IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

**I.**

The government walks a thin line when it argues that "the evidence considered is merely testimony" that Appellant had committed prior acts of sexual assault rather than evidence that he committed a crime or was charged with an offense. (Appellee's Br. at 16.) But its semantics make no difference here.

The admitted M.R.E. 413 evidence was, of course, testimony. But that testimony was admitted as evidence of Appellant's commission of other sexual assaults. (*Id*.) Indeed, the government even admits as much. (*Id.*) And sexual assault is a crime under the UCMJ. Appellant has never argued, as the government seems to suggest, that the military judge erred in admitting evidence that Appellant had been convicted of or charged with a crime. (*Id*.) To the contrary, Appellant's

complaint is——and has been——that the military judge erred in admitting the testimony of LCpls B and R as evidence of Appellant's commission of prior crimes for use as propensity evidence.

**1. The government uses flawed logic in interpreting the abuse of discretion standard**

The government relies on flawed logic in claiming: "As long as the government follows the procedural guidelines in Mil. R. Evid. 413 and the Military Judge evaluates the evidence according to the Court's guidance in *Berry* and *Wright*, there is no abuse of discretion." (Appellee's Br. at 13.) Of course, merely evaluating evidence in accordance with this Court's guidance may be an abuse of discretion where the military judge makes erroneous findings of facts and conclusions of law. Such error exists here.

**2. The military judge's findings were erroneous.**

The military judge found "When [LCpl 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 95.) PFC Solomon's alibi evidence, that authorities apprehended him at the *same time* LCpls B and R claimed he was in their room, directly contradicts the admitted M.R.E. 413 evidence. The military judge never reconciled this vital contradiction in his findings.

Additionally, the M.R.E. 413 evidence cannot withstand a cursory factual analysis. LCpls B and R each claimed that the man in their room physically touched them, walked past them, and quickly walked into the head before exiting through their head-mate's room. (JA at 27-29, 36-37.) Yet neither testified that they smelled alcohol on him. They did not note any slurred speech when he attempted to quiet them. And neither mentioned he was unsteady on his feet while standing or walking. In fact, the individual must have been quite nimble to quickly exit their room and escape through the adjoining head and bedroom.

That description is the opposite from what military police described when they encountered PFC Solomon. Upon stopping PFC Solomon, the sentry "noticed an odor of an alcoholic beverage emitting from [PFC Solomon's] breath and person." (J.A. at 87.) While leaving his vehicle, PFC Solomon exhibited "slowed movement, slurred speech and unsure balance." (*Id.*) Moreover, PFC Solomon's performance during Field Sobriety Tests indicated severe impairment. He lost his balance, had to raise his arms, double counted a number, and could not complete the One Leg Stand Test. (*Id.*) Additionally, during the Walk and Turn Test, he did not touch heel to toe on any steps as required and lost balance on numerous steps. (*Id.*) Notably, PFC Solomon's Blood Alcohol Content from two chemical samples taken of his breath was .19% and .20%. (*Id.*)

It is illogical to assume, as the lower court and apparently the military judge did, that PFC Solomon was the sober individual in the Lance Corporals' room. If true, then PFC Solomon, who showed no signs of alcohol-induced impairment while assaulting LCpls B and R in their room, would have had to flee in his car and within minutes raise his Blood Alcohol Content to .20% before exiting the base and returning through the gate. Rather, what is logical, and supported by the evidence, is that PFC Solomon was not the individual in the Lance Corporals' room, or they made up the story. Either way, it was the government's burden to prove PFC Solomon assaulted them in their room; and it failed.

**3. The government's weak case relied on the impermissible M.R.E. 413 evidence to secure convictions.**

Before acknowledging the government's weak case in his opening statement, the trial counsel stated "Now, I started by saying 'secrets' plural because this isn't the first time that the accused has done something similar." (R. at 180.) He then conceded that the propensity evidence was the government's most important proof:

> "*The most important thing we have* is a fingerprint. We have a fingerprint of the accused. And what is that fingerprint? Not a physical print, but we have similarities of actions. Some people call it modus operandi, sexual propensity, similarities of actions . . . . Look at the similarities of actions and you will see the fingerprint of the accused in all three of these cases."

(R. at 181) (emphasis added). Indeed, without the propensity evidence the government's case would have been significantly weakened. The government on appeal concedes as much, agreeing that the prior allegations of assault against LCpls B and R "constituted compelling evidence" against PFC Solomon. (Appellee's Br. at 39.) Thus, this error requires reversal.

## II.

### 1. The trial counsel's statements and personal assurances are error and improper.

The government's argument that trial counsel did not vouch for his witnesses is similarly semantic and also misapprehends the law. *Fletcher* does not limit improper vouching to instances where personal pronouns are used in connection with assertions. The *Fletcher* court said improper vouching "*can include* the use of personal pronouns in connection with assertions that a witness was correct or to be believed." *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005) (emphasis added).

The key to identifying improper vouching is to determine whether the trial counsel made "personal assurances of the witnesses' veracity." *Id*. And both the trial counsel that says "he was honest" and the trial counsel that says "I think he was honest" are making personal assurances about the credibility of a witness. The only difference is that in the former statement,

the phrase “I think”, which contains the personal pronoun, is omitted as a matter of common speech. But this omission does not change the fact that the statement is an assertion by the speaker. Under *Fletcher*, the appropriate and preferable practice would be to state “based on the evidence, it is reasonable to conclude that the witness is telling the truth.” *See Fletcher*, 62 M.J. at 183.

The trial counsel’s assertions here mirror the assertions this Court determined were error in *Fletcher*. It was error when the *Fletcher* trial counsel concluded based on drug urinalysis cut-off levels that “*we know* that that was from an amount that’s consistent with recreational use . . . .” *Id*. at 180 (emphasis in original). Here, the trial counsel repeatedly made these types of personal assurances. With respect to LCpls B and R, he said that “*we should* believe them”; “they were believable”; and that “what they said was true.” As to LCpl K, trial counsel called him “very truthful”; “honest”; and told the members “you should believe his testimony.” In addition to these assurances, trial counsel implicitly vouched for his witnesses by chastising the defense counsel for not calling each of them a liar.

Notably, the trial counsel’s impermissible tactic of pitting himself against the defense counsel was not limited to the trial counsel’s closing argument. The trial counsel also discounted the defense’s case and personally implicated the

defense counsel in the government's opening statement: "Now I expect the defense to get up here and talk about how none of it's true, that everyone is trying to *frame his client* . . . ." (R. at 181) (emphasis added). His opening statement set the tone that the trial would be between the defense counsel's "absolutely ridiculous" "frame-job" defense, and the government's case of "truthful" and "honest" witnesses. This improper argument is similar to the trial counsel's misconduct in *Fletcher*, where the trial counsel described the government's evidence as "unassailable," "fabulous," and "clear." *Fletcher*, 62 M.J. at 180. The result, in both cases, is that the government's evidence appeared stronger than it actually was because it was backed by the weight of the United States.

**2. The trial counsel's statements prejudiced PFC Solomon.**

While the trial counsel set this tone in his opening, he made impermissible statements throughout both his closing and rebuttal arguments. In fact, of the roughly seventeen pages of record constituting the trial counsel's closing argument, he made sixteen improper statements:

| Trial Counsel's Improper Statements | JA page |
|---|---|
| If this is a conspiracy, **then [defense counsel] should say it explicitly** while [LCpls B and R are] in the room. | 53 |
| It's **absolutely, absolutely, absolutely ridiculous**. | 54 |
| That's what the **defense counsel's argument** is. It's **absolutely ridiculous**. | 54 |
| That's just **smoke and mirrors by defense counsel**. | 54 |
| How likely is that? It's **absolutely ridiculous**. | 54 |
| There are **not that many conspiracies** in the **JFK assassination**. | 54 |
| [LCpls B and R] stood up here and testified in front of you under oath and **they were believable**. | 56 |
| And **we should believe [LCpls B and R]** that that's why they didn't tell because they wanted it to go away. | 56 |
| Those nonverbals should have give [sic] you a clue as to what was going on and what was true. And **what [LCpls B, R, and K] said was true**. | 56 |
| I'm sure you got a good determination of [LCpl K]. **Very truthful** . . . . | 57 |
| [LCpl K] looked at each of you when he testified and **he was honest**. | 57 |
| **You should believe [LCpl K's] testimony**. | 57 |
| NCIS made a decision that day. They decided not to take him in. And based upon the facts, **that was a good decision**. | 58 |
| The reason why we put [LCpls B and R] on is to show sexual propensity. Sexual propensity. The theory is that if a person commits a sexual offense, they will probably commit it again because the recidivism rate, the repeat offender rate is so high. | 63 |
| [LCpl K] testified to exactly what happened that night. **He was believable**. | 68 |
| **You should believe [LCpl K].** | 68 |

The trial counsel made four more improper statements during rebuttal argument, which took only five pages in the record. While arguing that the accused must have ran out of LCpl B and LCpl R's room, into his car, and out of the base gate, he assured the members "I think that's most likely." (JA at 73.) He then reassured them that LCpls B, R, and K were "not lying." (*Id*.) He insisted the three "told the truth." (*Id.*) And that "[t]hey told the truth to each one of you and they told the truth each single time they testified." (*Id*.) These numerous statements are not "isolated incidents of poor judgment in an otherwise long and uneventful trial." *Fletcher*, 62 M.J. at 184. Rather, they were pervasive, calculated, and intentional.

The trial counsel's improper argument constitutes error under the *Fletcher* three-prong test. First, the prosecutor's conduct was severe. In sum, over the twenty-three pages of trial counsel's transcribed arguments on findings, he made twenty improper comments. In many of those instances the trial counsel "offered his personal commentary on the truth or falsity of the testimony and evidence." *Id.* at 181. Because this case centered on witness credibility, such improper statements severely prejudiced PFC Solomon.

Additionally, the brevity of the deliberations favors PFC Solomon. After sitting for the four-day trial, the members deliberated for only two and a half hours before convicting PFC

Solomon. (R. at 420, 422.) In *Fletcher*, this Court weighed this factor in the appellant's favor where the members deliberated for four hours during that three-day trial. *Fletcher*, 62 M.J. at 185. This Court should similarly weigh this factor in Appellant's favor here.

Second, since the military judge's generic instruction did not address the error here, this factor also weighs in Appellant's favor. The government concedes as much. (Appellee's Br. at 39.)

Third, the government's case was supported by weak evidence, which was bolstered by improper M.R.E. 413 evidence. This case came down to the credibility of LCpl K. Yet the government's circumstantial evidence of LCpl K's demeanor is unpersuasive. Additionally, the digital analysis of the cell phones in this case provided nothing of evidentiary value. Similarly, the lack of forensic evidence weighs against the government. At best, this was a close case, where the trial counsel's improper statements could have tipped the balance and led to conviction. The prosecutor's actions are plain error that 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 February 11, 2013.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation of Rule 24(b). 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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