IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim. App. Dkt. No. 20150160
Master Sergeant (E-8) **JOHN T. LONG,** United States Army, Appellant	)	USCA Dkt. No. 21-0085/AR

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

Issues Presented

I. WHETHER THE ARMY COURT ERRED IN CONCLUDING THE IMPERMISSIBLE USE OF CHARGED SEXUAL MISCONDUCT AS PROPENSITY EVIDENCE WAS HARMLESS BEYOND A REASONABLE DOUBT.

II. WHETHER APPELLANT'S CONVICTION FOR RAPE OF A CHILD WAS LEGALLY SUFFICIENT WHERE THE GOVERNMENT PRESENTED NO EVIDENCE OF THE CHARGED SEXUAL ACT.

III. WHETHER THE ARMY COURT ABUSED ITS DISCRETION IN REASSESSING THE SENTENCE.

Statement 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. This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 17 April, 19 June, 16 October, 6 and 17 November, and 19 December 2014; and on 22 and 30 January, 18–21 and 23–26 February, and 14–15 December 2015, Appellant was tried at Fort Bragg, North Carolina before a military judge sitting as a general court-martial. The military judge convicted Appellant, contrary to his pleas, of abusive sexual contact with a child (three specifications), indecent liberties with a child (two specifications), rape of a child, sodomy upon a child under twelve years of age, assault consummated by a battery upon a child under sixteen years of age, indecent acts with a child (two specifications), child endangerment, and sexual abuse of a child, in violation of Articles 120, 125, 128, and 134 of the Uniform Code of Military Justice [UCMJ]; 10 U.S.C. §§ 920, 925, 928, and 934 (2006) and Article 120b, UCMJ; 10 U.S.C. 920b (2006 & Supp V 2012). (JA 034–38). On 10 November 2016, the convening authority approved the adjudged sentence of confinement for sixty years, reduction to E-1, and a dishonorable discharge. (JA 039).

On 26 October 2018, the Army court issued an opinion after reviewing Appellant's case pursuant to Article 66(c), UCMJ. *United States v. Long*, ARMY 20150160, 2018 CCA LEXIS 512 (Army Ct. Crim. App. 26 Oct. 18) (mem. op.);

(JA 007). In light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016) and *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017), the Army court set aside all findings of guilty except for those to Specification 5 of Charge I (child endangerment), Specification 8 of Charge II (rape of a child), and the Specification of Charge IV (assault consummated by battery on a child under 16 years of age); the Army court affirmed the findings of guilty to those three specifications. (JA 019). The Army court set aside the sentence and returned the case to the convening authority for further action on the sentence as to the affirmed findings. (JA 019). In its decision, the Army court concluded that Appellant's claim of factual insufficiency was without merit as to Specification 8 of Charge II and the Specification of Charge IV. (JA 017). The Army court also found that the *Hills* error, which the government conceded, was harmless beyond a reasonable doubt with respect to Specification 8 of Charge II. (JA 025).

The Army court gave the convening authority the options to conduct a rehearing on the set aside specifications along with the sentence; conduct a rehearing on the sentence alone; or "reassess the sentence, affirming no more than a dishonorable discharge, confinement for forty years, and reduction to E-1." (JA 025). Appellant petitioned this Court for review of the Army court's decision, and this Court dismissed (without prejudice) on ripeness grounds. *United States v. Long*, 79 M.J. 99 (C.A.A.F. 2019).

On 12 February 2020, the convening authority determined that a rehearing on either the set aside specifications or the sentence alone was not practicable and approved only so much of the sentence as provided for reduction to E-1, confinement for 40 years, and a dishonorable discharge. (JA 046).

In light of this Court's decision in *United States v. Gonzalez*, 79 M.J. 466 (C.A.A.F. 2020), the Army court recognized its 26 October 2018 decision contained language to the convening authority that was in error and accordingly took corrective action on October 21, 2020. (JA 005). The Army Court then re-affirmed Appellant's convictions for Specification 5 of Charge I, Specification 8 of Charge II, and the Specification of Charge IV, and reassessed themselves the sentence to a dishonorable discharge, confinement for forty years, and reduction to the grade of E-1. (JA 002-06).

Summary of Argument

The Army court correctly concluded that Appellant's conviction for raping his eleven-year-old daughter was unaffected by any propensity evidence considered by the military judge prior to this Court's decision in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). Based on the overwhelming corroborating evidence of AL's disturbing account of Appellant's actions leading up to, during, and following the rape, any error based on *Hills* was harmless beyond a reasonable doubt. As the Army court stated, "[w]hile harmlessness beyond a reasonable doubt

is an exceedingly high bar, the quantum of evidence showing Appellant raped AL surpasses it." (JA 023). This conclusion is also supported by the fact that the government did not rely on propensity evidence in its closing argument to the military judge. Despite Appellant's contentions to the contrary, it cannot be assumed, and the record does not support, finding that the military judge improperly relied on an argument made by government counsel in response to a blanket motion to dismiss under Rule for Court-Martial (R.C.M.) 917 in order to ultimately find Appellant guilty of rape.

Further, the strength of the corroborating evidence proves that Appellant's conviction of raping AL is legally sufficient, regardless of AL's inability to recall the rape. The lack of memory on the victim's part is of course because Appellant strangled the child twice to ensure her unconsciousness. Nonetheless, AL's testimony is corroborated by the testimony of her mother and half-brother, NB and TW respectively.

Lastly, the Army court applied the correct legal standard when it reassessed Appellant's sentence. It is not required that the court specifically list the standard of review, so long as it is clear from the record that the correct legal standard was applied. *See United States v. Mackie*, 66 M.J. 198, n.2 (C.A.A.F. 2008). In this case, the Army court reassessed the sentence in accordance with this Court's precedent in *United States v. Gonzalez*, 79 M.J. 466 (C.A.A.F. 2020) and with

confidence it could do so beyond a reasonable doubt. The Army court also performed an analysis of factors outlined in *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013) to ensure the sentence was capable of reassessment. Accordingly, there was no abuse of discretion in the Army court's reassessment of Appellant's sentence.

Statement of Facts

1. Appellant Raped AL on New Year's Eve.

On December 31, 2009, Appellant stayed home with his eleven-year-old daughter, AL, and AL's half-brother, TW. (JA 098). NB, mother to AL and TW, had started a new job working at a liquor store. (JA 067). NB worked at the store on New Year's Eve. (JA 078). Appellant drove to the store with TW and AL and purchased two bottles of vodka.[1] (JA 079–80). He left TW and AL in the car while he purchased the alcohol. (JA 140). He then asked TW and AL if they wanted to drink. (JA 140).

When Appellant, TW, and AL arrived home, Appellant lined up shot glasses on the table. (JA 141, 098). TW testified, "[t]here was three different sizes, and we rotated shot glasses, each shot we took; and we drank up to, like half the bottle

[1] NB testified Appellant purchased "two half gallons" of vodka. (JA 080). She testified that one bottle was "pink lemonade mixed with vodka" and one bottle was "just vodka." (JA 080). TW testified that Appellant purchased "two bottles of vodka." (JA 140). AL testified the alcohol was "clear and it was lemon." (JA 098).

with [AL]". (JA 141). AL testified she "stopped because I took one and couldn't get it down . . . ." (JA 098). During cross examination, AL clarified that she consumed "a couple" shots and then "couldn't get that one down . . . ." (JA 114).

TW testified AL became belligerent following her consumption of alcohol. "She was jumping around on the couches, just acting belligerent." (JA 142). At one point she "fell down the stairs, and then we [Appellant and TW] were picking her up." (JA 142). AL recalled that her father began to yell at her "[b]ecause he said I was being crazy." (JA 99). She also remembered falling down the stairs. (JA 103). AL testified Appellant ordered her go to her room and sleep. (JA 099).

AL next recalled that Appellant entered her room, got on top of her, and choked her. (JA 100). She woke up and he choked her again until she passed out. (JA 100). She woke up the next morning with pain in her vaginal area and "butt," and remembered she saw blood on her vagina and "butt." (JA 100). AL was eleven years old at the time of the assault. (JA 081). She testified she did not begin menstruating until she was in seventh grade, at least a year after Appellant raped her. (JA 102). She testified she observed hand marks on her legs and bruises on her neck. (JA 101).

NB, TW, and AL all testified to the events that occurred the next morning. AL testified she woke up and went into TW's room. There she found TW in bed, awake, with vomit on him. (JA 103). Sometime later, NB returned home and AL

showed her the bruises on her neck. (JA 103). She never told NB about the pain in her genitals or the blood. (JA 103–04).

NB testified she returned home around 0900 the following morning, January 1, 2010. (JA 080). Appellant, TW, and AL were sick from drinking. (JA 080–81). NB observed "vomit everywhere. There was vomit in the bathroom. There was vomit in my daughter's room. There was vomit in my son's room." (JA 081). NB was angry with her daughter, son, and Appellant. (JA 082). She recalled both children were still passed out in bed when she arrived. (JA 082). She observed the empty half gallon bottles of vodka, which her husband purchased the previous day in the kitchen and on the dining room table. (JA 082). Upset, NB, screamed at her family as she cried. (JA 082). NB observed bruising on AL's neck and legs. (JA 082).

TW recalled his mother woke him up and yelled at him the next morning. (JA 144). He saw his mother and AL in AL's room. (JA 146). AL cried as she talked to NB. (JA 146). He did not remember seeing any bruises on AL. (JA 149).

Appellant's friend, GH, testified he was also in the house that morning. (JA 154–55). He testified he lived in the basement of Appellant's house from October 2009 until January 2010. (JA 152–53). GH stayed with friends on the night of 31 December and returned to the house around ten o'clock the next morning. (JA

154–55). He went to the kitchen to get water when he returned to the house and then went downstairs into the basement. (JA 155). He spoke with AL when he was upstairs in the kitchen. (JA 155). He stood in the kitchen while she sat on the living room couch during their conversation. (JA 157–58). The interaction between them lasted only a couple of minutes and only involved a couple of questions. (JA 158). GH claimed he did not observe any bruising and that AL acted normally. (JA 156). GH did not further interact with the family on 1 January 2010.

During the trial, AL testified under oath and the defense cross-examined her. The defense attempted to impeach AL with an alleged motive to fabricate. Defense alleged she fabricated the allegations after Appellant punished her and JL—AL's half-sister—on or about July 9, 2012 for mistreating YH, AL's other half-sister, and sending explicit photos. (JA 109). The defense also elicited from AL that she was "angry" at Appellant and he had punished her worse than he punished JL. (JA 125).

2. The Government's Mil. R. Evid. 413 and 414 Notices and Subsequent Rulings by the Military Judge and Army Court.

Prior to trial, the government provided notice of intent to offer evidence under Military Rules of Evidence (Mil. R. Evid.) 413 and 414 with the purpose of showing Appellant had a propensity to commit sexual offenses against both adults and children. Both notices contained only evidence of charged offenses. (JA 010,

205-09. The defense objected to the Mil. R. Evid. 413 evidence involving the adult victims, but not the Mil. R. Evid. 414 evidence. (JA 047). Because the defense never raised an objection to the Mil. R. Evid. 414 evidence, the military judge did not specify whether or how he would use the propensity evidence involving the children.

The parties only discussed Mil. R. Evid. 413 and the rape of AL after defense moved for a finding of not guilty pursuant to Rule for Courts-Martial (R.C.M.) 917. (JA 165). Following the government's conclusion of its case-in-chief, the defense moved under R.C.M. 917 to dismiss Specifications 7 and 8 of Charge II, the rape of AL. (JA 163–64). The defense argued there was no evidence presented that AL's vulva had been penetrated. (JA 163–64). Government counsel argued, "the government believes that the Court can make an inference, as well as the use of the M.R.E. 413 [NB] discussion, with regard to [AL] . . . [AL's] description is very similar, if not very similar, to that which [NB] describes when the accused would be penetrating her while strangling her." (JA 165–66). The military judge denied the defense motion with regard to Specifications 7 and 8 of Charge II, but did not refer to propensity when he denied the defense motion to dismiss. (JA 009–10, 167).[2]

[2] The military judge granted the defense motion to dismiss one specification based on the date being incorrect and his reluctance to make the change over defense objection. (JA 167).

The Army court evaluated the Mil. R. Evid. 413 and 414 issues surrounding the conviction for raping AL in light of *Hills* and *Hukill* and found the following:

> The military judge limited his consideration of the only Mil. R. Evid. 413 evidence to which appellant objected to adult offenses of which appellant was later acquitted. Appellant never objected to the consideration of Mil. R. Evid. 413 or 414 evidence as to the offenses of which appellant was later convicted. In fact, the military judge did not say he was considering any charged misconduct as evidence of appellant's propensity to commit sexual offenses against children.

(JA 022).

3. The Army Court Affirmed Appellant's Conviction for Rape of AL on New Years' Eve.

The Army court affirmed three of Appellant's convictions, all arising from the night of December 31, 2009: child endangerment for providing eleven-year-old AL with hard liquor and encouraging her to get drunk; assault consummated by battery for strangling her; and rape of a child, AL, for penetrating her vulva with his penis as she lost consciousness. (JA 008–009). The Army court found the *Hills* error committed by the military judge was harmless beyond a reasonable doubt with respect to the conviction of rape of AL and affirmed. *United States v. Long*, ARMY 20150160, 2018 CCA LEXIS 512. (JA 025).

The court found the error was harmless beyond a reasonable doubt based on "independent evidence corroborating the circumstances surrounding the sexual offense, [even though] . . . there was no direct corroboration of the sexual act

itself." (JA 023). In doing so, the court relied on this Court's precedent in *United States v. Williams*, 77 M.J. 459 (C.A.A.F. 2018), wherein this Court affirmed a conviction for sexual assault and found the *Hills* error harmless beyond a reasonable doubt based on corroborating evidence—presence of non-sexual injuries inflicted contemporaneous with the assault and the distraught demeanor of the victim shortly after the accused assaulted her. *Williams*, 77 M.J. at 464; (JA 023). The Army court found similar corroborating evidence in this case – the credible testimony of NB and TW, who were able to corroborate Appellant purchased alcohol, the extensive consumption of alcohol by AL, Appellant's presence alone in AL's room prior to the rape, the bruising on her neck and legs, as well as AL's complaints of pain and distraught demeanor the next morning. (JA 023–24).

Further, the court rejected Appellant's argument that the government made propensity arguments during its closing when it referred to Appellant's "victim tree." Specifically, the court interpreted the reference to the "victim tree" as the government's "attempt to grapple with the fact that Appellant was charged with multiple crimes against multiple victims, and it can be hard to sort through them all." (JA 024). The court found only one argument by the government that could be possibly viewed as a propensity argument—the statement that Appellant is "not a man who takes 'no' for an answer." (JA 024). The Army court nonetheless

rejected such an interpretation since any reference to Appellant as "not a man who takes 'no' for an answer" was not the theory of the case for the rape of AL on New Year's Eve 2009. Instead, that was the theory of the case for other assaults, not involving AL, where Appellant "literally and figuratively did not take 'no' for an answer." (JA 024).

In sum, the court found the evidence against Appellant regarding the crimes against AL on New Year's Eve 2009 to be "overwhelming, and the government made little to no effort to pile on to that evidence by invoking propensity during closing arguments." (JA 025). Accordingly, the court held that "any error in considering impermissible propensity evidence was harmless beyond a reasonable doubt with respect to Appellant's conviction of raping AL." (JA 025).

Additional facts necessary to resolve the granted issues are included below as necessary.

I. WHETHER THE ARMY COURT ERRED IN CONCLUDING THAT THE IMPERMISSIBILE USE OF CHARGED SEXUAL MISCONDUCT AS PROPENSITY WAS HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review

"A military judge's decision to admit evidence is reviewed for an abuse of discretion." *Hukill*, 76 M.J. at 221. When constitutional dimensions are at play, an error "must be tested for prejudice under the standard of harmless beyond a

reasonable doubt." *Hills*, 75 M.J. at 357 (quoting *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))). "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." *Id*. "An error is not harmless beyond a reasonable doubt when 'there is a reasonable possibility that the [error] complained of might have contributed to the conviction.'" *Id*. at 358 (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007)) (brackets in original).

Law

"It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent." *Hills*, 75 M.J. 350, 356 (C.A.A.F. 2016). In order to affirm a conviction tainted by unconstitutional propensity evidence "[t]he government must prove there was no reasonable possibility that the error contributed to" Appellant's verdict in this case. *Hukill*, 76 M.J. at 222.

Furthermore, "[e]ven a structural error implicating constitutional provisions of due process is subject to waiver and forfeiture." *United States v. Hill*, 2018 CCA Lexis 111, *4 (Army Ct. Crim. App. 27 Feb. 2018) (mem. op.) (citing

Weaver v. Massachusetts, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017)). If the error at issue is unpreserved and forfeited, plain error analysis applies. Plain error analysis requires Appellant to show: "(1) error, (2) that is clear or obvious at the time of appeal, and (3) prejudicial." *Williams*, 77 M.J. at 462. "In the context of a constitutional error, the burden is on the government to establish that the [error was] harmless beyond a reasonable doubt." *United States v. Carter*, 61 M.J. 30, 35 (C.A.A.F. 2005). Pursuant to this Court's holdings in *Hills* and *Hukill*, the use of propensity evidence from charged offenses to prove other charged offenses constitutes "clear or obvious error."

Argument

The Government readily meets its burden to prove any error was harmless beyond a reasonable doubt. In this case, the evidence supporting Appellant's conviction for the rape of AL is sufficiently strong so that any error related to propensity evidence considered by the military judge is harmless beyond a reasonable doubt. As an initial matter, as the Army court adeptly noted, "it is not clear on the record that the military judge even considered propensity on the issue of appellant's guilt or innocence. The government explicitly invoked propensity in response to appellant's blanket R.C.M. 917 motion, but did not explicitly invoke propensity during closing arguments." (JA 024). To the extent there is a *Hills*

error with respect to the conviction for rape of AL, the government responds as follows.

1. The Corroborating Evidence of Appellant's Rape of AL Was Overwhelming.

In this case, the government introduced corroborating evidence for the specification at issue; eyewitnesses testified about events before and after the sexual assault. NB testified Appellant purchased alcohol and TW testified Appellant then plied TW and AL with the vodka. TW testified AL was at a very high level of intoxication, which is unsurprising given she was 11 at the time and drank shots of full proof liquor. (JA 081, 098, 142). TW further described AL as "jumping around on the couches, just acting belligerent." (JA 142). He then explained he and Appellant picked AL up by her arms and her legs and took her to her room. (JA 143). TW left; Appellant remained in AL's room. (JA 143).

NB corroborated much of her daughter's narrative. NB came home and discovered the evidence of excessive drinking the prior night. She saw the empty bottles; she also noticed that her children, AL and TW, were hung over. (JA 080–82). She observed bruising on AL's neck – bruising Appellant inflicted when he choked AL as he raped her. (JA 103).

Moreover, AL's testimony clearly established Appellant's guilt. AL testified she remembered her father getting on top of her, choking her, before passing out. (JA 100). Later, she woke up and he was on top of her again. (JA

100). He choked her until she passed out again. (JA 100). The next morning, she was in pain. (JA 100). She testified that there was pain in "her vagina and my butt." (JA 100). She went to the bathroom and there was pain as she urinated. (JA 101). She observed blood on her vagina and butt, marks on her legs, and bruises on her neck. (JA 100).

Because she had been rendered unconscious by both alcohol and by Appellant strangling her, AL could not testify about any penetration; however, her testimony establishes beyond a reasonable doubt that Appellant raped her, and propensity evidence did not play a role in the verdict. The only inference a reasonable factfinder could make from the above testimony is that Appellant raped AL. He plied her with alcohol. He was on top of her. He choked her. She woke up in the morning and had blood on her vagina and was in pain. She had not yet begun menstruating and would not begin for a year or more. (JA 102). Appellant's penetration of her vulva with his penis is the only reasonable inference that can be drawn from those facts. The circumstantial evidence is overwhelming. The next morning AL's mother noticed bruises on AL's body where Appellant injured her. AL's brother noticed she cried in her room, as she talked to her mother. (JA 146). Based on all of this circumstantial evidence, the military judge appropriately determined the evidence proved Appellant raped AL. AL's clear

testimony and the corroboration provided by NB and TW establish beyond a reasonable doubt Appellant's guilt.

This case is analogous to *United States v. Williams*, 77 M.J. 459 (C.A.A.F. 2018), wherein this Court set aside all but one conviction of sexual offenses due to a *Hills* error similar to this case. This Court affirmed the one specification of sexual assault based on independent evidence that corroborated the circumstances surrounding the sexual offense, despite the lack of direct corroboration for the sexual act itself. *Williams*, 77 M.J. at 464. As such, the constitutional error was harmless beyond a reasonable doubt with respect to the sexual assault conviction corroborated by other evidence. The same is true in this case.

The evidence relating to Specification 8 of Charge II, the rape of AL on New Year's Eve 2009, was overwhelming, and this court may "rest assured that an erroneous propensity instruction did not contribute to the verdict by 'tipp[ing] the balance in the . . . [factfinder's] ultimate determination.'" *United States v. Guardado*, 77 M.J. 90, 94 (C.A.A.F. 2017) (quoting *Hills*, 75 M.J. at 358).

2. The Government Did Not Rely on Propensity Evidence in Its Closing Argument.

Additionally, contrary to Appellant's brief, the use of propensity evidence played no part in the government's closing argument. The government's argument did not focus on the available propensity evidence, but instead on the individual narratives of each victim and why that victim should be believed. Appellant's

brief includes the government's argument that Appellant is "not a man who takes no for an answer" and "not a man who listens to anything, or anyone, and certainly not his family." (Appellant Br. at 13). However, reading the paragraphs that preceded and followed those quotes indicate these statements were not a propensity argument. (JA 080). The government counsel did not tie Appellant's misconduct from one charged offense to another to argue that Appellant "doesn't take no for an answer" or doesn't "listen to anything." The government's argument is descriptive to Appellant's actions to each individual person he assaulted and in each individual situation. Additionally, as the Army court highlighted, neither Appellant's refusal to take no for an answer nor his failure to listen to his family applies to the facts of Appellant's rape of AL after he rendered her unconscious by strangulation.

Moreover, the government's description of a "victim tree" does not tie in any propensity evidence. (Appellant Br. at 13). The government counsel's use of the term "victim tree" is an appropriate and allowable argument on the merits. It reflects the fact that Appellant victimized his female family members. To understand Appellant's family requires an understanding of different women with whom Appellant had children and the children those women had previously with other men. (JA 058–59). There are half-siblings related to some children involved and not to others. (JA 139). It appears from the record that the government was simply trying to help the factfinder understand the family dynamics and the

relationship between the parties and victims in the case. (JA 169). Specifically, the government argued, "So let's take a look at that – that victim tree. It's not really a family tree. That explains how all these players come into being and the government's going to walk you through this, Your Honor." (JA 169). The government did not ever argue in its closing that because Appellant assaulted one family member, he had a propensity for assaulting others. The government's closing was bereft of argument of Appellant's propensity.

Appellant cites *United States v. Prasad*, 80 M.J. 23 (C.A.A.F. 2020) when arguing that propensity arguments were a "key component of the government's closing argument." (Appellant's Brief at 21). This case is distinguishable from *Prasad* because, in that case, this Court considered a government counsel's exploitation of a propensity instruction to a panel and that counsel's specific references in closing argument to the appellant's propensity. *Prasad*, 80 M.J. at 28, 33. There, the court concluded the blatant propensity arguments by the government did not constitute harmless error beyond a reasonable doubt; however, those are not the same facts here. *Prasad*, 80 M.J. at 33. There was no mention of propensity in the government's closing argument, and there is no indication the military judge even considered propensity in deciding on the defense's R.C.M. 917 motion. Consequently, there is not a similar exploitation here by the government of any propensity argument.

3. The Military Judge Acquitted Appellant of Several Offenses Despite The Available Propensity Evidence.

Further, this Court can find beyond a reasonable doubt that propensity evidence did not influence the verdict because the military judge acquitted Appellant of numerous offenses despite the available propensity evidence that could be considered pursuant to Mil. R. Evid. 413. The government introduced Appellant's uncharged misconduct involving Ms. TW pursuant to Mil. R. Evid. 413 to demonstrate Appellant's guilt in regards to Specifications 1, 2, and 3 of Charge II, the incidents of rape against ML and NB. (JA 154). In addition to the testimony of ML and NB, the judge could consider Appellant's propensity to commit these sexual assaults under Mil. R. Evid. 413. The military judge was not swayed by this propensity evidence and, despite its availability, acquitted Appellant of these charges. (JA 031–32). This undercut's Appellant's argument that "[i]f an accused is convicted of sex offenses against different victims after using improper propensity evidence, there is an indication that the error impacted the findings." (Appellant's Brief at 18) (citing *Prasad*, 80 M.J. at 33–34).

Therefore, for the foregoing reasons, this Court should affirm the Army court's ruling and find the error was harmless beyond a reasonable doubt.

II. WHETHER APPELLANT'S CONVICTION FOR RAPE OF A CHILD WAS LEGALLY SUFFICIENT WHERE THE GOVERNMENT PRESENTED NO EVIDENCE OF THE CHARGED SEXUAL ACT.

Standard of Review

"Courts of Criminal Appeals have a statutory mandate to 'conduct a de novo review of . . . legal . . . sufficiency of a conviction.'" *United States v. Rosario*, 76 M.J. 114 (C.A.A.F. 2017) (quoting *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).

Law

Under the test for legal sufficiency, "evidence is legally sufficient if, viewed in the light most favorable to the government, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011). In resolving questions of legal sufficiency, this court is "not limited to appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996). On the contrary, this court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008) (internal quotations and citations omitted). Indeed, under this limited inquiry, courts "'give full play to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *United States v. Pabon*,

42 M.J. 404, 405 (C.A.A.F. 1995) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Argument

When viewed in a light most favorable to the government and drawing all reasonable inferences from the evidence, Appellant's conviction for rape of AL is legally sufficient. It is true AL did not directly testify that Appellant penetrated her vulva with his penis. Of course, she could not do that because Appellant incapacitated her by strangling her before he raped her. (JA 087, 100–02). And when she regained consciousness, he did it again to subdue her. (JA 087, 100–02).

Irrespective of her lack of memory of the sexual act because Appellant physically incapacitated her, AL did present compelling testimony that after Appellant plied her with alcohol, he made her go to her room. (JA 084, 086, 098, 099). She went to her bed to go to sleep after being assisted by Appellant and TW to her room. (JA 099, 143). TW left for his own room, but Appellant stayed behind, got on top of AL, and strangled her. (JA 099, 143). When she woke up, he choked her again until she passed out. (JA 100–02, 087). Beyond evidence of an assault consummated by a battery of an 11-year-old girl, other evidence further described the scope of Appellant's assault to include disturbing evidence of injuries to AL and certainly supports a conclusion that Appellant raped his daughter. This inescapable conclusion is particularly unavoidable considering the

deferential standard which requires review of this evidence the light most favorable to the government. *Winckelmann*, 70 M.J. at 406.

The physical violence AL remembered Appellant inflicting upon her, provides important context to the fact that she woke up the next morning suffering specific and corroborative pain. (JA 100). When this evidence is considered in toto and in the light most favorable to the government, Appellant's conviction should be found legally sufficient. *Id*. AL testified that her vagina hurt, her butt hurt, and it hurt to urinate. (JA 100–01). She observed blood. (JA 101). She testified, "[t]here was blood. There was dried blood. There was just . . . Everywhere . . . It was in my - - it was my - - it was just all over - - like all over my vagina and my butt." (JA 101). The factfinder could have reasonably found the blood was based on trauma from the penetration since AL testified she did not start menstruating until she was in the seventh grade – one or more years later. (JA 102). There was also bruising on her legs that appeared like hand marks. (JA 101). She testified about bruising on her neck – bruising her mother also noticed that next morning. (JA 157). AL's testimony provided strong evidence that Appellant raped her. The military judge could find beyond a reasonable doubt that Appellant raped AL by penetrating her vulva with his penis. His penis penetrated her vulva while she was unconscious. He penetrated her vulva when he was on top of her. The blood she saw in the morning and the pain she felt was due to

Appellant's rape. There is nothing in the record to indicate she observed any object in the room that Appellant could have used to penetrate her vulva.

Witnesses also corroborated each other's testimony that Appellant provided AL alcohol and the presence of injuries after he choked her. NB testified that she (1) observed Appellant purchase the alcohol, (2) she observed bruises on AL's neck, and (3) that the alcohol had been mostly consumed when she arrived at the house on New Year's Day. (JA 079–87).

These facts, the cold facts from the record without even considering AL's demeanor as she testified, should convince this court of Appellant's guilt. AL's testimony established beyond a reasonable doubt that Appellant plied her with alcohol, choked her, and raped her the night of December 31, 2009. The military judge had the opportunity to observe the demeanor of all the witnesses and found Appellant guilty of these offenses. The testimony of NB and TW corroborate the testimony of AL. Accordingly, this Court should affirm the finding of guilty for Appellant's rape of AL.

III. WHETHER THE ARMY COURT ABUSED ITS DISCRETION IN REASSESSING THE SENTENCE.

Standard of Review

A service court may reassess a sentence if it can reliably "determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F.

2013) (quoting *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006)). "The standard for reassessment is not what would have been imposed at a rehearing but what would have been imposed at the original trial absent the error." *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997).

Law

Purusant to *United States v. Gonzalez*, after setting aside a specification, a service court may: "(1) dismiss the [set aside specification] and reassess the sentence; or (2) remand to the convening authority who shall (a) order a rehearing on the [set aside specification] and the sentence or (b) [or] order a rehearing on the sentence alone." 79 M.J. 466, 470 (C.A.A.F. 2020).

Argument

The Army court properly reassessed Appellant's sentence and relied on this Court's precedent in *Gonzalez* in doing so. The Army Court first recognized the procedural similarities in the present in case and *Gonzalez* – both cases "involved appellate review pursuant to Article 66, UCMJ, which resulted in the affirmance of some findings and the setting aside of others, [as well as the cases] both [being] remanded to the convening authority for further review with near identical language . . . ." (JA 005). Because the set aside convictions were dismissed by the convening authority, the Army Court opted for the first remedy offered by this Court and determined it could adequately reassess Appellant's sentence. In doing

so, the Army Court considered the totality of the record and held: (1) there was no drastic change to the penalty landscape because the remaining convictions subjected Appellant to a maximum sentence to life without parole; (2) Appellant remained convicted of the most serious offense – the targeting, neutralizing, and raping of his own child; and (3) the Court felt confident in its knowledge of the legal and factual history of the offenses based on the record and seriousness of the misconduct, in order to determine a sentence the military judge would have imposed at trial. (JA 005).

1. The Army Court Did Not Apply The Wrong Legal Standard When Reassessing Appellant's Sentence.

Appellant contends the Army court applied the wrong standard when it reassessed Appellant's sentence because it did not specifically state that it was convinced 'beyond a reasonable doubt' that it could determine the sentence the military judge would have adjudged. (App. Brief at 36). Appellant cites a specific line in the Army court's opinion that states, ". . . we determine, based on a totality of the record, we can adequately reassess [A]ppellant's sentence." (JA 005). If the Army court must be satisfied beyond a reasonable doubt the quantum of the sentence it found appropriate, after reassessment, was at least as much as would have been found by the military judge for the affirmed specifications, the Army

court applied the correct standard.[3] Although factually true that the Army court did not use the words "beyond a reasonable doubt," further down in the opinion, the court uses strong language indicative of its confidence that it could determine the sentence beyond a reasonable doubt. (JA 005).

The Army court held, "We have *closely reviewed* [A]ppellant's record of trial and matters now before this court on appeal. We are *satisfied* the sentence adjudged for the offenses we affirmed would have been at least a dishonorable discharge, confinement for 40 years, and reduction to the grade of E-1." (JA 005)

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[3] When addressing sentence reassessment, this Court has held that "'if the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error.'" *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006) (quoting *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1988)). "However, 'if the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error.'" *Moffeit*, 63 M.J. at 41(quoting *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)). Appellant asserts that the Army court must find beyond a reasonable doubt that it is capable of determining the sentence the factfinder would have adjudged absent the constitutional error. (Appellant's Brief at 36). While the Army court did find that it could determine the sentence beyond a reasonable doubt, arguably it is unnecessary to apply a "beyond a reasonable doubt" standard when deciding the specific, appropriate sentence. In cases involving constitutional error, by the time a court of criminal appeals begins to determine what sentence is appropriate, it has already found beyond a reasonable doubt the constitutional error was either harmless or has been cured and then also determined beyond a reasonable doubt that it could reassess the sentence without returning the case for a rehearing. Indeed, at the time of the sentence reassessment in this case, the constitutional error had already been cured by the setting aside of specifications affected by the *Hills*/*Hukill* error. The Government has also found no support for Appellant's application of a "beyond a reasonable doubt" standard to the sentence components themselves.

(emphasis added). The Army court further specified, "We are *acutely* familiar with the legal and factual history for these remaining offenses. We may *reliably determine* what sentence would have been imposed at trial and are *quite confident*, based on the entire record and the seriousness of appellant's misconduct, the military judge would have imposed at least such a sentence." (JA 006) (emphasis added). Proof beyond a reasonable doubt does not require an absolute or mathematical certainty. Accordingly the Army court's use of words such as "acutely," "reliably determine," and "quite confident" do not fall short of the legal standard required for this case's sentence reassessment. R.C.M. 918(c), Manual for Courts-Martial (2008 Ed.). Moreover, the Army court's mere omission of the phrase is not an abuse of discretion, because the court nonetheless analyzed the sentence reassessment in a manner consistent with the beyond a reasonable doubt standard. *See United States v. Mackie*, 66 M.J. 198, n.2 (C.A.A.F. 2008). As such, this sentence reassessment was not an abuse of discretion by the Army court.

2. The Army Court's *Winkelmann* Analysis Weighed in Favor of Sentence Reassessment.

Further, the Army court's holding tracks an analysis of the factors outlined in *Winckelmann*, which weigh significantly in favor of the Army Court's ability to reassess Appellant's sentence. In *Winckelman*n, this Court held that when deciding whether a sentence is capable of reassessment, a service court must consider the totality of the circumstances, including the following four factors: (1) whether

there has been a dramatic change in the penalty landscape; (2) whether Appellant chose sentencing by a military judge or panel members; (3) the gravamen of the remaining offenses and the relevance and admissibility of aggravating circumstances addressed at trial; and (4) whether this court has the experience to reliably determine the sentence for offenses of the types at issue. *Winkelmann*, 73 M.J. at 15–16. In this case, all four factors weigh in favor of the Army court conducting the sentence reassessment.

There was no change to the penalty landscape. Appellant's conviction for rape of a child was affirmed by the Army court, and by itself carries a maximum sentence of confinement for life without the possibility of parole. (JA 025). Appellant's convictions for child endangerment and assault consummated by battery of a child under 16 years also remain in force. Therefore, the maximum penalty Appellant faces remains confinement for life without the possibility of parole.[4]

Appellant argues that the penalty landscape has changed "because a number of offenses carrying lengthy maximum punishments are no longer on the table"

[4] Upon reassessment, the service court may not impose more than the originally adjudged reduction to E-1, sixty years of confinement, and a dishonorable discharge. R.C.M. 810(d). The service court may impose more than the forty years' confinement contemplated by the original, now invalid sentence reassessment. *See United States v. Wall*, 79 M.J. 456 at 462, n.2 (C.A.A.F. 2020).

and cites this Court's decision in *United States v. Eversole*, 53 M.J. 132 (C.A.A.F. 2000) (App. Brief at 37–38). This case is factually distinguishable from *Eversole*, because the offense dismissed in that case which arguably changed the penalty landscape, was the most serious offense. In *Eversole*, the appellant's conviction for aggravated assault was set aside and only charges of bigamy, adultery, and obstruction of justice remained. *Eversole*, 53 M.J. at 133. It is quite difficult to compare bigamy, adultery, and obstruction of justice to a remaining conviction for intoxicating, strangling, and raping one's own daughter when she was just eleven years old.

Additionally, the overarching issue in *Eversole* was this Court's reluctance to say that a service court would know how a trial court would sentence the appellant since his circumstances were extraordinary – his charges (which originally included sodomy) were referred to special court-martial rather than a general court-martial and appellant was a noncommissioned officer with 19 years of service and a pension to lose. This Court specifically mentioned how unusual the circumstances were in *Eversole* and remarked, "[u]nder ordinary circumstances, we might have felt quite confident that the Court of Criminal Appeals had made a good approximation of a sentence the trial court would have imposed. The court did, after all, halve appellant's adjudged sentence to confinement." *Id*. at 133–34. This case is not such an unusual circumstance and

the Army court nearly halved Appellant's sentence to account for the dismissal of all other convictions against his other family members.

Appellant elected trial before a military judge alone for both the merits and sentencing. This weighs in favor of the Army court reassessing Appellant's sentence itself. See *Winckelmann*, 73 M.J. at 16 ("service courts are more likely to be certain of what a military judge would have done as opposed to members").

Appellant's conviction for rape of a child was the most serious offense of which he was charged or convicted, and that conviction still stands. The Army court's concurrence is abundantly clear. "Appellant remains convicted if the most serious misconduct. The gravamen of the offenses involved an extremely vulnerable child victim. Appellant targeted his own child with deliberate action to neutralize her in order to violently rape her." (JA 006). Appellant got his own child drunk, ordered her to her room, climbed on top of her in her bed while she was unconscious, strangled her when she awoke to subdue her, raped her, and left her bloody and bruised. Such vicious acts certainly are worthy of at least forty years of confinement. Further, the Army court is well-suited to appropriately weigh the relevant and admissible evidence in the record for sentencing purposes. Appellant presents no evidence that the three Army court judges were inexperienced or otherwise unequal to the task of performing their statutory duties pursuant to Article 66.

The Army court is highly experienced and familiar with cases involving violent crime and sexual crime. Indeed, the Army Court has reviewed the records of a substantial number of child sexual abuse courts-martial and has "extensive experience with the level of sentences imposed for such offenses under various circumstances." *Moffeit*, 63 M.J. at 41.

This Court has already acknowledged its obligation "not to 'disturb' the intermediate court's reassessment except to 'prevent obvious miscarriages of justice or abuses of discretion.'" *Eversole*, 53 M.J. at 133 (quoting *United States v. Dukes*, 5 M.J. 71, 73 (CMA 1978)). Also, "[i]t is undisputed that military judges are presumed to know the law and to follow it, absent clear evidence to the contrary . . . . Certainly, appellate judges of the Courts of Criminal Appeals are deserving of no less a presumption." *United States v. Mason*, 45 M.J. 483, 484 (1997)(citations omitted). "Accordingly, when three judges apply the principles that have been handed down by this Court to the facts of a particular case, see *United States v. Sales*, 22 M.J. 305 (CMA 1986), where is the abuse of discretion?" *Eversole*, 53 M.J. at 138 (dissent). As such, Appellant's argument that the Army court somehow influenced itself and did not fully consider the evidence in Appellant's case and this Court's precedent is without merit and should be rejected.

Accordingly, this Court should find that the Army court did not abuse its discretion in reassessing Appellant's sentence.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the service court and deny Appellant's requested relief.

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 8,035 words.

2. This Brief on Behalf of Appellee complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 23 April 2021 and electronically filed to Defense Appellate on April 23, 2021.

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