IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Allen J. SOLOMON Private First Class (E-2) U.S. Marine Corps, Appellant	APPELLANT'S BRIEF USCA Dkt. No. 13-0025/MC Crim.App. No. 201100582

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

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Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a punitive discharge and more than one year of confinement. Accordingly, his case fell within the Article 66(b)(1), Uniform Code of Military Justice, jurisdiction of the Navy-Marine Corps Court of Criminal Appeals. 10 U.S.C. § 866(b)(1) (2006). Appellant invokes this Court's jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867 (2006).

Statement of the Case

Appellant pleaded guilty, before a military judge sitting as a general court-martial, to one specification of failing to obey a lawful order and one specification of wrongful use of ecstasy, violations of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. He pleaded not guilty to the remaining charges and was tried by a panel of members with enlisted representation. The panel found him guilty of one specification of abusive sexual contact, one specification of indecent conduct, and one specification of indecent exposure, all in violation of Article 120, UCMJ, 10 U.S.C. § 920; and one specification of being drunk and disorderly, and one specification of obstruction of justice, both in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge, *sua sponte*, found the indecent exposure specification multiplicious and dismissed it before the members determined a sentence.

The panel sentenced Appellant to be reduced to pay grade E-1, to forfeit all pay and allowances, to be confined for six years, and to be discharged with a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for dishonorable discharge, ordered it executed.

On July 31, 2012, the Navy-Marine Corps Court of Criminal Appeals, in a 2-1 decision, set aside and dismissed the drunk and disorderly and obstruction of justice offenses, but affirmed

the remaining convictions. *United States v. Solomon*, No. 2001100582, 2012 CCA LEXIS 291, at *11 (N-M. Ct. Crim. App. Jul. 31, 2012). The lower court then reassessed the sentence and affirmed only four years of confinement and the remainder of the approved sentence.

The NMCCA decision was mailed to Appellant on August 8, 2012, in accordance with Rule 19(a)(1)(B) of this Court's Rules of Practice and Procedure. Appellant filed a timely petition for review on September 19, 2012, which this Court granted on November 29, 2012.

Statement of Facts

A. The evidence of the alleged assault on Lance Corporal K.

At trial, Appellant's roommate, Lance Corporal [K], testified that on the morning of December 17, 2010, after falling asleep clothed in his barracks room bed, he woke up to find his pants and boxer shorts down by his ankles and Appellant lying in between his knees. (JA at 46.) LCpl K claimed Appellant rubbed his genitals against LCpl K's, then jumped into his own bed where LCpl K confronted him. (JA. at 46.) After taking Appellant's cell phone, LCpl K claimed he saw three photographs of his own genitals on the phone. (JA. at 47.) LCpl K then reported the incident to the barracks duty officer. (JA at 47.)

B. The evidence of an alleged prior sexual assault from a previous court-martial that ended in acquittal.

In August of 2010, Lance Corporals [B] and [R], two females, alleged that Appellant had sexually assaulted them in their barracks room. Although Appellant was tried and acquitted on those allegations, they nonetheless played a central role here. (JA at 81-82.) Pre-trial, Appellant moved *in limine* to suppress evidence of the previous allegations for which he was acquitted. (JA at 79.) The government's evidence consisted solely of two written statements made by LCpls B and R describing the alleged incident (JA at 92, 93), and an expert's opinion of Appellant's propensities regarding sexually deviant behavior (JA at 18). The defense presented an email from Appellant's defense counsel in the August 2010 trial, and a military police incident report. (JA at 83-88.)

The email detailed Appellant's previous defense counsel's thoughts on why Appellant had been acquitted for the alleged sexual assaults on LCpls B and R. Among them, he explained that the evidence at trial showed Appellant was arrested for driving under the influence at a location 45 minutes away from the place where he allegedly assaulted LCpls B and R at the very time that LCpls B and R claimed he assaulted them. (JA at 83.) The military police incident report supported this--Appellant's arrest for DUI occurred at 0158 on November 15, 2009. (*Id*.)

Appellant's previous defense counsel reported that LCpls B and R claimed Appellant assaulted them at the 0200 hour, and LCpl B specifically testified that she looked at the clock and saw "2" for the hour. (JA at 83.)

While litigating the motion to suppress, the government called Dr. Slicner, an expert in forensic psychology, but did not call either of the alleged victims to testify. (JA at 17.) Instead, the statements of LCpls B and R were included as appendices to the government's written response on the motion. (JA at 93, 94.) In those statements, both LCpl B and R said that Appellant assaulted them at approximately 0230-0330 on the night of November 15, 2009.

The military judge ruled that the assaults on LCpl B and R were admissible under both Military Rules of Evidence 404(b) and 413. (JA at 20.) He ruled that they were admissible under M.R.E. 404(b) as evidence of Appellant's *modus operandi*. (*Id*.) And he also ruled that the three prongs for admissibility under *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), had been met for the incident's admissibility under M.R.E. 413. (*Id.)* Specifically, the military judge found that the assault alleged by LCpls B and R had a tendency to show Appellant "committed a similar nonconsensual act against a vulnerable sleeping person." (*Id*.) When making each ruling, he mentioned the M.R.E. 403 balancing test. (*Id*.) The military judge later

attached his supplemental findings of fact and conclusions of law to the record. (JA at 94-98.)

During Appellant's trial for the alleged assault on LCpl K, LCpls B and R both testified for the Government on the merits. Each stated that Appellant assaulted them at approximately 0200 on November 15, 2009. (JA at 35, 36.)

C. The trial counsel's closing and rebuttal arguments.

During his closing argument, the trial counsel said that LCpls B and R "stood up here and testified in front of you under oath and they were believable." (JA at 56.) He went on tell the members that "we should believe" LCpls B and R because "what they said was true." (JA at 56.) When he discussed LCpl K's testimony, the alleged victim here, he noted that LCpl K was "[v]ery truthful." (JA at 57.) He told the members that LCpl K looked at "each of [them] when he testified and he was honest." (*Id.)* And he instructed them "[y]ou should believe him." (*Id*.)

The trial counsel characterized the defense's theory of the case as "smoke and mirrors" during his closing. (JA at 54.) He said that the defense theory of the case was "absolutely, absolutely, absolutely ridiculous", and also "absolutely preposterous." (*Id*.) He disparaged the defense counsel's argument, saying "That's what the defense counsel's argument is. It's absolutely ridiculous." (JA at 54.) And he unfavorably

compared it to the number of conspiracy theories in the President Kennedy assassination. (*Id.)*

At the very end of his closing, the last thing he told the members before he asked them to return verdicts of guilty was: "You heard from [LCpl K]. He testified to exactly what happened that night. He was believable. You should believe him." (JA at 68.)

Further facts necessary to the resolution of the presented issues are detailed below.

Summary of Argument

The military judge abused his discretion when he allowed the testimony of LCpls B and R in as evidence of Appellant's commission of prior alleged assaults for use as propensity evidence. The evidence before the judge did not reasonably support the conclusion that Appellant sexually assaulted LCpls B and R since Appellant was in police custody at the time of the alleged assault.

Additionally, the trial counsel made improper and inflammatory arguments during his closing and rebuttal arguments. Accordingly, this Court should reverse the lower court's decision to affirm Appellant's convictions, which the NMCCA narrowly upheld in a divided vote.

Argument

I.

THE MILITARY JUDGE IN THIS CASE, WHICH CONCERNED SEXUAL MISCONDUCT COMMITTED AGAINST A MALE VICTIM, ADMITTED EXTENSIVE EVIDENCE UNDER M.R.E. 404(B) AND M.R.E. 413 THAT RELATED TO APPELLANT'S PREVIOUS ACQUITTAL FOR SEXUAL MISCONDUCT COMMITTED AGAINST TWO FEMALES, DESPITE ALIBI EVIDENCE THAT CONTRADICTED HIS INVOLVEMENT IN THE SEXUAL MISCONDUCT. THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE PRIOR SEXUAL MISCONDUCT EVIDENCE.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010).

Principles of Law

There are two requirements for admitting evidence of similar crimes in sexual assault cases under M.R.E. 413. First, three threshold findings must be made: (1) the accused must be charged with an offense of sexual assault; (2) the proffered evidence must be evidence of the accused's commission of another offense of sexual assault; and (3) the evidence must be relevant under M.R.E. 401 and M.R.E. 402. *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000). Second, the military judge must apply a balancing test under M.R.E. 403 and consider the following non-exclusive factors: strength of proof of the prior acts; probative weight of the evidence; potential for less

prejudicial evidence; distraction of factfinder; time needed for proof of prior conduct; temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and the relationship between the parties. *Id*.

Evidence of other crimes or acts is admissible under M.R.E. 404(b) only where: (1) the evidence reasonably supports a finding that the defendant committed prior crimes, wrongs or acts; (2) a fact of consequence is made more or less probable by the evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *United States v. Harrow*, 65 M.J. 190, 202 (C.A.A.F. 2007).

Discussion

The military judge here abused his discretion in admitting the alleged assaults against LCpls B and R because the evidence of the previous assaults could not reasonably support the finding that Appellant had committed the prior crimes. Moreover, the weak probative value of the evidence was substantially outweighed by prejudice and the other considerations delineated by this Court in *Wright*.

A. The evidence of the previous assaults against LCpls B and R could not reasonably support the finding that Appellant committed those crimes.

The contradicting proof--the DUI report and the statements of LCpls B and R--renders the previous assaults inadmissible under M.R.E. 413. It was an abuse of discretion for the

military judge to admit the assaults under that rule. The strength of proof of the prior acts is one of the factors weighed in the M.R.E. 403 balancing test for evidence admitted under M.R.E. 413. And that strength must necessarily be considered weak where the evidence before the military judge demonstrates that the accused could not have possibly committed the prior acts.

While it is true that the strength of proof is only one factor considered in the balancing test, in a case like this—where the evidence suggests that the proffered event *did not occur*—it becomes dispositive. The weakness of proof infects the other factors. It lessens the probative value and relevance of the proffered incident because the incident is untrue. Furthermore, it increases the danger of confusion and prejudice for the same reason. Because of this, the prior allegations of assault should not have been admitted.

Additionally, the military judge here should not have admitted the evidence of Appellant's alleged assaults against LCpls B and R under M.R.E. 404(b) or 413. The evidence supporting the conclusion that Appellant had committed the crimes was weak and the strength of the supporting evidence is a key factor in the admissibility of other crimes evidence. For character evidence to be admitted under either M.R.E. 404 or 413, a court must determine if the strength of the evidence

supports a finding that the defendant committed the other crimes offered, either as a threshold matter (in the case of evidence offered under M.R.E. 404) or as a matter determined during the 403 balancing test (in the case of evidence offered under M.R.E. 413). *Harrow*, 65 M.J. at 202.

1. The evidence that Appellant assaulted LCpl B and R was weak.

Here, the evidence before the military judge supporting the conclusion that Appellant had assaulted LCpls B and R directly contradicted the conclusion that the assaults had occurred. Appellant was acquitted of those charges, therefore there was at least a reasonable doubt that the crime occurred. (JA at 35, 82, 83.) And while this Court has noted that an acquittal is not equivalent to a finding that the crimes did not occur, the circumstances presented to the military judge surrounding this particular acquittal suggest Appellant was acquitted because he did not commit the crimes.

Appellate Exhibit X contains two items relevant to this point: (1) an email from Appellant's previous defense counsel to his defense counsel in this case; and (2) a military police report that details Appellant's arrest for DUI as he came aboard Camp Pendleton via the San Luis Rey Gate. (JA at 83-88.) In the email, the previous defense counsel explained why he believed Appellant was acquitted for the assaults on LCpls B and

R: Appellant was arrested at the San Luis Rey Gate, a 45-minute drive from the barracks where the assaults allegedly occurred, at 0200 on November 15, the same time LCpl B claimed the alleged assaults occurred. (JA at 83.) The military police report supports this alibi. (JA at 85-88.)

Given this fact, it is impossible for Appellant to have committed the crimes that LCpls B and R claimed he did. Each of them swore that Appellant was assaulting them between 0230 and 0300. (JA at 92, 93.) But the police report makes such a scenario impossible because Appellant was apprehended at 0158 coming onto base at a location forty-five minutes away from where the alleged assault occurred. (JA at 83, 87.) And it was not until 0326 that he was released to a command representative. (*Id*.)

Nothing the government presented during the motions hearing rebutted this impossibility. The government's expert, Dr. Slicner, did not testify about the actual assault. She testified as an expert in forensic psychology as it pertains to sexual deviant behavior (JA at 18), and her testimony was limited to a discussion of Appellant's propensities. Those propensities were based entirely on case materials trial counsel provided her, not on any discussions with Appellant. (JA at 19.) Notably, in offering her testimony, Dr. Slicner admitted that she had to take those materials and allegations as true,

including LCpl B and LCpl R's claim that Appellant was in their room when he was actually detained forty-five minutes away. (JA at 19.) She had nothing to say about the timeline of events and therefore could not correct the evidentiary problem——she could not say Appellant was there when he demonstrably was not.

2. LCpl B and LCpl R's stories were undermined by other evidence besides the police report.

Other evidence undermined the accuracy of LCpls B and R's testimony. For example, LCpl B did not report the alleged incident until an entire day later. (JA at 29-30, 31-32, 93.) Instead, she testified they just went back to bed after the alleged assault. (JA at 31-32, 92.) The two slept in an additional ten hours after they were allegedly assaulted. (JA at 83.) Furthermore, they did not warn their head-mates, who also lived next-door to Appellant, about the alleged incident. (JA at 33.) LCpls B and R did not report the incident until they heard in formation that the whole company lost a 72-hour liberty because Appellant got a DUI. (JA at 34, 83.) After finding out Appellant's DUI caused the unit to lose liberty, LCpl B said Appellant "was going to get his ass whooped." (JA at 34, 83.) This evidence raises serious questions about LCpl B and LCpl R's statements and demonstrates their motive to fabricate.

3. The military judge's findings are replete with errors, unsupported facts, and omissions.

Ignoring these evidentiary problems, the military judge accepted LCpl B and LCpl R's statements outright. Most troubling, his findings of fact omitted the motion's most important contested point: the timing of the alleged assault compared to Appellant's detention by police. The military judge found by a preponderance of evidence that "When [R] awoke, the accused ran out of the room, got in his car, and promptly drove away, ultimately receiving a citation for driving under the influence of alcohol." (JA at 94-95.) But there is no evidence that Appellant got in his car after the alleged incident. Nor is there any evidence that he promptly drove away. Both LCpl B and LCpl R wrote in their statements that they last saw Appellant running through the head and their head-mate's room. (JA at 92, 93.) Neither mentioned anything about Appellant getting in his car or driving away.

Notably, the military judge made no finding of fact concerning Appellant's police detention that occurred *at the same time* LCpl B and R claimed Appellant was in their room. The military judge only mentioned that Appellant "ultimately receiv[ed] a citation for driving under the influence of alcohol." (JA at 95.) He did not make a finding of when Appellant received the citation, where the incident occurred, or

if Appellant was ever in police custody. Yet the defense provided evidence of all of that in the police report. (JA at 85-88.)

4. The NMCCA's majority opinion upheld the military judge's error by making determinations that directly contradict the record.

Unlike the trial judge, the NMCCA panel majority did note that the testimony of LCpls B and R contradicted the police report, but it still refused to disturb his factual findings:

> The evidence indicates that the two female Marines were awoken from their sleep to find the appellant in their room, that he assaulted, or attempted to assault them, and that on the same night the appellant was apprehended for an unrelated offense. *It is implicit in his findings of fact that the military judge concluded that the appellant entered the female Marines' room earlier than they recall and was apprehended subsequently.* We decline to disturb the factual findings of the judge on the grounds that they are unsupported by the record or clearly erroneous.

Solomon, 2012 CCA LEXIS 291, at *7 (emphasis added). Thus, to insulate the trial judge's ruling, the panel majority created two findings of fact for him: first, that Appellant entered the female Marines' room earlier than they recall, and second that Appellant was apprehended some time after entering their room. In fact, both points are clearly erroneous since they are plainly contradicted by the record.

The record establishes the alleged assaults on LCpls B and R occurred *at the same time* that Appellant was being arrested. The police report the military judge had before him documents

that Appellant was in military police custody from 0158 until 0326 on the night in question. (JA at 87.) Those times are likely to be accurate. Military Police are trained and required to keep accurate times in their reports. Thus, Appellant could not have committed the assaults on LCpls B and R during the 0200 hour or immediately after since police released him to the custody of a staff non-commissioned officer at 0326. (JA at 87.)

But equally accurate are the times reported by LCpls B and R. Neither LCpl B nor LCpl R testified that they were unsure of the time they were assaulted. They never equivocated. In fact, the time of the alleged assault remained consistent over three separate statements made during the course of almost an entire year. In their statements immediately following the alleged incident, they *each* swore under oath that the assaults occurred between 0230-0300. (JA at 92, 93.) They then both testified at the first trial that they were assaulted during the 0200 hour. (JA at 83.) And finally, at this trial they testified once again that the assaults occurred during the 0200 hour. (JA at 35, 36.)

Furthermore, the fact that Appellant was arrested at 0158 while he was driving on to rather than off of the base (JA at 83, 87) contradicts any finding--implicit or otherwise--that Appellant was arrested after assaulting LCpls B and R. Had

Appellant escaped LCpl B and LCpl R's bedroom and subsequently fled off base before being apprehended as the panel majority suggests, then Appellant would have been apprehended while leaving base. But security personnel apprehended him entering base. Accordingly, not only does the record directly contradict the NMCCA's determinations, there is no evidence that supports the purported implicit findings in which the panel majority relied.

B. The weak evidence was inadmissible under M.R.E.s 404(b) and 413.

The evidence should have been excluded because its probative value was substantially outweighed by the considerations delineated in *Wright* and the danger of unfair prejudice. The military judge found the evidence of the prior assault was admissible under M.R.E. 404(b) and M.R.E. 403 to show Appellant's common scheme or *modus operandi*. (JA at 98.)

Modus operandi evidence is admissible under M.R.E. 404(b) to identify an unknown perpetrator. *United States v. Ferguson*, 28 M.J. 104, 109 (C.M.A. 1989). But here, the identity of the perpetrator was not unknown. LCpl K knew who assaulted him. The issue was simply whether Appellant did what LCpl K said he did. Identity evidence had no probative value in this inquiry; s*ee id.*, therefore, the prior assaults were irrelevant. Because they were irrelevant, their probative value must have been

substantially outweighed by the danger of unfair prejudice and the assaults should not have been admitted under M.R.E. 404(b).

Likewise, they should not have been admitted under M.R.E. 413. Although propensity evidence is permitted under that rule—indeed, that is the point of the rule—a weighing of the factors delineated in *Wright* demonstrates that the prior assaults should not have been admitted here. The incidents occurred a year and a half before Appellant's trial for the assault on LCpl K. And as discussed above, the strength of proof for the proffered misconduct was so weak that the assaults should not have been admitted at all.

To make matters worse, the potential for distraction of the members was high, as was the time needed for proof of the prior conduct. Both LCpl B and R were women, thus they were more sympathetic victims than the male LCpl K. *See generally*, Irina Anderson, *Explaining Negative Rape Victim Perception: Homophobia and the Male Rape Victim, Current Research in Social Psychology*, 42 Vol. 10, No. 4 (Nov. 1, 2004). And to present the evidence, the assaults on LCpls B and R had to be re-litigated. Both victims were called to the stand and testified, and demonstrative pictures of their barracks room were entered into evidence. Their testimony spans 46 pages of the record of trial, and argument on their allegations took considerable time.

C. The military judge compounded his error by not exercising "due sensitivity" to Appellant's acquittal for the previous alleged assaults on LCpls B and R.

Noting the importance of deriving prior acts from an acquittal, this Court held that while "[t]he fact of an acquittal does not necessarily bar the evidence of prior acts . . . [t]here is a need for great sensitivity when making the determination to admit evidence of prior acts that have been the subject of an acquittal." *United States v. Griggs*, 51 M.J. 418, 419-20 (C.A.A.F. 1999). In *Griggs*, "the military judge exercised due sensitivity" to Griggs's previous acquittal by taking several steps. *Id.* at 420. He admitted a stipulation of fact concerning the acquittal into evidence for the members, and he expressly discussed the prior acquittal during instructions on the stipulation and also during limiting instructions. *Id*.

Conversely, the military judge here did not exercise "due sensitivity" to Appellant's prior acquittal. To the contrary, the military judge refused a defense request to take judicial notice of the prior acquittal and did not even mention it in his instructions to the members. (JA at 24.) In fact, the only evidence of the acquittal came through a single question during LCpl B's cross-examination. (JA at 35.) Although this action did allow the defense to note the acquittal in opening (JA at 26) and argue it in closing, this did not satisfy *Griggs*.

Griggs imposes a specific duty on the military judge. That duty was not met.

D. The admission of the evidence was not harmless.

There are two possible conclusions that can be drawn from the facts on the record: (1) LCpls B and R are lying and no assault occurred, or (2) they are telling the truth and were assaulted by someone other than Appellant. Either way, Appellant did not commit the previous assaults and it was an abuse of discretion for the judge to admit this evidence. The prejudice resulting from this erroneous admission is plain. As the government previously pointed out, Appellant's prior assaults constituted compelling evidence of guilt. (Appellee's Br. of Mar. 9, 2012, at 35.) No doubt, this compelling but improperly admitted propensity evidence factored into Appellant's convictions here.

Additionally, this re-litigation of the previous assaults prejudiced Appellant by substantially bolstering the government's otherwise weak case. The alleged assaults became an anchor for the government's case. LCpls B and R were the government's first witnesses, and their assault was the first thing mentioned in the government's closing. The trial counsel went on to discuss the incident during his closing argument on *ten* of its seventeen pages in the record of trial, (JA at 51-68)

and the incidents also figured heavily in the trial counsel's rebuttal argument.

This use no doubt confused the members since the trial counsel drew parallels between the cases and wove the facts of the alleged assaults on LCpls B and R into the charged assault on LCpl K. In fact, the previous alleged assaults became such an important component in the government's case that the trial counsel argued in his closing that Appellant was guilty of those assaults despite his acquittal at court-martial. He said if the defense counsel believed LCpls B and R were liars, then defense counsel should stand up and say it to their faces. (JA at 53.) But if not, "then his client's guilty. His client is guilty of those two particular acts [against LCpls B and R]." (*Id*.)

LCpl B and LCpl R's allegations were necessary to bolster the government's otherwise weak case. Without them, the government's case consisted of LCpl K's testimony supported only by various hearsay evidence of statements he made after the alleged incident. (JA at 40-41, 43, 44, 45.) Even so, the defense elicited evidence of LCpl K's motive to fabricate. On cross-examination, LCpl K admitted that he was annoyed at dealing with Appellant's drinking problem over the months they roomed together. (JA at 49-50.) In fact, he was so annoyed with Appellant that on the night of the alleged incident he

quickly left the room once he saw Appellant had started drinking a case of beer. (JA at 49-50.)

The trial counsel's reason for emphasizing LCpl B and LCpl R's story is obvious: as propensity evidence, it was particularly powerful. It bolstered a weak case of "he said-he said" with two additional witnesses and permitted the government to paint Appellant as a depraved bi-sexual predator. And although the military judge gave the members the correct instructions for the use of evidence that is properly admitted under M.R.E.s 404 and 413, that does not matter. The error here is in the admission of the evidence under those rules in the first place, therefore the instruction to use the evidence as propensity or *modus operandi* evidence perfects the error and leads directly to the harm rather than avoids it.

Conclusion

The military judge abused his discretion by admitting the alleged prior sexual assaults on LCpls B and R because the evidence at trial shows that Appellant could not possibly have committed those assaults. This error was materially prejudicial to Appellant's substantial rights because the admitted propensity evidence bolstered the government's otherwise weak case. Additionally, the NMCCA's majority opinion erroneously upheld the military judge's findings despite contradicting

evidence that established Appellant's alibi. Therefore, this Court should reverse the lower court's decision.

II.

DURING THE TRIAL COUNSEL'S CLOSING AND REBUTTAL ARGUMENT, HE EXPRESSED PERSONAL OPINIONS ON THE EVIDENCE, VOUCHED FOR THE VERACITY OF THE GOVERNMENT WITNESSES, RIDICULED THE DEFENSE'S CASE THEORY, ARGUED FACTS NOT IN EVIDENCE, AND CLAIMED THAT THE DEFENSE CROSS-EXAMINATIONS WERE DISINGENUOUS. HIS IMPROPER CONDUCT CONSTITUTED PROSECUTORIAL MISCONDUCT THAT MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS.

Standard of Review

Improper argument is a question of law reviewed *de novo*. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011).

Principles of Law

When an improper argument is not objected to, relief will be granted only in cases of plain error. Article 59, UCMJ; Mil. R. Evid. 103. To prevail, an Appellant must prove that: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citation and quotation marks omitted).

Discussion

The trial counsel's improper closing and rebuttal arguments constituted plain error that materially prejudiced Appellant's substantial rights. His arguments overstepped the bounds of

fairness that "should characterize the conduct of a [prosecutor] in the prosecution of a criminal offense." *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1985)). He did this in many ways: he interjected his personal beliefs and opinions into the trial; he set up the case as a popularity contest and invited the members to draw the inference that the victims were telling the truth from the fact that the trial defense counsel did not explicitly "look at them and say" they were lying (JA at 53); and he made disparaging comments about both Appellant's theory of the case and his defense counsel.

A. The trial counsel interjected his personal beliefs and opinions into the trial.

During his closing argument, the trial counsel repeatedly offered his personal opinions on the truthfulness of the government's witnesses and the quality of the defense's theory of the case. This was error. Trial counsel may not interject themselves into a trial "by expressing a 'personal belief or opinion as to the truth or falsity of any testimony or evidence.'" *Fletcher*, 62 M.J. at 179 (quoting *United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980)). Two of the ways that a trial counsel can violate this rule, both of which occurred here, are through "personal assurances that the Government's witnesses are telling the truth" and by "offering substantive

commentary on the truth or falsity of the testimony and evidence." *Id.* at 180.

1. Trial counsel improperly vouched for government witnesses.

Here, the trial counsel repeatedly assured the members throughout his closing and rebuttal arguments that the government witnesses were telling the truth. He said that LCpls B and R "stood up here and testified in front of you under oath and they were believable." (JA at 56.) He then made matters worse by using a personal pronoun in connection with a second assertion that their testimony was truthful. *Fletcher*, 62 M.J. at 180. He told the members that "*we* should believe" LCpls B and R because "what they said was true." (JA at 56) (emphasis added).

The trial counsel continued this pattern of vouching for his witnesses when he discussed LCpl K. He said:

> I'm sure you got a good determination of [LCpl K]. Very truthful; from a small town; tells it very simply; he didn't wax on and on, on and on. He simply answered the question and moved on. He looked at each of you when he testified and he was honest. You should believe him.

(JA at 57.) Later, he vouched for LCpl K one final time. The very last thing he told the members before he asked them to return verdicts of guilty was: "You heard from [LCpl K]. He testified to exactly what happened that night. He was believable. You should believe him." (JA at 68.)

2. Trial counsel made unsolicited personal views of the evidence and disparaging comments on Appellant's counsel and case.

Trial counsel improperly gave his personal thoughts on the defense's theory that LCpls B and R fabricated their story to punish Appellant because he got a DUI, which cost their unit a day of liberty. He called the defense "smoke and mirrors" (JA at 54) and painted it as a farfetched conspiracy theory. In the space of one page of the record of trial he twice asserted that it was "absolutely ridiculous", once asserted that it was "absolutely, absolutely, absolutely ridiculous", and once asserted that it was "absolutely preposterous." (*Id*.) He also said that there were not that many conspiracies in the President Kennedy assassination. (*Id.*)

In *Fletcher*, this Court held that similar comments made in closing argument constituted plain error. There, the prosecutrix used words like "nonsense", "fiction", "unbelievable", "ridiculous", and "phony" to describe Tech Sergeant Fletcher's defense. *Fletcher*, 62 M.J. at 180. This Court found this was error, even absent objection, because when a prosecutor offers their "personal views of a defendant's guilt or innocence . . . it may confuse the jurors and lead them to believe that the issue is whether or not the prosecutor is truthful instead of whether the evidence is to be believed." *Id*. at 181. Here, the prosecutor told the members that

Appellant's theory was "absolutely ridiculous" and "preposterous" instead of allowing them to decide on their own. When he did so, he had the prestige of the Government backing his assertion.

B. The trial counsel made the trial a popularity contest.

Trial counsel further stacked the deck against Appellant when he turned the case into a popularity contest. LCpls B, R, and K were in the gallery during closing arguments (JA at 53, 69), a fact that the trial counsel took advantage of. He pointed LCpls B and R out, and then argued to the members that they should believe LCpls B and R because the defense counsel did not explicitly call them liars. He said:

> [Defense counsel] has hinted at a conspiracy between Lance Corporal [B], Lance Corporal [R], trying to frame his client. A conspiracy. He has hinted at it, but he has not said it explicitly. If this is a conspiracy, then he should say it explicitly while they're in the room. They're sitting right there, Lance Corporal [B] and Lance Corporal [R]. He should look at them and say. You two are lying. You two are telling a conspiracy. You two are gaining [sic] against my client. If it's true, he should say it. They're sitting right there. Point it out and make it explicit. If it's not true, then his client's guilty. His client is guilty of those two particular acts.

(JA at 53.) After the defense counsel's closing argument, the trial counsel in rebuttal again disparaged the defense counsel for not accepting his earlier challenge:

> Now during my initial closing, I said that [defense counsel] if he's really going to call Lance Corporal [B], [R], and Lance Corporal [K] a liar, then he needs

> to get up here and tell them that they're lying. He never did that. He never did. He never said it explicitly. He hinted around it, but he never said it. They are not lying. They came up here and told the truth. They told the truth to each one of you and they told the truth each single time they testified.

(JA at 73.) This argument was improper and inflammatory.

It was improper because it set the case up as a popularity contest between the prosecutor and the defense counsel. At this point, the trial counsel had already vouched for the victims by explicitly saying that they were telling the truth. Now, he ridiculed the defense counsel for his failure to explicitly call them liars. In essence, he was inviting the members to directly compare his vouching with the defense counsel's failure to explicitly call the victims liars. This was error. As this Court has explained, when a trial becomes a popularity contest between the two attorneys there is a danger that "[r]ather than deciding the case 'solely on the basis of the evidence presented,' as is required, the members may be convinced to decide the case based on which lawyer they like better." *Fletcher*, 62 M.J. at 181 (citing *United States v. Young*, 470 U.S. 1, 18 (1985)).

Likewise, the argument was inflammatory because it encouraged the members: (1) to choose favorites between the victims and the defense counsel; and (2) to determine the credibility of the victims based on the defense counsel's

actions at trial. The trial counsel emphasized the presence of the female victims in the courtroom. He noted that the defense counsel had implied they were lying, but never said it "explicitly." (JA at 53.) Then he told the members that the defense counsel should do so "while they're in the room" and that if defense counsel did not "then [Appellant] did commit those acts" because then they were not liars. (*Id*.) Trial counsel was pitting the victims against the defense counsel. And he was arguing that the members should decide that the victims were telling the truth because the defense counsel did not call them liars to their face. This was further error. *See Fletcher*, 62 M.J. at 183 (citing *United States v. Barrazamartinez*, 58 M.J. 173, 175-76 (C.A.A.F. 2003) (for the proposition that ". . . counsel are prohibited from making arguments calculated to inflame the passions or prejudices of the jury.")).

C. The trial counsel misled the members.

The trial counsel withheld important facts from the members during his rebuttal. When discussing Appellant's DUI on the night of November 15, 2009, he said to the members "we don't know if [the DUI] was after the assault on Lance Corporals [R] and [B]. Doesn't it make the most sense that right after . . . he runs right out of the room, runs to get into his car, and

tries to get outside the gate?" (JA at 73.) For good measure, he added that his version was "most likely." (*Id*.)

But he knew this was not the case. It was *contrary* to the information he had in Appellate Exhibit X (the police report), which the members did not have. His argument was therefore misleading. Appellate Exhibit X plainly shows that Appellant was being arrested, while *coming onto the base*, at 0158 on the night of November 15, 2009. (JA at 83, 87.) Thus, he could not have assaulted LCpls B and R at the 0200 hour, as they testified he did. (JA at 35, 36.)

D. The NMCCA's opinion unanimously found the trial counsel's argument was improper, but split on whether it was error.

The NMCCA panel majority found that the trial counsel made improper personal assurances of the government witnesses' veracity when he said, "we should believe them" and "(y)ou should believe him." *Solomon*, 2012 CCA LEXIS 291, at *9. Despite these impermissible statements, the majority did not find plain error. *Id*. Additionally, the panel majority acknowledged that the trial counsel "used injudicious language in his closing statement." *Id.* at *10. But the majority found no plain or obvious error given "the defense theory that the appellant was framed by a conspiracy of government witnesses." *Id*. Thus, the majority's reasoning perpetuated the trial counsel's error.

Conversely, Judge Beal, in his dissent, found that the trial counsel's comments were "examples of a prosecuting attorney overstepping 'the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Id*. at *15 (Beal, J., dissenting) (quoting *Fletcher*, 62 M.J. at 179). In his prosecutorial misconduct analysis, Judge Beal found the *Fletcher* factors weighed in favor of Appellant. *Id.* at *16.

E. Appellant was prejudiced by the trial counsel's conduct.

The trial counsel's improper argument materially prejudiced Appellant's substantial rights because the misconduct was severe, it was not addressed by the military judge save for a generic instruction, and the overall case against Appellant was weak. *Fletcher*, 62 M.J. at 184.

Improper argument permeated the trial counsel's closing and rebuttal. He vouched for his witnesses throughout both and called defense counsel's cross-examinations disingenuous. He gave his personal opinion on the evidence and ridiculed the defense's theory of the case. He misled the members. And he specifically turned the case into a popularity contest by complaining that the defense counsel had not explicitly called his witnesses liars. The trial itself was short, lasting only about three days, and the members deliberated for only about two and a half hours. Thus, the improper comments were not

"isolated incidents of poor judgment in an otherwise long and uneventful trial." *Fletcher*, 62 M.J. at 185.

The military judge did nothing to fix this situation. He gave only the generic Benchbook instruction that "arguments of counsel are not evidence . . . ." (JA at 51.) But as the *Fletcher* Court explained, this non-targeted and non-curative generic instruction is not enough to address the errors here.

The government's case here was weak. At its core, it was a "he said, he said" case that pitted LCpl K's credibility against Appellant's. Thus, the danger that the trial counsel's improper actions influenced the outcome here is too great to be ignored.

Conclusion

The trial counsel's impermissible statements permeated his closing and rebuttal arguments. The military judge's generic instruction did little to cure the error. And the weight of the government's evidence was not overwhelming. Consequently, the prosecutor's misconduct undermined the integrity of the trial and prejudiced Appellant. Thus, this Court should reverse.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 31, 2012.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 21(c) because it contains 7,128 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word version 2003 with 12-point-Courier-New font.

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