IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Private (E-1) **TYLER WASHINGTON** United States Army, Appellant	)	Crim. App. Dkt. No. 20170329
	)	USCA Dkt. No. 19-0252/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY PERMITTING THE UNIT'S SHARP REPRESENTATIVE TO TESTIFY THAT "WHEN A PERSON SAYS 'NO' IT MEANS STOP, WALK AWAY."

Statements of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012). This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On 31 May 2017, at Fort Bragg, North Carolina, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two

specifications of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2016). (JA 13).[1] The panel sentenced appellant to confinement for thirty days and a bad-conduct discharge. (JA 16). The convening authority approved the sentence as adjudged. (JA 5). The Army Court affirmed the findings and sentence in this case on 14 February 2019. (JA 2).

Statement of Facts

Background.

Appellant and Private First Class (PFC) AF arrived to the Fort Bragg reception company in September 2016. (JA 55–56). While at the reception company, they regularly hung out and went to dinner with Private (PVT) Macias, Specialist (SPC) Thomson, and PVT Qualls. (JA 56). Appellant was an active participant in a class on sexual consent conducted on approximately September 12, 2016. (JA 154). On September 17, 2016, PFC AF, appellant, SPC Thomson, and PVT Macias went to a Hooters restaurant late in the evening. (JA 57). As they sat at the table, appellant joked openly about "how he wanted to get laid." (JA 59). After the group left Hooters, they went to PFC AF's barracks room to hang out. (JA 59). Private Macias left shortly after they arrived, leaving SPC Thomson in the common area and PFC AF and appellant in her bedroom. (JA 60).

[1] The military judge merged Specifications 1 and 2 of The Charge for sentencing. (JA 14–15, 198).

Abusive Sexual Contact.

While in PFC AF's bedroom, appellant lay down under the covers of her bed and asked for someone to cuddle with him. (JA 62). After PFC AF climbed into the bed with appellant, he began to move his hands onto her waist, chest, and between her legs. (JA 62). Private First Class AF stated, "Someone's being grabby," causing appellant to move his hands back to her waist and begin tickling her. (JA 62–63). Appellant and PFC AF removed their shirts and kissed for several minutes. (JA 63). A few minutes later, PFC AF put her shirt back on and went into the common area to retrieve her phone; she then returned to her bedroom, removed her shirt, and resumed kissing with appellant. (JA 64). Private First Class AF became hesitant as the encounter resumed and asked, "why are we doing this?" Appellant responded, "Shush; just let it happen." (JA 65). Appellant pushed PFC AF onto her back, mounted her, and began kissing her more aggressively as he undid his pants and belt buckle. (JA 66). At this point, PFC AF raised her arms against her chest and stopped kissing appellant. (JA 66).

Private First Class AF told appellant "stop" and "I am uncomfortable with that" three times. Appellant's response remained, "Shush; just let it happen." (JA 67). Appellant covered PFC AF's mouth with his hand, began kissing her breasts and stomach, and moved his head down between her legs, kissing her genitals over her pants. (JA 68). PFC AF continued to say "stop" with a muffled voice through

appellant's hand and wiggled her body "to try to get away from him" while appellant continued kissing her vagina over her pants. (JA 69).

Specialist Thomson, sitting in the adjacent common room, heard appellant say either "Shut up; stop talking," "shush; don't say anything," or words to that effect, causing him to grow concerned for PFC AF and to knock on the bedroom door. (JA 116, 132). Appellant answered the door while pulling up his pants and told SPC Thomson, "Shit went down, stuff definitely happened, but nothing bad." (JA 117). Standing at the door, SPC Thomson noticed PFC AF reach for her phone as she sat on the bed with her knees to her chest. (JA 71, 118). Specialist Thomson's phone alerted in the common room, causing him to check it and find two text messages from PFC AF reading, "Help" and "I told him to stop and he didn't." (JA 118–119, 191). Upon reading PFC AF's messages, SPC Thomson charged back into the room to find appellant repeating, "shit went down, but nothing bad," and PFC AF crying. (JA 122). Specialist Thomson noted appellant's nervous demeanor as he repeated, "Shit went down," when he returned to the room, terminating the encounter. (JA 124).

Private First Class AF rode with SPC Thomson to drop appellant off and immediately burst into tears when appellant exited the vehicle. (JA 73). Private First Class AF formally reported the assault hours later and captured the following conversation with appellant via text message two days later:

> PFC AF: Then why'd you do it, and kept telling me to stop talking when I asked?
>
> Appellant: I thought it was one of those like keep going moment [sic] sorry. Won't happen again.
>
> PFC AF: Yeah it wasn't but that was fuckin [sic] scaring me, I told you to stop and you kept going down and I didn't want your hand on my mouth.
>
> Appellant: I apologize. We still cool?
>
> PFC AF: I dunno [sic]. I don't know how to feel about that to be honest.
>
> Appellant: Yeah I thought that was one of those moments when the person says stop but they want to keep going. Been with people like that before sorry.
>
> PFC AF: That doesn't mean shit though, I wanted you to stop. I said it multiple times.
>
> Appellant: Well I'm sorry and I really do apologize for the other night.

(JA 187–89).

References to the Army SHARP Program.

Both parties and the military judge conducted extensive voir dire on the issue of Army Sexual Assault Harassment/Assault Response and Prevention (SHARP) Program influence and interference before sitting the panel. (JA 31, 33, 36–37, 40–45). Once the panel was seated, the military judge informed the members that they were "required to follow [her] instructions on the law and may not consult any other source as to the law pertaining to this case unless it is

admitted into evidence." (JA 19). The military judge instructed them not to "consult any source of law or information, written or otherwise, as to any matters involved in this case" or to "conduct [their] own investigational research." (JA 25). No panel member expressed a concern and all indicated confidence in their ability to follow the military judge's instructions in deciding the case. Satisfied, the defense lodged no causal challenges on that basis.

The government made no mention of the SHARP program or appellant's participation in a class on sexual consent within days of the charged event in its opening statement. (JA 46–49). To the contrary, the government's theme of the case, repeated throughout the trial and closing argument, was the basic, common sense adage, "no means no." (JA 46, 49, 160).

Despite evidence of PFC AF's verbal protests, defense counsel raised the defense of mistake of fact regarding her consent during cross-examination. (JA 74–114). During a subsequent Article 39(a) session, the government indicated its intent to call the SHARP representative from appellant's company, Sergeant First Class (SFC) Wilfredo Rivera. (JA 136). Appellant confirmed his intent to request the mistake of fact instruction but objected to SFC Rivera's testimony under Mil. R. Evid. 403. (JA 138, 141). Appellant's objection was overruled after a lengthy discussion in which the military judge explained why the probative value of the

proffered evidence was "not substantially outweighed by the danger of one of the M.R.E. 403 concerns." (JA 138–44).

Sergeant First Class Rivera's Testimony.

Immediately after a ruling predicated on the relevance of the upcoming witness's testimony as it relates to the defense of honest and reasonable mistake of fact as to consent, the government called SFC Rivera. Sergeant First Class Rivera testified that appellant participated in a company-level training class on the issue of consent during the week preceding the assault. (JA 145–49). The direct, cross, and redirect examination of SFC Rivera occupies less than ten pages of the record. (JA 145–54). The training included a slide on the topic of withdrawn consent and guidance on what to do when a person says "no" during a sexual encounter. (JA 149). SFC Rivera testified about the slide, indicating that the takeaway was that when one party says "no," it means the other should "stop, walk away." (JA 149). Sergeant First Class Rivera was not asked for his opinion on the meaning of the words "no" or "stop," whether the slide accurately reflected the state of the law, or to otherwise credit that slide or the SHARP program.

Findings Instructions.

The parties held an Article 39(a) session to discuss findings instructions at the close of evidence. (JA 156–57). The military judge indicated his intent to read the standard instructions for the elements of the charged offenses, the lesser-

included offense of assault consummated by a battery, the defense of mistake of fact as to consent, circumstantial evidence, credibility of witnesses, spill-over, and witness' opinion on credibility or guilt. (JA 156–57). The instructions did not mention SFC Rivera, his testimony, or SHARP policy. When prompted for any requests for additional or tailored instructions, the defense responded, "none for the defense, Your Honor."[2] (JA 157).

Closing Arguments.

The government did not feature SFC Rivera, his testimony, or the fact of appellant's recent class on consent in its summation. (JA 160–67). Instead, trial counsel highlighted PFC AF's forthrightness in admitting that the encounter progressed consensually until appellant escalated the situation by removing his pants, attempting to kiss her body where she did not wish to be kissed, and covering her mouth once she started verbally protesting. Trial counsel also emphasized PFC AF's testimony, SPC Thomson's corroboration, and appellant's text messages to drive home the point that PFC AF exercised her right to revoke consent with clear verbal language ("Stop. I'm not comfortable.") when appellant attempted to escalate from kissing to some form of oral sex and that he "was privy

[2] Both parties later unsuccessfully argued for prior consistent and prior inconsistent statement instructions, and the appellant accepted the military judge's offer to instruct on his election not to testify.

to that information." (JA 162, 166, 181, 187–89). Despite that clear revocation, appellant persisted.

The lone reference to appellant's recent training occurred in the government's rebuttal to appellant's mistake of fact based argument. Trial counsel began his address to the mistake of fact defense by first reminding the panel to "go back and look at the judge's instructions." (JA 181). Then, in discussing the reasonableness aspect of the defense, the government reminded the panel that appellant had recently received training "about the importance of consent, about the importance of listening to other people if they say 'no' or 'stop' or express discomfort in a sexual situation." (JA 182). The government did not advance or argue any SHARP standards. Rebuttal concluded with the government's position that "any sort of mistake was not honest and was not reasonable." (JA 184).

Standard of Review

Appellate courts review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015) (citation omitted). An abuse of discretion occurs when a military judge makes findings of fact that are clearly erroneous or conclusions of law that are incorrect. *Id*. (citation omitted). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."

United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010) (internal quotation marks and citations omitted). "[W]hen reviewing challenges to evidence based on Rule 403, [courts] must give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *United States v. Cox*, 871 F.3d 479, 486 (6th Cir. 2017) (quotation marks and citations omitted). Non-constitutional errors are harmless in the absence of a showing by "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *See United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (citations omitted).

Law and Analysis

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Military Rules of Evidence (Mil. R. Evid.) 401. "Irrelevant evidence is not admissible." Mil. R. Evid. 402. "The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403.

Summary of Argument

The military judge did not abuse her discretion by permitting SFC Rivera to testify because his testimony was relevant and limited to the purpose of rebutting

the defense of reasonable mistake of fact as raised by appellant during trial. Furthermore, even if the military judge did commit error, there was no prejudice given the use of the evidence, the military judge's instructions, and the overall weight of the government's evidence which resulted in appellant's conviction.

A. The military judge did not abuse her discretion by admitting testimony that appellant received SHARP training days before the assault.

1. The evidence was relevant to a raised defense and therefore probative.

The military judge conducted an Article 39(a) session in which she carefully considered the proffer of testimony, the government's theory of relevance, and the defense's Mil. R. Evid. 403 objection. (JA 136–45). The military judge engaged both parties with respect to their specific theories regarding the subjective and objective components of the mistake of fact instruction and concluded that the evidence potentially went to both. (JA 140–41). The government agreed. (JA 141). Examining the above in the context of a court-martial in which the accused asserted mid-trial that he honestly and reasonably believed the victim consented to his actions despite repeatedly telling him to stop, his participation in consent (and withdrawal of consent) training days before was significantly probative. This is especially so given the military judge's interactions with defense counsel prior to her ruling in which she walked through the language of the instruction and articulated the court's finding of relevance:

> [Military Judge]: Counsel, I'm going to have you read this instruction even further because within the instruction it says, 'You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the Accused's age, education, and experience along with other evidence in this case.' The word 'education' seems to indicate to me that training the week of would fall under that penumbra. And for those reasons, Counsel — again, Defense, my understanding of your theory of the — one of your theories of the case, a big theory of your case, is mistake of fact to consent. Your client thought she was consenting all along the way, right? And you want that instruction read to the panel?
>
> [Defense Counsel]: Yes, Your Honor.

(JA 143).

Considering the state of the evidence, appellant's theory, and the mistake of fact as to consent instruction given, it was proper for the military judge to admit testimony that appellant received training specific to consent a mere week before his sexual misconduct. This limited evidence directly correlated to the objective component of appellant's education, training, and experience called upon by the instruction's analysis. Moreover, SFC Rivera's testimony was relevant, brief, and limited to the fact that appellant was an active participant in a group discussion on consent, its revocability, and what to do when someone says "no" mere days before his abuse of PFC AF.

Sergeant First Class Rivera's testimony was not expert testimony intended to provide SHARP education or knowledge to the panel. Rather, it was offered for

the purpose of showing that appellant received training directly related to his claimed lack of understanding and knowledge and it went directly to the reasonableness of that claim. Importantly, neither SFC Rivera nor the government attempted to credit the material briefed during the class.

2. The evidence was not likely to confuse the members.

The limited use and purpose of this relevant evidence was not likely to confuse the issues or mislead the members. Sergeant First Class Rivera's testimony was offered solely to determine the reasonableness of appellant's claimed mistake of fact. This is readily apparent in the full context of a trial in which the members were told not to regard SHARP as a legal standard at the outset, by both parties and the military judge, and reminded again at the close of evidence with unequivocal instructions to which the defense neither objected nor saw fit to amend. (JA 19, 25, 31, 33, 36–37, 40–45, 136–44, 156–59).

The military judge specifically addressed the defense's concern that the panel would "transfer that the SHARP is the standard" as part of her Mil. R. Evid. 403 analysis, stating "I'm going to give them instruction that it's not that." (JA 141–42). In fact, the only mention of the word "SHARP" during the merits occurred as a consequence of appellant's choice to raise a claim which the evidence directly rebutted. In other words, appellant opened the door to this

limited evidence when he attempted to feign ignorance of the notion that "no" might actually mean "no."

3. The testimony was not unduly prejudicial and was not unlawful command influence.

Evidence that appellant attended training that advised soldiers to forgo a sexual encounter if they hear "no" or "stop," days before finding himself in that situation, introduced only to rebut a raised defense, was not unduly prejudicial. Moreover, mere mention of a command policy is insufficient to raise the issue of unlawful command influence that appellant now claims for the first time in his brief. (Appellant's Br. 26); *see United States v. Boyce*, 76 M.J. 242, 249–50 (C.A.A.F. 2017) (holding an appellant must show "some evidence" that unlawful command influence occurred, not merely the allegation that it is "in the air.").

Unlawful command influence (UCI), once properly raised, transfers a burden to the government on appeal to persuade the appellate court beyond a reasonable doubt that there was no UCI or that it "had no prejudicial impact on the court-martial." *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999). Notwithstanding the fact that appellant raised no claim of UCI at trial, requested no post-trial inquiry to develop the issue, nor assigned it as error in his appeals, nothing supports the claim now. Moreover, unlike the granted UCI issue cases which appellant cites, there is no evidence to suggest an attempt by the command,

convening authority, or any other element of the upper echelons of command to influence his right to a fair trial.[3]

This case is also distinguishable from cases involving non-constitutional error claims of improper references to command policy. "What is improper is the reference to such policies before members *in a manner* which brings the commander into the deliberation room." *United States v. Kirkpatrick*, 33 M.J. 132, 133 (C.M.A. 1991) (citing *United States v. Fowle*, 7 U.S.C.M.A. 349, 22 C.M.R. 139 (1956)) (emphasis added). In *Kirkpatrick*, this Court found plain error when the military judge himself injected improper command policy considerations during sentencing for marijuana convictions where his ad-libbed instructions told members to contemplate "all the time and money and expense the army consumes each year to combat marijuana and here we have a senior noncommissioned officer directly in violation of that open, express, notorious policy of the Army." *Id*.

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[3] In *United States v. Thomas*, a commanding general's comment to subordinate commanders that it was "paradoxical" to recommend court-martial and then testify on a soldier's behalf was found to constitute UCI potentially affecting multiple cases. 22 M.J. 388, 391 (C.M.A. 1986). Appellant in *Thomas* first raised the claim before this Court, who then remanded to the CCA, resulting in a sentencing rehearing at which the comments were found not to have impacted his case. *Id*. at 398. Similarly, this Court found a claim of UCI properly raised in *Biagase* after appellant's timely pretrial motion resulted in extensive litigation and testimony indicating his commander circulated copies of his confession throughout the unit and referenced it during formations. 50 M.J. at 144–48. Notwithstanding its finding that the CCA applied the wrong legal standard, this Court concluded that the trial was unaffected and affirmed the judgment. *Id*. at 152.

Likewise, in *United States v. Grady*, plain error occurred where the military judge allowed trial counsel to repeatedly and flagrantly argue Air Force drug policy during sentencing to the extent that in demanding a punitive discharge he cited the specific policy, told the members they were "bound to adhere to those policies in deciding a sentence," and that "to even consider [retention] would be foolish, out of the question." 15 M.J. 275, 276 (C.M.A. 1983).

United States v. Knopf presents another scenario in which command policy was referenced during the government's summation in support of a punitive discharge. 39 M.J. 107, 108 (C.M.A. 1993). While this Court stated that trial counsel's claim that "the Navy has a zero tolerance policy towards drugs for a reason, a very good reason" touched an area in which the government should tread lightly, it found no error citing two reasons: 1) it was "neither 'clear' nor 'obvious' that the argument infected the members' deliberations with Navy policy or that it affected a substantial right of appellant" and 2) appellant's failure to seek a curative instruction. *Id*. at 108–09.

There was no abuse of discretion in this case because the judge carefully conducted the appropriate analysis rather than act in an arbitrary, capricious, or unreasonable manner. This Court found an abuse of discretion during the military judge's Mil. R. Evid. 403 analysis in *United States v. Baumann*, a child sexual abuse case in which the judge permitted the government to introduce evidence that

the accused molested his own sisters 25-years prior, which trial counsel went on to reference extensively in closing argument. 54 M.J. 100, 103–05 (C.A.A.F. 2010). The military judge in *Baumann* acknowledged the prejudicial nature of the evidence but found it sufficiently probative in rebutting the defense theory that the accused's spouse fabricated the charged offenses for leverage in a pending divorce action. *Id*. at 107. Noting that the government had already adduced a separate reason supporting the spouse's desire for divorce, the CAAF held that given the "reduced, if not nonexistent, probative value for such evidence and its high potential for prejudice and confusion of issues, we conclude that the military judge abused his discretion by admitting the challenged evidence in violation of Mil. R. Evidence. 403." *Id*. at 105. Notably, however, the error was held harmless by this Court which cited the strength of the government's case, the "weak defense," and the military judge's instructions to conclude that under the circumstances of the case the admission of the evidence did not materially prejudice appellant's substantial rights. *Id*.

Here, appellant chose to put before the panel his subjective and objective beliefs as to what PFC AF really meant when she said "stop." (JA 75–114, 138). The government then introduced evidence that he was part of a classroom discussion on that very scenario days prior. Rather than attempt to exploit the fact in order to "SHARP shame" the accused or the panel members as appellant

contends, the government neither expanded on the training, relied on the testimony in its closing argument, nor attempted to credit SHARP policy. (Appellant's Br. 27–28); (JA 145–54, 160–67).

B. Appellant stated no objection to the military judge's findings instructions and requested no additional instructions.

Appellant's complaint that the military judge exacerbated an erroneous ruling when she only gave the standard benchbook instruction on the defense of mistake of fact was waived when defense counsel adopted those instructions *in toto*. *See United States v. Haynes*, 2019 CAAF LEXIS 484, *5 (C.A.A.F. 2 Jul 2019) (finding affirmative waiver because agreement with the military judge's pretrial confinement credit calculation was "akin to a statement of 'no objection,' which we have previously recognized may count as affirmative waiver.") (citing *United States v. Ahern*, 76 M.J. 194, 198 (C.A.A.F. 2017); *see also United States v. Swift*, 76 M.J. 210, 217 (C.A.A.F. 2017) ("[A]s a general proposition of law, 'no objection' constitutes an affirmative waiver of the right or admission at issue.").

Appellant's reliance on *United States v. Kasper* on this point is readily distinguishable. 58 M.J. 314 (C.A.A.F. 2003). *Kasper* involved prejudicial plain error when the military judge sat idly by as an Air Force Office of Special Investigations (OSI) agent provided blatant "human lie detector" testimony throughout direct and redirect examination and then utterly failed to supply the panel with guidance. *Id*. at 319. In fact, during findings instructions in *Kasper*, the

military judge made no mention of the OSI agent's repeated human lie detector testimony whatsoever. *Id*. at 318.

In this case, the military judge informed the parties of the exact findings instructions she intended to provide the panel members and solicited any further requests. (JA 156–57). Despite being given ample opportunity to voice any concerns, defense counsel stated appellant's lack of objection to the proposed instructions and explicitly requested neither additional nor tailored instructions. This is affirmative waiver.

C. Even if the military judge erred, there was no material prejudice to appellant's substantial rights.

Appellate courts will not reverse a conviction for an error of law "unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ; *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998). Prejudice from an erroneous evidentiary ruling is evaluated by weighing: "(1) the strength of the [g]overnment'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. Roberson*, 65 M.J. 43, 47–48 (C.A.A.F. 2007) (internal quotation marks and citations omitted).[4]

[4] As no colorable claim of constitutional error is raised by the record or granted as an issue in this case, this brief proceeds with a harmless error analysis.

Any unwaived error concerning SFC Rivera's testimony is harmless given its measured use and relative impact in the context of the court-martial. The government's case-in-chief included testimony from the victim, corroborating evidence from the intervening soldier in the next room, and admissions from the accused. (JA 55–75, 115–26, 185–91). Private First Class AF reported the sexual misconduct immediately after it occurred. (JA 126). She offered details about the actions leading up to the sexual misconduct to include how many times she communicated to appellant "stop" and "I am uncomfortable with this" as he covered her mouth with his hand and persisted to escalate the now nonconsensual encounter. (JA 67). Specialist Thomson corroborated the timeframe when he heard appellant state, "Shush; don't say anything," or words to that effect, received PFC AF's distress messages, and personally observed both individuals' demeanor immediately after "charging" back into PFC AF's bedroom. (JA 115–35).

The strongest evidence was appellant's own words when he texted PFC AF two days later stating, "Yeah I thought that was one of those moments when the person says stop but they want to keep going. Been with people like that before sorry." (JA 187–89). This presented the panel members with overwhelming evidence that PFC AF physically locked up and verbally revoked her consent during the encounter, that appellant heard her, and that he persisted nonetheless. That evidence was sufficient to reach a conviction in its own right.

Regarding the strength of the defense's case, it raised the defense of mistake of fact as to consent during cross-examination but presented no case-in-chief.[5] The evidence in question was offered simply to discredit appellant's somewhat shaky defense theory. Moreover, the government had other evidence from the victim to undercut the reasonableness of appellant's claimed belief as she repeated "stop" and "I am uncomfortable with this." Consequently, even if the military judge abused her discretion in admitting testimony of appellant's recent consent training, such evidence is unlikely to have impacted the court-martial's outcome and appellant's substantial rights were therefore not materially prejudiced.

Conclusion

The United States respectfully requests that this Honorable Court affirm the judgment of the Army Court.

[5]Appellant's assertion that his choice to present no case-in-chief serves as proof of the weakness of the government's case lacks authority and is without merit. (Appellant's Br. 32).

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 4800 words.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 22nd day of November, 2019 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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