the victim's testimony, a series of text messages in **[*11]** which the appellant apologized to the victim for "crossing the line," and DNA evidence indicating sexual activity between the victim and the appellant (which was consistent with the defense theories that the sex had been consensual or that there had been a mistake of fact as to consent). 78 M.J. at 462, 468-69.

However, in *Williams*, we found prejudice for all the convictions for which there was no supporting evidence but no prejudice when the victim's account of being sodomized was backed up by damage to a door in the apartment where the assault took place, medical confirmation of the victim's (nonsexual) injuries, and witness confirmation of her upset demeanor. 77 M.J. at 464. In a summary disposition for *United States v. Hazelbower*, we determined the *Hills* instruction was harmless beyond a reasonable doubt because "the victims' accounts were corroborated by a wealth of independent supporting evidence, including (but not limited to) admissions of rape, incriminating text and Skype messages, and the exchange of nude photographs." 78 M.J. 12 (C.A.A.F. 2018).

We also consider the military judge's instructions. Where a military judge's instruction "explicitly refer[s] to the preponderance of the evidence standard, this Court cannot deny that the military **[*12]** judge's muddled . . . instructions potentially implicated fundamental conceptions of justice under the Due Process Clause and heightened the risk that the members would apply an impermissibly low standard of proof." *Prasad*, 80 M.J. at 30 (alterations in original) (internal quotation marks omitted) (quoting *Williams*, 77 M.J. at 463-64). Here, as in *Hills*, the military judge's instructions were clearly erroneous, including explicit reference to the preponderance of the evidence standard.

In addition, we look at the degree to which the Government relied upon the propensity evidence and the instruction on the preponderance of the evidence standard. *Id.* at 33. Here, the Government relied heavily upon the similarities between the cases, repeatedly highlighting the propensity evidence. The Government mentioned the similar circumstances surrounding both incidents in its opening argument. During closing arguments and rebuttal, the Government discussed multiple times that the members could and should consider the propensity evidence and also referenced the preponderance standard. The Government reminded members that:

> The military judge instructed you about propensity, members, and that's what makes this trial unique. These cases are connected and they are connected only **[*13]** by the accused's involvement.
>
> What did he tell you? He said that if you find that an offense occurred, whether that be grabbing the penis, rubbing the thigh and the groin, or penetrating the anus, you may use that on any other point to which it is relevant if you find that [the] initial charge was just by a preponderance of the evidence.
>
> So if you find that by a preponderance of the evidence the accused grabbed K.L.M.'s penis, Specification 2 of Charge I, simply by a preponderance of the evidence, you may use that—you may even use that to find that he has a predisposition to engage in sexual assault. So if you find that any one of these things happened by a preponderance of the evidence, you can use that to find that he is the type of person that does these things.

As in *Prasad*, the Government "exploited—to the considerable detriment of Appellant—the confusion surrounding the military judge's preponderance of the evidence instructions, as well as the negative inference to be drawn from the putative propensity evidence." 80 M.J. at 33.

We are not convinced that, under these circumstances, the evidence against Appellant reaches the level of

overwhelming. Unlike in *Williams*, there is no physical evidence **[*14]** to support KLM's version of events. Granted, the additional evidence—the text messages and calls sent by KLM during his interaction with Appellant—makes this considerably more than just a he said/he said situation. But this additional evidence plays a similar role to the text messages and DNA evidence we considered in *Tovarchavez* or the Snapchat messages in *Prasad*. It is enough to make the alleged assault "certainly possible," but it is not overwhelming. *Prasad*, 80 M.J. at 30 (internal quotation marks omitted) (citation omitted). Given this lack of overwhelming evidence and the central role the propensity evidence played in the Government's case, we cannot be certain that the members' ultimate determination of guilt was not affected. We therefore cannot conclude that the military judge's error was harmless beyond a reasonable doubt.

Given our resolution of Issue I, we need not address Issue II.

III. Conclusion

The military judge erred in admitting charged conduct as M.R.E. 413 propensity evidence and the Government has failed to meet its burden to show that error was harmless beyond a reasonable doubt. The decision of the United States Navy-Marine Corps Court of Criminal Appeals is reversed. The remaining findings **[*15]** of guilt and the sentence are set aside. The record is returned to the Judge Advocate General of the Navy for appropriate action.

Dissent by: MAGGS

Dissent

Judge MAGGS, with whom Senior Judge CRAWFORD joins, dissenting.

I would affirm the decision of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA). *United States v. Upshaw*, 79 M.J. 728, 736 (N-M. Ct. Crim. App. 2019). In my view, the NMCCA correctly determined that the instructional error in this case was harmless beyond a reasonable doubt with respect to the specification of abusive sexual contact of which Appellant was found guilty. I also agree with the NMCCA's conclusion that the first military judge's substantive participation in Appellant's case after he recused himself was harmless error. I therefore respectfully dissent.

I. Propensity Instruction

The first assigned issue is whether "the military judge's improper propensity instruction, in violation of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), [was] harmless error beyond a reasonable doubt." *United States v. Upshaw*, 80 M.J. 179 (C.A.A.F. 2020) (order granting review). Unlike the Court, I would answer this question in the affirmative.

A. Error and Standard of Review

In *Hills*, the accused was charged with several offenses alleging sexual misconduct. 75 M.J. at 352. The military judge granted the government's request for an instruction **[*16]** based on Military Rule of Evidence (M.R.E.) 413. *Id.* at 356. M.R.E. 413 at the time provided that "evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." M.R.E. 413(a) (2012). The military judge instructed the members that if they found by a preponderance of the evidence that the accused had committed one of the charged offenses—even if they were not convinced beyond a reasonable doubt that the accused had committed that charged offense—they could consider the evidence of that charged offense for its tendency to show that the accused committed the other charged offenses. *Hills*, 75 M.J. at 353.

On appeal, this Court ruled that the instruction violated M.R.E. 413 because "[n]either the text of M.R.E. 413 nor the legislative history of its federal counterpart suggests that the rule was intended to permit the government to show propensity by relying on the very acts the government needs to prove beyond a reasonable doubt in the same case." *Id.* at 352. This Court also ruled that the instruction violated the constitutional requirement of due process "by creating [a] risk that the members would apply an impermissibly low standard of proof, undermining both 'the presumption of innocence and the requirement **[*17]** that the prosecution prove guilt beyond a reasonable doubt.'" *Id.* at 357 (quoting *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000)).

The instructions in this case are indistinguishable from the instructions in *Hills*. Because the error in *Hills* has a constitutional dimension, this Court may not affirm the finding of guilt unless we find the error to be harmless beyond a reasonable doubt. *Id.* This exacting standard

is met "where a court is confident that there was no *reasonable* possibility that the error might have contributed to the conviction." *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (emphasis added) (citation omitted) (internal quotation marks omitted). As explained in *United States v. Guardado*, "[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 by 'tipp[ing] the balance in the members' ultimate determination.'" 77 M.J. 90, 94 (C.A.A.F. 2017) (second alteration in original) (quoting *Hills*, 75 M.J. at 358).

In *United States v. Williams*, 77 M.J. 459, 464 (C.A.A.F. 2018), we concluded that a *Hills* instructional error was harmless beyond a reasonable doubt with respect to a specification for forcible sodomy. We reasoned:

> With respect to the night [the victim] ended up in the hospital, the Government introduced photographs of the door Appellant kicked in on [the victim]'s head as well **[*18]** as photographs of [the victim]'s wounds. A neighbor and a police officer bore witness to her distraught demeanor and injuries. Moreover, Appellant issued a sworn statement that, though silent on the issue of sodomy, largely confirmed and supported [the victim]'s story. With the benefit of this corroborating evidence, we are confident that Appellant committed sodomy with [the victim] by force and without her consent that evening.

Id.

B. Harmlessness

The evidence in this case, like the evidence in *Williams*, establishes that the instructional error was harmless beyond a reasonable doubt. As the Court recounts, the named victim, Lance Corporal KLM, provided extensive and detailed testimony establishing the elements of the abusive sexual contact offense. This testimony did not stand alone. Lance Corporal KLM's allegation that a distressing incident occurred during the car ride back to his barracks was corroborated by the undisputed fact that Appellant stopped his car along a busy road. And Lance Corporal KLM's allegation that the incident involved abusive sexual contact was corroborated by Lance Corporal KLM's consistent and contemporaneous telephone calls and texts. As the NMCCA recounted: **[*19]**

> [Lance Corporal KLM] texted his roommate at 0055: "This fuses [sic] trying to rape me man I need help." At 0058, [Lance Corporal] K.L.M. called his squad leader. According to his squad leader, a sobbing [Lance Corporal] K.L.M. told him he accepted a ride home from a corpsman and woke up in the vehicle to the corpsman trying to rape him. When the squad leader next texted at 0124 that he was on his way to help, [Lance Corporal] K.L.M. replied, "[p]lease hurry."

United States v. Upshaw, No. NMCCA 201600053, 2017 CCA LEXIS 363, at *13, 2017 WL 2361911, at *5 (N-M. Ct. Crim. App. May 31, 2017) (second and sixth alterations in original) (footnotes omitted). These communications indicate not only that Lance Corporal KLM was distressed, vulnerable, and in need of help, but also that the cause was a recent sexual assault implicating Appellant. Lance Corporal KLM's decision to involve his squad leader further confirms the seriousness of the incident. In addition, as the NMCCA also found, although Lance Corporal KLM was intoxicated, any suggestion that his intoxication confused his perception and memory about the abusive sexual contact was dispelled by his accurate and detailed recollection of numerous other aspects of the evening's events. 79 M.J. at 732.

Indeed, Appellant himself provided support for **[*20]** Lance Corporal KLM's testimony. Appellant's account of the evening's events largely corroborated Lance Corporal KLM's recollection of details other than the sexual assault itself. *See Williams*, 77 M.J. at 464 ("Appellant issued a sworn statement that, though silent on the issue of sodomy, largely confirmed and supported [the victim's] story."). And Appellant's contemporaneous statements in which he attempted to explain that Lance Corporal KLM was upset because he was suffering from "survivor syndrome" were baseless and unbelievable. Consequently, as the NMCCA correctly found, they served only to show Appellant's consciousness of his own guilt and a desire to avoid the consequences of the truth. *See Upshaw*, 79 M.J. at 732.

Appellant argues that this case is distinguishable from *Williams* because the victim's testimony in *Williams* was corroborated by "conclusive physical evidence," namely, the victim's wounds and a broken door, while Lance Corporal KLM's testimony in this case is not supported by physical evidence. Appellant also asserts that this case did not involve eyewitness testimony and observes that this Court noted the absence of eyewitness testimony in *Hills*, 75 M.J. at 358. These arguments are both legally and factually unfounded. First, while **[*21]** physical evidence and eyewitness testimony may help

to establish that an error was harmless beyond a reasonable doubt, neither *Williams*, nor *Hill*s, nor any other decision requires such evidence. Any type of evidence may suffice provided that this Court "rest[s] assured that an erroneous propensity instruction did not contribute to the verdict." *Guardado*, 77 M.J. at 94. Second, this case did involve corroborating physical evidence and eyewitness testimony. The trial was not merely a "he said/he said" contest of competing statements by Lance Corporal KLM and Appellant. The presence of the car at a location consistent with Lance Corporal KLM's testimony and consistent with his texts is corroborating physical evidence. And the unit members' observations of Appellant and Lance Corporal KLM and their demeanors immediately after the incident is corroborating eyewitness testimony.

Appellant also argues that the erroneous propensity instruction was not harmless beyond a reasonable doubt because trial counsel emphasized the similarities between two specifications of abusive sexual contact and urged the members to consider Appellant's propensity to commit them. Because of the corroborating evidence described above, **[*22]** I am convinced that these arguments did not affect the findings. In addition, Appellant's focus on the Government's arguments about propensity blurs the reasoning of *Hills*. Consideration of propensity evidence is not, by itself, a constitutional violation. On the contrary, this Court has held that M.R.E. 413 allows a court-martial to consider evidence of an *uncharged* sexual assault offense as propensity evidence relevant to a *charged* sexual assault offense. *Wright*, 53 M.J. at 480 (upholding the constitutionality of M.R.E. 413). The constitutional error under *Hills* arises from the risk of confusion about the presumption of innocence and burden of proof if a court-martial may draw conclusions about propensity based on a preponderance of the evidence that the accused committed a *charged* offense. *Hills*, 75 M.J. at 357. Here, as in *Williams*, the strength of the Government's case eliminates concern that this risk harmed Appellant.

II. Recusal

The second assigned issue is whether "a recused judge's substantive participation in Appellant's case after he recused himself [was] harmless error." *Upshaw*, 80 M.J. 179. The Court does not reach this second assigned issue. I would answer it in the negative.

As the Court recounts, when the case was remanded, Judge Sameit recused himself **[*23]** and Judge Munoz took his place. Judge Munoz disclosed to the parties that he had consulted with Judge Sameit about trial counsel's request to allow evidence about the incident involving Lance Corporal KLM to be used under M.R.E. 413 on another specification concerning Corporal KI. Trial defense counsel asked Judge Munoz to recuse himself based on this communication with Judge Sameit, but Judge Munoz denied the motion. On appeal, the NMCCA held that Judge Munoz should have recused himself but concluded that the error was not prejudicial.

The parties dispute some aspects of the standard of review applicable to recusal errors. The Government relies on Article 59(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 859(a) (2012), which provides that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." The Government contends that if we do not find material prejudice to Appellant, the error is harmless, and any contrary decisions are incorrect. The Government further contends that Appellant cannot show individual prejudice in this case.

Appellant, however, contends that in assessing **[*24]** the harmlessness of a recusal error we must also consider three of the factors identified in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988). These factors are "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864; *see also United States v. Witt*, 75 M.J. 380, 384 (C.A.A.F. 2016) (applying these factors in addition to Article 59(a), UCMJ). Appellant contends that the third *Liljeberg* factor is determinative because Judge Sameit's consultation with Judge Munoz on a substantive motion, after Judge Sameit's recusal, created a significant risk of undermining the public's confidence in the judicial process.

Although the Government makes a strong argument that any test for prejudice that requires us to consider factors other than the "substantial rights of the accused" is inconsistent with Article 59(a), UCMJ, resolution of the parties' disagreement about the standard of review is not necessary in this case. I agree with the NMCCA's conclusion that Appellant cannot show prejudice under the *Liljeberg* factors. The first and second factors are not substantially at issue. And with respect to the third

factor, I agree with the following **[*25]** reasoning of the NMCCA:

> Judge Munoz's ruling occurred while charges were still pending rehearing regarding [Corporal KI]. After [Corporal KI] decided not to participate in the rehearing, the [convening authority] withdrew the charges pertaining to him and ordered a resentencing hearing only for the remaining findings of guilty regarding [Lance Corporal KLM], as affirmed by this Court. That mooted the Mil. R. Evid. 413 propensity evidence issue giving rise to the challenge against both Judge Munoz and Judge Sameit, and Appellant then opted for members to determine his sentence. Finally, Judge Munoz issued limited rulings and sentencing instructions in connection with the sentencing proceedings, and no other allegations of error or bias are raised. Accordingly, we conclude that reasonable public observers, when taking into account the entirety of these court-martial proceedings, would have full confidence in the military judicial process.

Upshaw, 79 M.J. at 736 (citation omitted).

III. Conclusion

For these reasons, I would affirm the NMCCA's decision.

United States v. Scogin

United States Navy-Marine Corps Court of Criminal Appeals

August 31, 2012, Decided

NMCCA 201200003

Reporter
2012 CCA LEXIS 714 *

UNITED STATES OF AMERICA v. ALEC R. SCOGIN, LANCE CORPORAL (E-3), U.S. MARINE CORPS

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Motion granted by United States v. Scogin, 2012 CAAF LEXIS 1213 (C.A.A.F., Nov. 6, 2012)

Review denied by United States v. Scogin, 2013 CAAF LEXIS 24 (C.A.A.F., Jan. 9, 2013)

Prior History: **[*1]** GENERAL COURT-MARTIAL.

Sentence Adjudged: 24 June 2011. Military Judge: LtCol David M. Jones, USMC. Convening Authority: Commanding General, 3d Marine Logistics Group, Okinawa, Japan. Staff Judge Advocate's Recommendation: LtCol E.H. Robinson, Jr., USMC.

Counsel: For Appellant: Maj Kirk Sripinyo, USMC; LT Ryan Mattina, JAGC, USN.

For Appellee: Maj William C. Kirby, USMC.

Judges: Before J.R. PERLAK, M.D. MODZELEWSKI, R.G. KELLY, Appellate Military Judges.

Opinion

OPINION OF THE COURT

PER CURIAM:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of violation of a lawful general order and one specification of aggravated sexual assault, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The members sentenced the appellant to confinement for two years, total forfeitures, reduction to the pay grade of E-1 and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant raises two assignments of error: (1) that the judge erred in giving the members an instruction on false exculpatory statements; and (2) that the military judge erred by failing to instruct **[*2]** the members on the proper application of the Article 120, UCMJ, affirmative defenses, violating his right to due process. We conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

These charges arose from events in a barracks in Okinawa, Japan, after a group of young Marines returned from an evening of Halloween celebrations. Private AC (AC) had gone out with a group of friends to several bars. At one of the bars, she met the appellant for the first time, and he joined their group for the evening. Over the course of the evening, AC drank a substantial amount of alcohol. At the third bar, a military policeman from the Provost Marshall's Office (PMO) asked AC's companions to escort her back to the barracks, as she appeared too intoxicated to be out any longer. When the taxi arrived back at the barracks, AC vomited outside, and the appellant and AC's friend, Lance Corporal (LCpl) Morris, then carried AC up to her barracks room, got her partially undressed, and put her in bed. With their assistance, she went to the bathroom on two occasions **[*3]** to vomit, and then went back to bed. LCpl Morris then left AC's room to go to his own room, which was directly across the passageway. When LCpl Morris returned to check on AC a few minutes later, he found AC fleeing the room, and the appellant in the doorway of her room watching her run away. AC ran to the room of another Marine, Corporal (Cpl) Wendt, and reported that the appellant had raped her.

False Exculpatory Statements

Over the course of the next few hours and the following day, the appellant made statements to six different people about what had transpired in the room in those few minutes when he was alone with AC. Those statements, summarized here below, are now the subject of the first assignment of error.

His first conversation was with LCpl Morris, as AC was fleeing the scene. When LCpl Morris asked what had happened, the appellant told LCpl Morris that AC needed to vomit again, that he had helped her to the bathroom, and that she had then attacked him. LCpl Morris left to find AC; when he returned, the appellant repeated this story. Record at 782-83.

The next three conversations happened in a short time period after the appellant returned to his own barracks. As the appellant **[*4]** entered his barracks, LCpl Ngwenya, the barracks assistant duty officer, received a call reporting the allegation of rape, stopped the appellant, and held him until PMO arrived. While waiting for PMO to arrive, the appellant told LCpl Ngwenya that he had helped a girl up to her room, and that "she started screaming something and he ran through her back door of their barracks; and he came in through our back door." *Id.* at 493. When the assistant duty officer from AC's barracks came to check on the appellant, the appellant told that Marine that he had helped escort AC up to her room, that he had left the room, and that within seconds he saw AC running outside the room screaming and crying. *Id.* at 882-83. During this same timeframe, Cpl Wendt arrived and confronted the appellant, who stated that he and LCpl Morris had taken AC to her room and that he then left. *Id.* at 931.

Later that day, the appellant spoke to Cpl Buchard from his unit and told him a different version of the evening's events. The appellant told Cpl Buchard that he, AC, and two other Marines had been out drinking in town, that they moved the party back to his room; that the two other Marines gave the appellant and AC "their **[*5]** privacy"; that he had asked AC permission to have sex; that AC consented; that, after they had sex, AC began to feel sick, and went to the restroom; that when he went to check on her, AC came out of the bathroom screaming and crying, and ran from the building; that he had followed her all the way outside, but then had been stopped by PMO. *Id.* at 992-93.

On that same day, the appellant spoke to a Naval Criminal Investigative Service (NCIS) agent. He initially denied any sexual contact with AC, and told the special agent that he and LCpl Morris had brought AC back to her room, that they had helped her to the bathroom to vomit, and that she started "freaking out" and ran out of the room. *Id.* at 1026-28. Later during the interview, the appellant apologized for "stretching the truth," and said that he recognized that the agents knew what the facts were, and that he was "prepared to give [them] the full truth." *Id.* at 1029. He then made a statement in which he admitted to having consensual sex with AC. He stated that, after consensual sex, AC had again felt ill, vomited in the restroom, and then "freaked out" and ran out of the room. *Id.* at 1031-33.

At trial, the military judge gave the members **[*6]** the benchbook instruction [1] on false exculpatory statements. The essence of that instruction is that "[i]f an accused voluntarily offers an explanation or makes some statement tending to establish [his] innocence and such explanation or statement is later shown to be false, (the members) may consider whether this circumstantial evidence points to a consciousness of guilt." [2] In tailoring the instruction, the military judge included as possible false exculpatory statements all of the six statements outlined above: the statements to the five Marines and to the NCIS agent. The trial defense counsel objected to categorizing the appellant's denial to LCpl Morris as a false exculpatory statement, but did not object to the remainder of the instruction. Relying on *United States v. Colcol*, 16 M.J. 479 (C.M.A. 1983), the appellant now maintains that the military judge erred in giving the instruction because the alleged false statements were simply general denials of his guilt, and because the determination of the falsity of the statements turned on the ultimate question of his guilt or innocence. Appellant's Brief of 30 Mar 2012 at 9. We disagree.

Discussion on False Exculpatory Statements

Absent objection at trial, we review the military judge's decision to give an instruction for plain error. [3] *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). To establish plain error, the appellant must show that (1)

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[1] Military Judges' Benchbook, Dept. of the Army **[*7]** Pamphlet 27-9 at 1012 (Ch-7, 7-22, 01 Jan 2010).

[2] *Id.*

[3] Because defense objected at trial to characterizing the appellant's explanation to LCpl Morris as a false exculpatory statement, we review the military judge's instruction as to that particular statement for an abuse of discretion.

the trial judge committed error; (2) the error was plain or obvious; and, (3) the error materially prejudiced a substantial right of the appellant. *Id.*

The instruction given by the military judge reflects an established principle of law. Both our own military jurisprudence and Supreme Court jurisprudence recognize that false statements by an accused in explaining an alleged offense may themselves tend to show guilt. *Colcol*, 16 M.J. at 484 (citing *Wilson v. United States*, 162 U.S. 613, 16 S. Ct. 895, 40 L. Ed. 1090 (1896)).

The appellant's reliance on *Colcol* is misplaced, as the facts of that case are easily distinguished. In *Colcol*, the appellant was suspected of a theft of **[*8]** mail matter. When initially questioned by an Office of Special Investigations (OSI) agent, Sergeant (Sgt) Colcol reportedly "stated that he was not involved in any illegal activity and will give a statement to that effect." *Colcol*, 16 M.J. at 482. In a second interview several hours later, Sgt Colcol confessed. At his trial, however, Sgt Colcol took the stand and repudiated portions of his written confession. *Id.* at 482. At the close of the case, trial counsel requested a false exculpatory statement instruction, which the judge gave over defense objection.

On appeal, the Court of Military Appeals (CMA) noted that the instruction given by the judge correctly stated the principle of false exculpatory statement, but the court declined to find that principle applicable to the facts of the *Colcol* case. The court found that "unlike a false explanation or alibi given by a suspect when he is first confronted with a crime, [Sgt Colcol's] general denial of guilt does not demonstrate any consciousness of guilt." *Id.* at 484. Moreover, the CMA noted that in order to decide that the appellant's general denial of illegal activity was false; the factfinder had to decide the very issue of guilt or innocence. **[*9]** In this situation, the CMA found that the instruction "would only tend to produce confusion because of its circularity." *Id.*

Here, the appellant did not make general denials of guilt, but gave six false explanations of what had happened when he took AC to her room, all of which differed from his second statement to NCIS, in which he admitted to sexual intercourse with AC in her room, but maintained that it was consensual. Rather than general denials of guilt, his various accounts were intended for various discrete purposes, i.e., to explain why AC was seen fleeing the room, to explain why she was crying or "freaking out," to place himself outside the room when she fled, or to paint a picture of himself as her caregiver while she was ill. In his explanation to Cpl Buchard, the appellant gave a false explanation of consensual sex occurring in his own barracks room. In these various accounts, the appellant did not merely deny guilt in a general fashion. Instead, he invented scenarios that, if believed, would exonerate him of any wrongdoing. His statements to the five Marines and his initial statement to the NCIS agent fell squarely within the recognized principle of law that false exculpatory **[*10]** statements may properly be considered as circumstantial evidence that points to a consciousness of guilt.

We find that this instruction was fairly raised by the evidence adduced at trial, and that the military judge did not err in so instructing the members. [4]

Instructions Regarding the Affirmative Defenses

In his second assignment of error, the appellant contends that his right to due process was violated when the military judge instructed the members on the affirmative defenses of consent and mistake of fact as to consent without informing the members that they were to consider the evidence pertinent to those defenses on the related issues of the victim's capacity and the appellant's use of force.

We review the adequacy of the judge's instructions regarding consent *de novo*. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). Erroneous instruction on an affirmative defense has constitutional implications, and '"must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'" **[*11]** *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)(quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)). As the appellant notes, this court has previously considered this same issue and resolved it adversely to the appellant. *See, e.g., United States v. Escochea-Sanchez*, No. 201000093, 2011 CCA LEXIS 77, unpublished op. (N.M.Ct.Crim.App. 19 Apr 2011), *set aside on other grounds*, __ M.J. __ , 2012 CAAF LEXIS 567 (May 8, 2012) (summary disposition); *United States v. Nevandro*, NMCCA No. 201000641, 2011 CCA LEXIS 614 unpublished op. (N.M.Ct.Crim.App. 30 Aug 2011) (per curiam). For the reasons set forth in those cases, we find any error to be harmless beyond a reasonable doubt, and decline to grant relief.

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[4] With regard to the appellant's explanation to LCpl Morris, we find that the military judge did not abuse his discretion in characterizing that statement as a false exculpatory statement.

Conclusion

The findings and the approved sentence are affirmed.
