UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 38579 (rem)

UNITED STATES
Appellee

v.

Nehral Albert R. MALIWAT
Airman First Class (E-3), U.S. Air Force, *Appellant*

On Remand from
the United States Court of Appeals for the Armed Forces

Decided 30 August 2017

Military Judge: Michael J. Coco.

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1. Sentence adjudged 28 August 2013 by GCM convened at Joint Base Charleston, South Carolina.

For Appellant: Major Isaac C. Kennen; Captain Travis L. Vaughan; William E. Cassara, Esquire.

For Appellee: Lieutenant Colonel Joy L. Primoli; Major Mary Ellen Payne; Mr. Gerald R. Bruce, Esquire.

Before DREW, MAYBERRY, and SPERANZA, *Appellate Military Judges*.

Chief Judge DREW delivered the opinion of the court, in which Senior Judge MAYBERRY and Judge SPERANZA joined.

DREW, Chief Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his plea, of the rape of Airman First Class (A1C) JM, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. The court-martial acquitted Appellant of abusive sexual contact of Ms. KM. The adjudged and approved sentence was a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to E-1.

Upon initial review, Appellant raised three assignments of error: (1) the evidence is not legally and factually sufficient to support the conviction, (2) the military judge abused his discretion by providing a propensity instruction under Mil. R. Evid. 413, and (3) Appellant was denied his right under the Sixth Amendment[1] to effective assistance of counsel. We disagreed and affirmed. *United States v. Maliwat*, No. ACM 38579, 2015 CCA LEXIS 443 (A.F. Ct. Crim. App. 19 Oct. 2015) (unpub. op) (*Maliwat I*). The United States Court of Appeals for the Armed Forces (CAAF) granted review on whether the military judge abused his discretion by providing the propensity instruction, set aside our prior decision and remanded the case to us for reconsideration of the granted issue in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). *United States v. Maliwat*, 76 M.J. 128 (C.A.A.F. 2017) (*Maliwat II*).

For the reasons stated in *Maliwat I*, we reject Appellant's Sixth Amendment challenge and find the evidence legally and factually sufficient.[2] Having reconsidered his challenge to the propensity instruction in light of *Hills,* we hold that the military judge abused his discretion by instructing the court members that they could consider the evidence of one charged offense as Mil. R. Evid. 413 propensity evidence for the other charged offense. However,we find the error was harmless beyond a reasonable doubt. Accordingly, we affirm the findings and sentence.

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[1] U.S. CONST. amend. VI.

[2] As the CAAF in *Maliwat II* did not grant review of issues (1) or (3) and remanded the case to this court with specific directions regarding issue (2), we consider our previous holdings in *Maliwat I* with regard to issues (1) and (3) to be the law of the case. *See United States v. Jordan*, 38 M.J. 346, 351 (C.M.A. 1993) (Wiss, J., dissenting). Assuming, *arguendo*, that the CAAF's order setting aside our previous decision rendered our earlier opinion a complete legal nullity, we have reconsidered and restated our holdings on issues (1) and (3) of *Maliwat I* to ensure that it is clear that Appellant received his full Article 66, UCMJ, 10 U.S.C. § 866 appellate review.

I. BACKGROUND

Appellant met A1C JM in August 2012 and quickly became her best friend. In September 2012, he began sending her sexually suggestive text messages and later that month they went on a date which led to consensual sexual intercourse. Soon thereafter, however, the two decided not to continue the sexual aspect of their relationship. This was the status of their friendship on 14 October 2012, when A1C JM asked Appellant to come to her dorm room and rub her head because she was not feeling well. She testified that Appellant had done this on another occasion and it did not lead to a sexual encounter. In a text message to Appellant, she said, "You can come over now but just so you know I'm not putting clothes on haha." She sent another message clarifying the status of their friendship was unchanged saying, "No sex either." Appellant responded, "Lol ok."

When Appellant arrived, he rubbed A1C JM's head while they talked. After ten minutes of conversation, Appellant stood up, got on top of her, straddled her body with his legs, and kissed her. She initially returned the kiss but then pulled away and told Appellant, "No, I don't want this." Appellant responded by pinning her arms over her head and kissing her cheek, neck, and down her body. She repeatedly said "no" and "stop," but Appellant persisted.

A1C JM testified she was unable to move because Appellant was holding her wrists too tightly. Appellant moved her underwear aside and inserted his fingers into her vagina. She tried to close her legs but he grabbed her thigh and forced her legs open. She made one last attempt to move, but Appellant pushed her down and held her. Appellant then undressed himself, spit on her vagina, put his body weight on top of her so she could not move, and inserted his penis into her vagina. A1C JM continued to say "no" throughout the rape, which lasted until Appellant ejaculated on her stomach.

Appellant got dressed and asked A1C JM if she was mad. Because she did not want to talk about it, A1C JM said "no" even though she was angry and hurt about what had happened. A few hours later, they had the following conversation over text message:

A1C JM:	Sorry but I am mad about what happened earlier.
Appellant:	I knew u would be…. I'm sorry babe
A1C JM:	I said no.
Appellant:	I know… I couldn't control myself. The more u said no the more I wanted u
A1C JM:	:-(

Appellant: I'm sorry babe will u forgive me?

A1C JM: No. I can't. I'm sorry.

Appellant: I understand

A1C JM: No you don't. That's rape.

Appellant: Babe...

A1C JM: Don't babe me

Appellant: Can I go into ur room and we can talk?

I feel horrible

A1C JM: No

Appellant: Do u want me to stop talking to you

A1C JM: Yes

Appellant: Ok. I'm sorry

> I [f*****d] up, I ended up doing u wrong and being just another dude but I know I'm not. Ur special to me and I see u in a different light than anyone else. I don't want to lose u as my great friend. I had a lapse of reality and acted selfishly and I feel horrible for what I did to you. I know ur mad, ur hurt, and that ur going through a lot of things. I'm so sorry and I'm willing to do anything to make things right even if it means leaving u be. I love u [J]. I'm sorry

(Ellipses in original.)

The same day, A1C JM reported the assault to the Sexual Assault Response Coordinator. When she later met with agents from the Air Force Office of Special Investigations (AFOSI), they noted bruising on her arms and legs where Appellant had grabbed her during the rape.

II. DISCUSSION

A. Standard of Review

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Hukill*, 76 M.J. 219, 221 (C.A.A.F. 2017) (citing *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013)). A military judge abuses his discretion when his findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law. *United States v. Free-*

man, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

B. Proper Use of Mil. R. Evid. 413 Evidence

The meaning and scope of Mil. R. Evid. 413 is a question of law that we review de novo. *Id.* (citing *Hills*, 75 M.J. at 354). "In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant." Mil. R. Evid. 413(a).

> [T]he use of evidence of charged conduct as [Mil. R. Evid.] 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.

Hukill, 76 M.J. at 222.

The military judge, without benefit of the *Hills* and *Hukill* opinions, ruled that the evidence supporting the charged conduct of rape could be used as Mil. R. Evid. 413 propensity evidence for the charged abusive sexual contact offense, and vice-versa. This was error.

C. Mil. R. Evid. 413 Instruction

We review instructional errors de novo. *Hills*, 75 M.J. at 357 (citation omitted). Appellant contends that the Defense objected to the military judge instructing the members on Mil. R. Evid. 413 (and presumably, to the members being able to consider charged conduct as propensity evidence for the other offense). We have reviewed the record of trial. While the military judge based his decision on the state of the law as it existed at the time of trial, ultimately it was influenced by an erroneous view of the law and thus constituted an abuse of discretion.

The military judge instructed the members as follows concerning the use of evidence of one offense in support of another:

> An accused may be convicted based only on evidence before the court and not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense.

> If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant. For example, if a person were charged with stealing a knife and later using that knife to commit another offense, evidence concerning the knife, such as that person being in possession of it or that person's fingerprints being found on it, could be considered with regard to both offenses. But the fact that a person's guilt of stealing the knife may have been proven is not evidence that the person is also guilty of any other offense.
>
> The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.
>
> There is one exception to that general rule that I will now explain to you. As I just instructed you, evidence that the accused committed one of the charged sexual offenses may have no bearing on your deliberations in relation to the other charged offense. However, if you first determine by a preponderance of the evidence, that is more likely than not, that either of the charged offenses occurred, even if you are not convinced beyond a reasonable doubt that the accused is guilty of that offense, you may nonetheless consider the evidence of that offense for its bearing on any matter to which it is relevant in relation to the other offense. You may also consider the evidence of such other sexual offense for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual offenses.
>
> You may not, however, convict the accused of one offense solely because you believe he committed the other offense or solely because you believe the accused has a propensity or predisposition to engage in sexual offenses. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt.

The senior trial counsel did draw the court members' attention to the Mil. R. Evid. 413 instruction. However, the argument on the point constitutes less than a page in the record of senior trial counsel's 22-page findings arguments. Moreover, his discussion of the instruction emphasized that the members did not "have to rely on it by itself because [the members had] the testi-

mony, [they had] the text messages, [they had] the corroboration." After mentioning the instruction, senior trial counsel never returned to it for the remainder of his principal argument or at all during his rebuttal argument.

D. Analysis

The Government concedes that, in light of *Hills* and *Hukill*, the military judge erred in permitting evidence of the charged sexual offenses to be used pursuant to Mil. R. Evid. 413. We agree. Although the military judge's ruling is understandable, coming as it did before the decisions in *Hills* and *Hukill*, we must "apply the clear law at the time of appeal, not the time of trial." *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010) (citing *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008)).

The use of evidence of charged conduct as Mil. R. Evid. 413 propensity evidence for other charged offenses creates constitutional concerns regardless of the forum. *Hukill*, 76 M.J. at 222. As such, the erroneous use of evidence must be tested for prejudice under the harmless beyond a reasonable doubt standard. *Id.* (citing *Chapman v. California*, 386 U.S. 18, 22-24 (1967)). The error is harmless beyond a reasonable doubt when the error did not contribute to the appellant's conviction or sentence. *Hills*, 75 M.J. at 357 (citation omitted). An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the error might have contributed to the conviction. *Id.* (citation omitted).

> To say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. . . .
>
> To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

United States v. Othuru, 65 M.J. 375, 377 (C.A.A.F. 2007) (citing *Yates v. Evatt*, 500 U.S. 391, 403 (1991), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991)) (omission in original).

We have carefully considered the erroneous Mil. R. Evid. 413 instruction in light of the overwhelming evidence of guilt against Appellant. In addition to the testimony of A1C JM, other witnesses testified about her distraught demeanor in the hours after the rape, physical evidence of bruising directly corroborated A1C JM's description of how Appellant held her down during the rape, and, most damning to Appellant's case, his own words in the text messages he sent to A1C JM later the same day admitted his culpability: "I couldn't control myself. The more u said no the more I wanted u." When A1C JM directly confronted Appellant that he had just admitted to rape, he did

not deny it. On the contrary, later in the text stream, Appellant admitted: "I [f*****d] up, I ended up doing u wrong and being just another dude . . . . I had a lapse of reality and acted selfishly and I feel horrible for what I did to you."

In addition to the compelling evidence of Appellant's guilt, we have also carefully considered the overall message the military judge conveyed to the members. In particular, we evaluated the possibility that the instructions might have caused the members to violate Appellant's presumption of innocence. *Hills*, 75 M.J. at 357. The members acquitted Appellant of the alleged abusive sexual contact of Ms. KM. While both Ms. KM and A1C JM admitted that they had lied concerning the allegations prior to their trial testimony, Ms. KM's admitted lies concerned the substance of her allegation, whereas A1C JM's were limited to peripheral matters (including the clothing that she wore during the rape). In addition, Ms. KM's allegation was not corroborated by physical evidence or express admissions in Appellant's text messages.[3] On the basis of this record, the evidence admitted at trial, and the mixed findings of the court members, it is clear—beyond a reasonable doubt—that the members properly held the Government to its burden of proof and the instruction did not undermine Appellant's presumption of innocence.

We are convinced that the error in permitting the evidence supporting Ms. KM's allegation to be used for propensity purposes with regard to the rape of A1C JM and the corresponding error in giving the Mil. R. Evid. 413 instruction were unimportant in relation to everything else the court members considered in finding Appellant guilty of raping A1C JM. We conclude that there is no reasonable possibility that the errors might have contributed to Appellant's rape conviction. Accordingly, we find that the errors are harmless beyond a reasonable doubt.

III. CONCLUSION

The findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

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[3] The Prosecution did introduce some corroborating text messages between Appellant and Ms. KM regarding the abusive sexual contact allegation. However, the messages were somewhat ambiguous as to whether Ms. KM considered the sexual touching nonconsensual or simply annoying.

Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court