IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Krishil S. Prasad,
Airman First Class (E-3)
United States Air Force,

Appellant

BRIEF ON BEHALF OF APPELLANT

A.F. Ct. Crim. App. Dkt. No. 39003

USCA Dkt. No. 19-0412/AF

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

DAVID P. SHELDON
Lead Civilian Defense Counsel
Law Offices of David P. Sheldon, PLLC
100 M Street SE, Suite 600
Washington, D.C. 20003
Tel: (202) 546-9575
davidsheldon@militarydefense.com
C.A.A.F. Bar No. 27912

MARK J. SCHWARTZ, Maj, USAF
Appellate Defense Counsel
Air Force Defense Appellate Division
1500 West Perimeter Road,
Suite 1100
Joint Base Andrews NAF, MD 20762
Tel: (240) 612-4770
mark.j.schwartz7.mil@mail.mil
C.A.A.F Bar No. 35679

TAMI L. MITCHELL
Civilian Defense Counsel
Law Offices of David P. Sheldon, PLLC
5390 Goodview Drive
Colorado Springs, CO 80911
Tel: (719) 426-8967
tamimitchell@militarydefense.com
C.A.A.F. Bar No. 32231

SUBJECT INDEX

TABLE OF AUTHORITIES

ARMY COURT OF CRIMINAL APPEALS

NAVY-MARINE COURT OF CRIMINAL APPEALS

UCMJ ARTICLES

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

Airman First Class ("A1C") Prasad initially received an approved court-martial sentence that included a dishonorable discharge, 30 months of confinement, forfeiture of all pay and allowances, and reduction to E-1. As such, the Air Force Court of Criminal Appeals ("AFCCA") exercised jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). The AFCCA set aside a finding of guilt and the sentence, and authorized a rehearing. At the rehearing, Appellant was sentenced to a bad-conduct discharge, 210 days of confinement, forfeiture of all pay and allowances, and reduction to E-1. As such, the AFCCA again exercised jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review "upon petition of the accused and on good cause shown" under Article 67(a)(3), UCMJ.

Statement of the Case

Contrary to A1C Prasad's pleas, a panel consisting of officer and enlisted members, sitting as a general court-martial, convicted Appellant of two specifications of sexual assault and one specification of abusive sexual contact, in

violation of Article 120, UCMJ (JA 264). The court-martial sentenced A1C Prasad to a dishonorable discharge, 30 months of confinement, forfeiture of all pay and allowances, and reduction to E-1 (JA 265). The convening authority approved the adjudged sentence and, except for the dishonorable discharge, ordered it executed (JA 42-44). On September 5, 2017, the Air Force Court set aside the sexual assault conviction related to KMCG for a *Hills* violation, and the sentence, and authorized a rehearing on the set-aside conviction and sentence. *United States v. Prasad*, 2017 CCA LEXIS 610 (A.F. Ct. Crim. App. Sep. 5, 2017) (unpub. op) (hereinafter referred to as *Prasad I*). Appellant filed a request for reconsideration with suggestion for reconsideration *en banc* on October 3, 2017; the Court denied the request on October 16, 2017.

The Judge Advocate General returned the case to the convening authority on November 15, 2017. On February 18, 2018, the convening authority dismissed the specification related to the set-aside conviction, determining a rehearing on the specification was impracticable. On March 28-29, 2018, the rehearing on sentence was held. A panel of officer and enlisted members sentenced A1C Prasad to 210 days of confinement, forfeiture of all pay and allowances, and reduction to E-1 (JA 92). The convening authority approved the adjudged sentence. On June 10, 2019, the Air Force Court reaffirmed the findings and sentence. *United States v. Prasad*, 2019 CCA LEXIS 246 (A.F. Ct. Crim. App. Jun. 10, 2019) (unpub. op)

(hereinafter referred to as *Prasad II*).

A1C Prasad timely filed a petition for review, invoking this Court's jurisdiction pursuant to Article 67(a)(3), UCMJ. This Court granted review of his case on November 26, 2019. *United States v. Prasad*, 2019 CAAF LEXIS 822 (C.A.A.F. Nov. 26, 2019). He hereby submits this brief.

Statement of Facts

Specification 1 and 3 of Charge I involved Airman First Class (A1C) KF. She was assigned to the security forces squadron (SFS) while at Grand Forks AFB, North Dakota, and had been working in that capacity for nine months (JA 121). She had received training in self-defense (JA 122). A1C KF met DF (Senior Airman (SrA) at the time of trial), in April 2013, and became engaged to him in July 2013 (JA 122). They met at basic training at Lackland AFB, TX (*id*.). A1C KF moved to Grand Forks AFB, North Dakota on September 22, 2013 (JA 122). Less than a month later, DF broke off the engagement—not wanting to be in a long-distance relationship and indicating that he and A1C KF were moving "too fast too soon" (*id*.). The couple broke the engagement in October 2013 (JA 122). In April 2014, A1C KF and DF started speaking again; she wanted to get back together with him (JA 123). She was depressed and heartbroken about the break-up (*id*.). At the time, DF was dating someone else, to A1C KF's displeasure (*id*.).

A1C KF testified that on May 9, 2014, she returned to the dorms after an evening at the Single Airman Spa Night (JA 100). When she arrived at approximately 2130, she was talking to a security forces non-commissioned officer (NCO) on patrol when she saw Appellant (JA 100, 120). She was friends with Appellant; she "gave him a hug and said, hi" (JA 100). Shortly thereafter, she went alone with Appellant to his dorm room (JA 101). Appellant left first and A1C KF followed him (JA 125).

A1C KF had been to Appellant's room before several times (JA 124). That night, she went to his room to talk about the problems she was having with DF (JA 130). The two sat together on his bed and began watching television (JA 102). Appellant tried to tickle her, and she did not object (JA 103). He began rubbing her feet and legs, again with no objection (JA 126-28).

While the two were on the bed continuing to watch television, A1C KF carried on a texting conversation with DF (JA 134). While she was texting DF, Appellant began rubbing her back and stomach; A1C KF did not object (JA 104). They began "spooning," with Appellant unclasping her bra and rubbing her breasts (JA 104, 125-26, 131). A1C KF did not object (JA 105). Appellant took her phone from her hands, and put it to the side while A1C KF laid down on her back, looking up at the ceiling (JA 131). Things continued to escalate sexually, with Appellant kissing and touching her exposed breasts (*id*.).

Appellant then put his hand in A1C KF's pants (JA 105). She told Appellant she was going to hit him if he did not stop (*id*.). Appellant thought she was joking, as A1C KF was sarcastic around her friends (JA 132-33). A1C KF acknowledged that frequently her "friends take [her] "kind of the wrong way," and "think that [she] is joking" (JA 133). When Appellant penetrated A1C KF's vulva with his fingers, she "slapped him up against his head" (JA 105). A1C KF described it as a "tap"– "on a scale of two out of 10, [she] tapped him like a two" (JA 133). Appellant pulled his hand out and proceeded to go back to kissing her breasts (JA 106-07, 133). As Appellant continued to kiss A1C KF's breasts, she did not say anything to him and just ignored him (JA 134). Then he got on top of her and rubbed his groin against hers; A1C KF felt that Appellant had an erection (JA 107). Appellant tried to kiss her, but she turned her face away and declined as Appellant pulled A1C KF's sweatshirt over her head while still trying to kiss her through the sweatshirt (*id*.). Appellant stated, "You're not enjoying this, are you," and he stopped (JA 108, 134). In A1C KF's own words, he "stopped when he realized I didn't want to participate" (JA 119). Appellant did not touch her again after this (JA 108, 134).

Appellant laid down beside A1C KF and fell asleep (JA 108, 134). She continued to lie next to Appellant for some period of time, and then got up (JA 108). About five minutes later, Appellant "farted and woke himself up" (JA 108,

135). A1C KF started laughing at Appellant (JA 135). She asked for her phone; Appellant gave it to her, and she left the room (JA 108, 135). She was with Appellant for about 90 minutes (JA 108).

On May 20, 2014, A1C KF reported the incident to a sexual assault response coordinator (SARC), and then to the Air Force Office of Special Investigations (OSI) (JA 110). She discussed with OSI how to get Appellant to say things such as "I'm sorry" (JA 145). Appellant contacted A1C KF by text during her OSI interview, saying he was "sorry" that he "hurt" her during their interactions and what happened was "wrong" (JA 115; JA 66-91). Appellant explained that he had wanted to have sex with her and "I was trying to get you in the mood. I'm sorry" (JA 116).

In June 2014, a month after the incident with Appellant, A1C KF got back together with DF (JA 123). In August, due to reporting a sexual assault, A1C KF was given an expedited transfer to Holloman AFB, New Mexico, where DF was stationed at the time (JA 124). About a month later, the two got married (*id*.).

Appellant was originally charged with nine alleged sexual assault offenses against five different alleged victims. The trial counsel relied heavily on the number of alleged offenses and alleged victims, as well as the lower standard of proof in his 90-minute closing argument:

> [W]e start to tie in the propensity evidence . . . that's the lens through which you have to view this entire court. He has a propensity not to

> stop when someone says no. Five women told him no, and he kept going.
> [P]eople who engage in sexual offenses may have a propensity to commit that crime again and again and again what is what happened here.
>
> [T]hat propensity evidence, what do we see here again and again? And *if you find by a preponderance of the evidence*, okay, which is more likely than not, in fact *even if it's not beyond a reasonable doubt*, if you find it more likely than not that he did this, *then you can use that when you are looking at other crimes in this case*.

(JA 210-13). *Prasad I*, 2017 CCA Lexis 610, *20 (emphasis added).

Additional facts necessary to address the granted issue are contained below.

Granted Issue

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.

Standard of Review

This Court reviews a Court of Criminal Appeals' decision for an abuse of discretion. *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000). "An abuse of discretion occurs when the Court of Criminal Appeals makings findings of fact that are clearly erroneous or not supported by the record, or basing its decision on an erroneous view of the law." *Id*. (quoting *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997)). This Court reviews "'the prejudicial effect of an

erroneous evidentiary ruling *de novo*.'" *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (quoting *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011) (quoting *United States v. Toohey*, 63 M.J. 353, 358 (C.A.A.F. 2006)). Instructional error is also reviewed *de novo*. *United States v. Guardado*, 77 M.J. 90, 93 (C.A.A.F. 2017) (quoting *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016)).

Argument

"Evidence of the accused's commission of a sexual assault may *not* be used to prove propensity if the alleged sexual assault is charged in the same court-martial and the accused has pleaded not guilty to it." *Prasad I*, 2017 CCA Lexis 610, *15 (citing *Hills*, 75 M.J. at 356) (emphasis in the original).

> [T]he use of evidence of charged conduct as M.R.E. 413 propensity evidence for other charged conduct in the same case is error, regardless of the forum, the number of victims, or whether the events are connected. Whether considered by members or a military judge, evidence of a charged and contested offense, of which an accused is presumed innocent, cannot be used as propensity evidence in support of a companion charged offense.

United States v. Hukill, 76 M.J. 219, 222 (C.A.A.F. 2017). Because consideration of charged offenses as propensity evidence undermines the presumption of innocence, the error is one of constitutional dimension. *Hills*, 75 M.J. at 357. Accordingly, the test for prejudice is harmlessness beyond a reasonable doubt. *Id*.

"'The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'" *Chapman v. California*, 386 U.S. 18, 24 (1967); *Hukill*, 76 M.J. at 221 (quoting *Hills*, 75 M.J. at 357-58) (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007)). The error is not harmless beyond a reasonable doubt if there is "a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)); *Neder v. United States*, 527 U.S. 1, 15-16 (1999); *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "Under the 'reasonable probability of a different outcome' standard, '[t]he question is not whether the defendant would more likely than not have received a different verdict…, but whether…he received a fair trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *United States v. Romano*, 46 M.J. 269, 272 (C.A.A.F. 1997). Therefore, "[a] 'reasonable probability' of a different result is… shown when the [erroneous instruction] 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678); *Romano*, 46 M.J. at 272. The Government bears the burden of proving the error was harmless beyond a reasonable doubt. *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009).

The Air Force Court correctly held the military judge erred in instructing the panel members that they could consider each of the charged sexual assaults as substantive "propensity" evidence to find Appellant guilty. *Prasad I*, 2017 CCA Lexis 610, *17. However, the majority of the Air Force Court incorrectly held that the error was harmless beyond a reasonable doubt.

"The test for nonconstitutional error is whether the error had a "substantial influence" on the findings." *United States v. Adams*, 44 M.J. 251, 252 (C.A.A.F. 1996) (citing *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)). In evaluating whether a nonconstitutional error was harmless, the court "considers four factors: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007) (citing *United States v. Berry*, 61 M.J. 91, 98 (C.A.A.F. 2005)). The Government bears the burden of proving the error was harmless. *Kotteakos*, 328 U.S. at 760.

By evaluating the "strength" of the Government's case with respect to A1C KF, the majority used the test for prejudice flowing from nonconstitutional errors instead of constitutional errors. The AFCCA did not even correctly use the nonconstitutional error test, as the court did not even evaluate the other three factors. Regardless, when evaluating the impact of a constitutional error, the

strength of the Government's case is irrelevant. If there is *any reasonable possibility* the error contributed to the findings, the error is not "harmless beyond a reasonable doubt." *Dominguez Benitez*, 542 U.S. at 81-82 (quoting *Bagley*, 473 U.S. at 682); *Neder*, 527 U.S. at 15-16; *Tovarchavez*, 78 M.J. at 462.

As the dissent noted in *Prasad I*, there was a reasonable possibility the improper propensity evidence and erroneous instruction contributed to the verdict, given the evidence that Appellant reasonably believed KF consented. 2017 CCA Lexis 610, *35 (Johnson, J. dissenting); *see also Prasad II*, 2019 CCA Lexis 246, *22 (Johnson, J. concurring). Appellant reasonably believed A1C KF was "kidding" when she lightly tapped him upside the head to get him to stop penetrating her vulva with his finger (JA 132). A1C KF acknowledged Appellant's belief by admitting her friends "took [her] the wrong way" and believed she was "joking" (JA 133). In any event, Appellant stopped penetrating A1C KF's vulva and returned to kissing her exposed breasts, to which she did not manifest a lack of consent. Similarly, when Appellant realized A1C KF was "not in the mood," he stopped rubbing his erection against her. Because Appellant stopped his sexual advances when A1C KF explicitly or implicitly signaled for him to stop, Appellant did not commit a sexual assault on her. *United States v. Dawkins*, 2019 CCA Lexis 386, *17-18 (N-M. Ct. Crim. App. Oct. 4, 2019) (no sexual assault committed when the accused stops upon being asked to stop his

sexual advances). Contrary to trial counsel's argument (JA 134), Appellant stopped when A1C KF told him to stop.

The Government's case was anything but overwhelming. The trial counsel's closing argument, which relied heavily on the erroneous admission of propensity evidence, especially that Appellant continued his sexual advances after "all five" alleged victims told him to stop (JA 195-96, 215-16, 220), as well as the lower standard of proof of preponderance of the evidence, demonstrates the erroneous admission and instruction of propensity evidence contributed to Appellant's convictions. *See Guardado*, 77 M.J. at 94 (the possibility that the panel members convicted based on a preponderance of the evidence instead of beyond a reasonable doubt created doubt that the error was harmless beyond a reasonable doubt).

But for the improper propensity evidence and erroneous instruction, the panel members, in considering *only* the evidence related to A1C KF, may have harbored reasonable doubt of Appellant's guilt and found him not guilty. This Court should grant review and use its *de novo* standard of review to analyze the prejudicial effect the *Hills* error had on Appellant's case.

This Court noted a similar error by the Army Court of Criminal Appeals ("ACCA") in the application of a nonconstitutional error standard to constitutional error in *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). In *Kreutzer*,

the ACCA "defined the constitutional error inquiry as follows: 'In testing for harmless error we inquire whether the error itself had substantial influence on the trial results.'" *Id*. (quoting *United States v. Kreutzer*, 59 M.J. 773, 779 (A. Ct. Crim. App. 2004)). This Court noted the ACCA's erroneous application of a nonconstitutional error standard as follows:

> In contrast to asking whether a constitutional error contributed to a conviction, the quest for a "substantial" influence seeks a more measurable impact or importance. *When constitutional error is substantial and, as reflected by Chapman, where that error contributes to a conviction, the conviction cannot stand*. We hold that….testing this error for "substantial influence," the Army court applied an erroneous definition to the nature of the inquiry into the effect of constitutional error.

Kreutzer, 61 M.J. at 299 (emphasis added).

The AFCCA did not consider the guidance in *Guardado* during its first review of Appellant's case. However, *Guardado* was decided before the AFCCA's second review of Appellant's case. *Prasad II*, 2019 CCA Lexis 246, *22 (Johnson, J. concurring). Erroneous admission of evidence and erroneous instructions are reviewed based on the law at the time of the appeal. *Guardado*, 77 M.J. at 93 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). Accordingly, the AFCCA should have reviewed its first decision to determine if *Prasad I* was still correct in light of *Guardado* during its second review. The majority of the court did not. *Prasad II*, 2019 CCA Lexis 246, *22 (Johnson, J.

concurring). Accordingly, the AFCCA plainly erred in its first review of Appellant's case.

Appellant's case is not the only one in which the AFCCA erred in finding "harmless" error from erroneous admission of propensity evidence and instruction. This Court granted review of, and summarily reversed, other Air Force cases involving the same error: *United States v. Rodriguez*, 2019 CAAF Lexis 833 (C.A.A.F. Nov. 7, 2019); *United States v. Phillips*, 2019 CAAF Lexis 779 (C.A.A.F. Oct. 31, 2019).

Conclusion

For all the aforementioned reasons, this Court should set aside Appellant's convictions and sentence. A rehearing may be authorized.

Respectfully submitted,

DAVID P. SHELDON
Lead Civilian Defense Counsel
Law Offices of David P. Sheldon, PLLC
100 M Street SE, Suite 600
Washington, D.C. 20003
Tel: (202) 546-9575
davidsheldon@militarydefense.com
C.A.A.F. Bar No. 27912

TAMI L. MITCHELL
Civilian Defense Counsel

MARK J. SCHWARTZ, Maj, USAF
Appellate Defense Counsel
Air Force Defense Appellate Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
Tel: (240) 612-4770
mark.j.schwartz7.mil@mail.mil
C.A.A.F. Bar No. 35679

Law Offices of David P. Sheldon, PLLC
5390 Goodview Drive
Colorado Springs, CO 80911
Tel: (719) 426-8967
tamimitchell@militarydefense.com
C.A.A.F. Bar No. 32231

Certificate of Compliance

1. This Brief complies with the type-volume limitation of Rule 21 because it contains 4052 words.

2. This Brief complies with the type-style requirements of Rule 37 because it has been prepared with monospaced typeface using Microsoft Word 2010 with 14 point, Times New Roman font.

MARK J. SCHWARTZ, Maj, USAF
Appellate Defense Counsel
Air Force Defense Appellate Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
Tel: (240) 612-4770
mark.j.schwartz7.mil@mail.mil
C.A.A.F. Bar No. 35679

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on December 26, 2019.

MARK J. SCHWARTZ, Maj, USAF
Appellate Defense Counsel
Air Force Defense Appellate Division
1500 West Perimeter Road,
Suite 1100
Joint Base Andrews NAF, MD 20762
Tel: (240) 612-4770
mark.j.schwartz7.mil@mail.mil
C.A.A.F. Bar No. 35679