IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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Issues Presented

I.

IN A CASE INVOLVING SEXUAL MISCONDUCT COMMITTED AGAINST A MALE VICTIM, THE MILITARY JUDGE 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 WITH THEM. DID THE MILITARY JUDGE ABUSE HIS DISCRETION IN ADMITTING THE PRIOR SEXUAL MISCONDUCT EVIDENCE?

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. DID HIS IMPROPER CONDUCT CONSTITUTE PROSECUTORIAL MISCONDUCT AND DID IT MATERIALLY PREJUDICE APPELLANT'S SUBSTANTIAL RIGHTS?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006), because Appellant's sentence included a punitive discharge. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification of failing to obey a lawful order and one specification of wrongful use of a controlled substance, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a (2006). Subsequently, a panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification each of abusive sexual contact, indecent conduct, indecent exposure, drunk and disorderly conduct, and obstruction of justice in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934 (2006). The Members sentenced Appellant to six years of confinement, reduction to pay grade E-1, total forfeiture of all pay and allowances, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

On July 31, 2012, the lower court set aside and dismissed the drunk and disorderly and obstruction of justice offenses pursuant to this Court's decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *United States v. Solomon*, No. 201100582, 2012 CCA LEXIS 291 (N-M. Ct. Crim. App. July 31, 2012). The lower court affirmed all remaining findings, then reassessed Appellant's sentence and affirmed only four years of

confinement as well as the remainder of Appellant's approved sentence. *Id*.

Statement of Facts

A. Appellant sexually assaulted his roommate.

On the morning of December 17, 2010, Appellant was in his barracks room, drunk and high from ingesting ecstasy. (J.A. 22-23.) His roommate, Lance Corporal AK, was sleeping in the barracks room. (J.A. 46.) Appellant removed AK's trousers and took photographs of AK's genitals. (J.A. 46-47.) While AK was still sleeping, Appellant removed his own clothes, climbed on top of AK, and rubbed his genitals against AK's genitals. (J.A. 46.) When AK awoke during the course of these acts, Appellant ran across the barracks room to his own bed. (J.A. 46.) AK took Appellant's cell phone from Appellant, found the photographs Appellant had taken, and reported the facts to the duty non-commissioned officer at the barracks. (J.A. 47.) Subsequently, Appellant grabbed the phone back from Appellant and deleted the photographs. (J.A. 47.)

B. Appellant was found not guilty in August 2010 at a previous court-martial for sexual misconduct.

In August 2010, Appellant was tried at general court-martial and found not guilty of sexually assaulting two female Marines, LCpls MB and DR. (J.A. 91.) During that incident, Appellant entered the barracks room shared by LCpls MB and DR

while MB and DR were sleeping. (J.A. 27.) Appellant put his hand into the underpants of LCpl MB, and felt LCpl MB's upper vaginal area. (J.A. 27.) Appellant subsequently walked to the foot of LCpl DR's bed, and as she slept, grabbed onto DR's ankles. (J.A. 28.) Appellant's defense at the previous court-martial relied on an alibi case theory, based on the fact that Appellant was arrested the same morning for drunk driving on another part of the base. (J.A. 83.)

C. Appellant's fully litigated Mil. R. Evid. 413 motion.

Prior to trial, the Government gave notice to Defense that it intended to present evidence of Appellant's prior sexual misconduct. (J.A. 79.) Appellant moved *in limine* to exclude evidence of the prior sexual assaults on LCpls MB and DR, as well as two other incidents that predated Appellant's previous court-martial. (J.A. 79.) The Military Judge determined, pursuant to *United States v. Berry*, 61 M.J. 91 (C.A.A.F. 2005), that evidence concerning the assaults on LCpls MB and DR was admissible under Mil. R. Evid. 413, but excluded evidence of the two other incidents. (J.A. 20-21.) The Military Judge also ruled, in response to the Defense motion, that the evidence concerning the incident involving LCpls MB and DR was admissible under Mil. R. Evid. 404(b) to show a common *modus operandi* between the incidents. (J.A. 20.)

Post-trial, the Military Judge recorded his findings of fact and conclusions of law on the motion in writing. (J.A. 94-98.) The lower court substantially adopted the Military Judge's findings of fact in its opinion, and did not find that any of the Military Judge's findings were clearly erroneous. (J.A. 3-7.) The lower court noted that LCpls MB and DR stated that the previous offenses occurred between 0230 and 0300 on August 15, 2009, which was contradicted by Defense evidence that Appellant was in custody between 0158 and 0326 on that date. (J.A. 6.) The lower court noted, however:

> Although this contradiction . . . is not explicitly reconciled or explained, the military judge's factual finding has support in the evidence of record. The evidence indicates that the two female Marines were awoken in 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.

(J.A. 7.)

D. Trial Counsel's closing argument.

1. Comment on Defense theory.

Trial Counsel's initial closing argument comprises eighteen pages in the Record of Trial. (J.A. 51-68.) In the course of argument, Trial Counsel used the term "absolutely ridiculous" to characterize the Defense theory of the case. (J.A. 54.) The term was used by Trial Counsel to describe the idea that

Appellant was framed by a conspiracy of government witnesses.

(J.A. 54.) Specifically, Trial Counsel argued:

> [O]n the other hand, if [Defense Counsel] does stand up here and say, yes, there is a grand conspiracy to frame his client, then look at what Lance Corporal [MB] and Lance Corporal [DR] have to lose. And that is everything. Everything to lose for these two. . . . This happened in 2009. And guess what——she testified yesterday. It's 2011. We're talking about years of testimony. Years of speaking with attorneys. Years of testifying under oath. She's testified under oath at least four times, both of them. So she has lied every single time as to frame the accused. It's absolutely, absolutely, absolutely ridiculous.

(J.A. 53-54.) Trial Counsel also noted, in the same vein,

"[T]here is no frame-job going on here. There's no conspiracy. That's just smoke and mirrors by defense counsel." (J.A. 54.)

2. Reference to Kennedy assassination.

During the course of expounding on how unlikely the defense theory was, Trial Counsel argued:

> [LCpl AK] doesn't know these people [LCpls MB and DR]. He has no idea. He didn't even know this even occurred. Yet somehow the stars aligned and these two connected. Mental telepathy maybe have happened between the two and they all came up with this grand scheme to frame [Appellant]. How likely is that? It's absolutely ridiculous. There are not that many conspiracies in the JFK assassination. Was it the grassy knoll? Was it the Texas school book depository? Did it come from the street? What about this? It's absolutely preposterous. . . . A lot of conspiracies are supposedly surrounding [Appellant].

(J.A. 54.)

3. Comments on witness credibility.

At several points during both the closing argument and the rebuttal, Trial Counsel commented on the credibility of the witnesses called by the Prosecution. Referring to LCpls MB and DR, Trial Counsel stated:

> So we shouldn't have particular expectations on how those two reacted. They told you why they reacted. They stood up here and testified in front of you under oath and they were believable. And we should believe them that that's why they didn't tell because they wanted it to go away. They testified that they're hesitant. This has been a big pain for them. Two years of testimony. Their entire command knows. Who would believe a female Marine?

(J.A. 56.) Trial Counsel also specifically asked the Members to consider the demeanor of the witnesses in judging their credibility:

> I'm sure most of you heard the term that 70 percent of communication is nonverbal. And I hope each of you picked up on the nonverbals of all these witness[es], [LCpls MB, DR, and AK]. They looked at you and told their story. Those nonverbals should have give[n] you a clue as to what was going on and what was true. And what they said was true.

(J.A. 56.) Describing LCpl AK's testimony in particular, Trial Counsel argued:

> When [LCpl AK] came up here and testified, I'm sure you got a good determination of him. 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 his testimony. Believe it——exactly what happened because he told the same the first day, told the same to the OOD, and he told the same here.

(J.A. 57.)

Trial Counsel briefly reiterated this at the end of his first closing: "And then finally you heard from [LCpl AK], you heard from him. You heard from him. He testified to exactly what happened that night. He was believable. You should believe him." (J.A. 68.)

Trial Counsel also stated that several prosecution witnesses were believable, and testified honestly. (J.A. 56-57, 68.)

4. Defense Counsel's objections.

Defense Counsel objected twice during Trial Counsel's closing argument, but not to any of the arguments mentioned above or in Appellant's Brief. (J.A. 55, 63.) The first objection occurred following Trial Counsel's statement, "Now, there's a story told at The Basic School. I think his name is E Tool Smith. E Tool Smith took an E Tool——" (J.A. 55.) Defense Counsel objected that this story was "[i]rrelevant." (J.A. 55.) The Military Judge responded to the objection by instructing Trial Counsel, "Please argue the facts in evidence. If you have an analogy——but if you're going to assert facts, they need to be the evidence." (J.A. 55.) Trial Counsel complied, and did not attempt to raise the "E Tool Smith" anecdote again.

Defense Counsel's second objection came in response to Trial Counsel's statement, "The theory is that if a person commits a sexual offense, they will probably commit it again because the recidivism rate is so high. That's why we put them on, to show the sexual propensity." (J.A. 63.) Defense Counsel objected to "facts not in evidence." (J.A. 63.) The Military Judge at this point did not rule on the objection, but rather stated, "Hang on, hang on, hang on. That's exactly a reason you may not consider that type of evidence." (J.A. 63.) The Military Judge then issued a long curative instruction concerning the purposes for which the previous sexual assault evidence (the testimony of LCpls MB and DR) could be used. (J.A. 63.)

5. The Military Judge's instructions concerning arguments made by attorneys.

Additionally, the Military Judge instructed the Members prior to deliberations that:

> You just heard an exposition of the facts by counsel for both sides as they view them. Bear in mind that arguments of counsel are not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence but you must base the determination of the issues in this case on the evidence as you remember it and apply that evidence to the law as I instruct you.

(J.A. 78.)

Summary of Argument

Testimony by LCpls MB and DR concerning Appellant's prior sexual assault offenses was properly admitted by the Military Judge because a preponderance of the evidence showed that the offenses were committed and the Appellant committed them, and because the evidence was both logically and legally relevant to the present charges.

Trial Counsel did not commit prosecutorial misconduct during his summation and rebuttal argument, because all comments were made in relation to evidence presented, and did not contain affirmative, unsupported opinions.

Argument

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ADMITTING TESTIMONY OF PRIOR ACTS OF SEXUAL ASSAULT UNDER MIL. R. EVID. 413, BECAUSE A PREPONDERANCE OF THE EVIDENCE SHOWED THAT THE ASSAULTS OCCURRED, APPELLANT COMMITTED THEM, AND THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHED THE DANGER OF UNFAIR PREJUDICE. THE MILITARY JUDGE'S MIL. R. EVID. 404(b) RULING IS NOT AT ISSUE BEFORE THIS COURT.

A. This issue is reviewed for an abuse of discretion.

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Berry*, 61 M.J. 91 (C.A.A.F. 2005); *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). The abuse of discretion standard is a

strict one, requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). The challenged action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 43 M.J. 63, 65 (C.A.A.F. 1997).

B. The scope of evidence admissible under Mil. R. Evid. 413 is much broader than that under Mil. R. Evid. 404(b).

Appellant conflates the legal standards for admissibility under Mil. R. Evid. 413 and Mil. R. Evid. 404(b) throughout his brief. But as this Court noted in *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000), the scope of evidence admissible under Mil. R. Evid. 413 is much broader than that under Mil. R. Evid. 404(b), because it "authorize[s] admission and consideration of evidence of an uncharged offese for its bearing 'on any matter to which it is relevant.'" *Id*. at 480 (*quoting* 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994)). Therefore, the relevant question before this Court is whether the Military Judge abused her discretion by admitting evidence of the previous sexual assaults under Mil. R. Evid. 413. The Government does not contest the lower Court's observation that "If [the evidence] was not properly admitted under [Mil. R. Evid. 413], it cannot be 'saved' by a Mil. R. Evid. 404(b) analysis, as the members were instructed that they could consider this Mil. R. Evid. 413 evidence for all relevant purposes." *Solomon*, No. 201100582,

2012 CCA LEXIS 291 at *7-*8 n.1 (N-M. Ct. Crim. App. July 31, 2012).

1. If evidence is admissible under Mil. R. Evid. 413, it is admissible for any purpose to which it is relevant.

Mil. R. Evid. 413 is broad in scope and inclusive in nature. Its plain language states, "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." Mil. R. Evid. 413 (a). Its inclusive nature is plainly stated: "This rule shall not be construed to limit the admission or consideration of evidence under any other rule." Mil. R. Evid. 413(c).

Case law has amplified and fortified the plain language of this rule. Inherent in Mil. R. Evid. 413 is "a general presumption in favor of admission." *Berry*, 61 M.J. at 95 (*citing United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000)). In *Wright*, this Court articulated three threshold requirements for admissibility under Mil. R. Evid. 413:

1. The accused is charged with an offense of sexual assault;
2. The evidence proffered is evidence of defendant's commission of another offense of sexual assault; and
3. The evidence is relevant under [Mil. R. Evid.] 401 and 402.

53 M.J. at 482 (citation and internal quotation marks omitted).

If the threshold requirements are met, this Court determined that the military judge must apply a balancing test under Mil. R. Evid. 403, considering the following factors: "strength of proof of the prior act——conviction versus gossip; probative weight of evidence; potential for less prejudicial evidence; distraction of factfinder; time needed for proof of prior conduct; temporal proximity; frequency of prior acts; presence or lack of intervening circumstances; and relationship between the parties." *Id*. (citations omitted). No single factor is dispositive. *Berry*, 61 M.J. at 95. The *Berry* court also stated that the military judge should make detailed findings on the record, and that his "evidentiary ruling will receive less deference from the court" if he does not do so. *Id*. at 96.

For these reasons, it is clear that Mil. R. Evid. 413 establishes a broad range of evidence admissible for consideration on any relevant matter. 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.

2. The general exclusionary rule of Mil. R. Evid. 404(b) does not apply here because Appellant was charged with a crime of sexual assault, and the testimony at issue concerned Appellant's prior commission of sexual assault.

The scope of Mil. R. Evid. 404(b), in contrast, is much more limited than that of Mil. R. Evid. 413. The first sentence of the rule states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Mil. R. Evid. 404(b). The Rule goes on to articulate eight specific, though non-exhaustive, purposes for which such evidence may be admitted. *Id*.

But the exclusionary rule of Mil. R. Evid. 404(b) does not apply where evidence of prior sexual assaults is at issue. As the *Wright* court noted, "Rule 413 not only creates an exception to Rule 404(b)'s general prohibition against the use of a defendant's propensity to commit crimes but also it is subject to Rule 403." 53 M.J. at 480. The *Wright* court also quoted Congresswoman Molinari's statement as persuasive legislative history in interpreting Fed. R. Evid. 413, which is identical to the Military Rule: "This includes the defendant's propensity to commit sexual assault . . . . The practical effect of the new rules is to put evidence of uncharged offenses in sexual assault . . . cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary

rule." *Id*. (*quoting* 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994)).

Therefore, this Court should only evaluate the testimony concerning Appellant's previous sexual assaults under the more liberal Mil. R. Evid. 413 standard. This Court need only consider Mil. R. Evid. 404(b) if it determines that the incidents to which LCpls MB and DR testified did not meet the definition of "sexual assault" under Mil. R. Evid. 413.

C. The Military Judge correctly applied the *Wright* factors in determining that Appellant's previous sexual assaults were admissible under Mil. R. Evid. 413.

1. The evidence at issue is the testimony by LCpl MB and LCpl DR regarding Appellant's prior acts.

Prior to discussing the Military Judge's application of the *Wright/Berry* paradigm to the facts of this case, it is important to delineate precisely the evidence admitted under the rule. The evidence at issue was testimony by LCpl MB and LCpl DR: specifically, Trial Counsel's proffer of testimony by LCpl MB that Appellant "reached under her clothing while she was asleep and directly touched her vagina"; and testimony by LCpl DR that she "awoke to [Appellant] standing at the foot of her bed, touching her legs and feet." (J.A. 89-90.) The testimony of each witness at trial was offered to "show the accused's propensity to commit the sort of sexual misconduct at issue in the [p]resent [c]ase." (J.A. 91.) At trial, LCpls MB and DR

testified substantially in concert with this proffer. (J.A. 27-30; 36-38.)

This is important because much of Appellant's argument rests on the proposition that Appellant did not commit the prior crimes, because he was previously acquitted of the charges that resulted from the complaints of LCpls MB and DR. (*See* Appellant's Br. at 9-10.) But the evidence considered by the Military Judge, and admitted pursuant to Mil. R. Evid. 413, was *not* that Appellant had committed a crime, or had been charged with an offense. The evidence considered is merely testimony by other persons regarding previous actions by Appellant amounting to sexual assaults.

2. The threshold requirements of the *Wright* test are satisfied.

a. Appellant was charged with sexual assault.

The evidence in question clearly meets the first threshold requirement because Appellant was charged here with a sexual assault against LCpl AK. (J.A. 94.) Appellant has never disputed this, and does not dispute it now.

b. The testimony described other sexual assaults Appellant committed.

The second threshold requirement is met, because the evidence here is testimony that Appellant committed other offenses of sexual assault, as defined by Mil. R. Evid. 413(d). Specifically, the testimony by LCpl MB that Appellant placed his

hands on LCpl MB's vagina constitutes evidence that Appellant committed "contact, without consent of the victim, between any part of the accused's body . . . and the genitals or anus of another person." Mil. R. Evid. 413(d)(2).

Similarly, the testimony by LCpl MB and LCpl DR that Appellant stood at the foot of LCpl DR's bed, reached beneath LCpl DR's pajamas, and touched LCpl DR's legs and feet constitutes evidence that Appellant committed "an attempt to engage in conduct described in paragraph [2]"——specifically, that Appellant was attempting to do to LCpl DR the same thing he had done moments previous to LCpl NM. Mil. R. Evid. 413(d)(5). This was an attempt because Appellant committed a certain act—— touching LCpl DR's legs and feet beneath her clothing——with the specific intent to touch LCpl DR's genitals; the act constituted more than mere preparation; and the act tended to effect the commission of the offense. *See* Article 80, UCMJ, 10 U.S.C. § 880. The Military Judge determined that "the [M]embers could find by a preponderance of the evidence through the credible testimony or prior testimony of [MB and DR], that [the] proffered offense occurred and that the accused committed it." (Appellate Ex. XLVII at 4.)

c. The testimony was relevant under Mil. R. Evid. 401 and 402.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. Mil. R. Evid. 402 provides the basic rule that "[a]ll relevant evidence is admissible," except as provided by some supervening authority, and "[e]vidence which is not relevant is not admissible."

The testimony of LCpls MB and DR was relevant to the charged offenses for two reasons. First, and most important, it was relevant to show Appellant's propensity to commit this type of offense——a sexual assault at night against persons who are sleeping. In other words, this evidence is relevant under Mil. R. Evid. 401 and 402, because the testimony that Appellant had committed the previous offenses tends to make it more probable he committed the charged offenses.

Second, the testimony of LCpls MB and DR was relevant for its tendency to show Appellant's plan, intent and motive. Specifically, testimony that Appellant previously committed a sexual assault on a sleeping person tends to make it more probable that he planned the offense that was charged, intended to commit it, and had a motive to commit it. It was therefore less probable the victim of the charged offense was awake and

consented to the activity, and correspondingly more probable that Appellant committed a sexual assault.

For these reasons, the threshold requirements articulated by this Court in *Wright* are met.

3. The Military Judge weighed all *Wright* factors in writing, and determined that the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.

The Military Judge properly considered all the *Wright* factors, and recorded his determinations as an Appellate Exhibit. *Cf. Berry*, 61 M.J. at 96. He determined that the strength of proof was "compelling," and that "[a] fact finder could easily find beyond a preponderance that the proffered offense occurred and that the accused committed it." (J.A. 97.) The Military Judge found the evidence "highly probative based upon [its] similarity to the charged offense." (J.A. 97.) He determined there was no potential for less prejudicial evidence of the assaults on LCpls MB and DR to be admitted. (*Id*.) The Military Judge determined there "is little if any risk of distraction." (J.A. 97.) He found that the events to which LCpls MB and DR testified occurred approximately a year prior to the charged offense. (J.A. 97.) He determined there was only a single incident of sexual assault against LCpl MB, but that the nature of the event made it "highly probative of the Accused's state of mind." (J.A. 97.) Finally, the Military Judge completed the

inquiry by noting the lack of intervening circumstances and that "[n]one of the victims had a credible reason to fabricate." (J.A. 97.)

Appellant disputes the Military Judge's evaluation of the testimony's strength of proof, pointing to evidence that purportedly "contradicted the conclusion that the assaults had occurred." (Appellant's Br. at 10-11.) But the evidence cited by Appellant is simply an affidavit documenting the "major points" made by Appellant's defense counsel at the previous court-martial, including an incident report concerning Appellant's apprehension for driving under the influence. (*Id.*, *citing* J.A. 83-88.)

Even if the incident report created doubt at Appellant's first court-martial, which is purely speculation, it does not disprove the allegations by LCpls MB and DR. The incidents need not be proven beyond a reasonable doubt to satisfy the requirements of Mil. R. Evid. 413; on the contrary, the objective likelihood that the events occurred is but one of several factors the Military Judge must consider under the *Berry* test. Here, the Military Judge determined, based on the proffered evidence, that the testimony was compelling, and met the preponderance standard. (J.A. 98.)

For these reasons, the Military Judge complied with the requirements of *Wright* and *Berry*, and properly evaluated the

testimony in light of Mil. R. Evid 413. Therefore, the Military Judge did not abuse his discretion by admitting the testimony of LCpls MB and DR for the Members' consideration, and this Court should affirm the lower court's decision.

D. Appellant's reliance on *Griggs* is misplaced because the testimony of LCpls MB and DR was properly admitted under Mil. R. Evid. 413, not under Mil. R. Evid. 404(b) as in *Griggs*.

The Military Judge also considered whether the testimony in question was admissible under Mil. R. Evid. 404(b), and determined it was admissible to for the purpose of showing intent, as well as a common scheme or *modus operandi*. (J.A. 98.) But because the Military Judge had already determined that the evidence was admissible under Mil. R. Evid. 413, the 404(b) ruling is largely superfluous.[1] The lower court agreed with this analysis, and neither the Government nor the Defense now contests the lower court's decision to confine its analysis to whether the evidence was properly admitted under Mil. R. Evid. 413. *Solomon*, No. 201100582, 2012 CCA LEXIS 291 at *7-*8 n.1 (N-M. Ct. Crim. App. July 31, 2012).

As a result, Appellant's reliance on *United States v. Griggs*, 51 M.J. 418 (C.A.A.F. 1999), is misplaced. (*See*

[1] Trial Counsel also sought admission of evidence regarding two other previous incidents under a Mil. R. Evid. 404(b) theory, because they were not "sexual assaults" as defined by Mil. R. Evid. 413. The Military Judge rejected these arguments, and they are not at issue before this Court.

Appellant's Br. at 19-20.) The Court in *Griggs* evaluated admissibility of an appellant's prior acts under the general exclusionary rule of Mil. R. Evid. 404(b). The *Griggs* rule requiring "great sensitivity when making the determination to admit evidence of prior acts that have been the subject of an acquittal" has not been applied by this Court to evaluate decisions to admit evidence of prior sexual assaults under Mil. R. Evid. 413. 51 M.J. at 420. This Court did not even mention *Griggs* when articulating the factors to be considered in the *Wright* balancing equation, despite deciding *Wright* less than a year after *Griggs*. 53 M.J. 476. Therefore, the Military Judge was under no obligation to exercise any special "great sensitivity" in light of Appellant's prior acquittal, and did not abuse his discretion by admitting the evidence under Mil. R. Evid. 413.

Even if the *Griggs* rule applies to the Mil. R. Evid. 403 balancing test required by *Wright*, it did not purport to establish any bright-line rule requiring the Military Judge to take judicial notice of the acquittal, or instruct the Members that Appellant had previously been acquitted. As Appellant concedes, he was able to cross-examine LCpl MB concerning the acquittal, and was also able to argue the acquittal in both his opening statement and his closing argument. There is consequently no showing that the Military Judge's handling of

the prior acquittal rose to the level of error under *Griggs*, and no showing that Appellant suffered prejudice as the result of such error.

For these reasons, the Military Judge did not abuse his discretion by admitting the testimony of LCpls MB and DR under Mil. R. Evid. 413.

II.

APPELLANT WAIVED REVIEW OF THE IMPROPER ARGUMENT OF WHICH HE NOW COMPLAINS BECAUSE HE FAILED TO OBJECT AT TRIAL. IF REVIEWED FOR PLAIN ERROR, THE TRIAL COUNSEL'S ARGUMENT IN SUMMATION AND REBUTTAL WAS NEVERTHELESS PROPER BECAUSE ALL ARGUMENT WAS FAIR COMMENTARY UPON EVIDENCE ADDUCED DURING TRIAL, INCLUDING THE CREDIBILITY OF WITNESSES AND THE PLAUSIBILITY OF THE DEFENSE THEORY. EVEN IF THE ARGUMENT WAS ERROR, HOWEVER, THERE WAS NO PREJUDICE BECAUSE THE IMPROPER COMMENTS RESPONDED TO AN INFLAMMATORY DEFENSE THEORY, WERE NOT SEVERE UNDER THE CIRCUMSTANCES, AND THE WEIGHT OF THE EVIDENCE AGAINST APPELLANT WAS SUBSTANTIAL.

A. Under this Court's case law, allegations of improper argument are tested for plain error when an appellant did not object at trial. But this Court should apply waiver instead, because the Rules for Court-Martial direct such practice, and because the trial court is the most appropriate venue to resolve complaints involving improper argument.

1. This Court should apply waiver because Trial Defense Counsel did not object to the argument about which he now complains.

Failure to object to improper argument before the military judge begins to instruct the members on findings constitutes

waiver. R.C.M. 919(c). The plain text of R.C.M. 919(c) appears to foreclose appellate review altogether when the accused fails to object——a conclusion bolstered by comparison to other provisions that, unlike R.C.M. 919(c), treat failure to object as waiver "in the absence of plain error." *See United States v. Marsh*, 70 M.J. 101, 108 (C.A.A.F. 2011) (Ryan, J., concurring in part and dissenting in part) (noting the same wording of R.C.M. 1001(g) and comparing that rule with R.C.M. 920(f); 1005(f); 1106(f)(6), which by contrast, treat failure to object as waiver "in the absence of plain error").

Policy interests weigh in favor of strictly applying R.C.M. 919(c) waiver in the absence of constitutional or structural error. Doing so would serve the interests of justice, as it would require all complaints regarding improper argument to be addressed by the military judge, who is much better situated to evaluate the potential prejudice of inflammatory arguments on the proceedings. Such a rule would also ensure a much more robust record for appellate courts to evaluate, enabling a more deferential standard of review.

Applying waiver in this manner will not prejudice an accused's ability to receive a fair trial. Indeed, electing not to object may in many instances supplement defense trial strategy——especially where, as here, the defense theory is premised on the idea that the prosecution was overreaching or

"fanciful." (J.A. 25.) Similarly, applying waiver here also would not prejudice Appellant, who demonstrated the capacity to object twice during Trial Counsel's summation——allowing the Military Judge on both occasions to admonish Trial Counsel, and on one occasion to issue a curative instruction. (J.A. 55, 63.)

For these reasons, this Court should revisit prior case law to the contrary, and find that Appellant's failure to contemporaneously object at trial waived this issue.

2. Plain error review.

This Court has previously noted that it reviews allegations of improper argument *de novo* for plain error. *Marsh*, 70 M.J. at 104. Should this Court tests for plain error, Appellant still has the burden of demonstrating that "(1) there is error, (2) the error is clear or obvious, and (3) the error materially prejudiced a substantial right of the accused." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

Even if an appellant carries this burden and demonstrates prejudice under plain error's third prong, the Court still has the discretion to not grant relief: "Nothing in Article 59(a), UCMJ, mandates reversal even when an error falls within its terms." *United States v. Humphries*, 71 M.J. 209, 214 (C.A.A.F. 2012). The plain error doctrine "'is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Fisher*, 21 M.J. 327,

328-29 (C.M.A. 1986). When an appellant establishes the three-part plain error test, an appellate court has discretion to grant relief if it determines that the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Olano*, 507 U.S. 725 (1993) (*quoting United States v. Atkinson*, 297 U.S. 157 (1936)); *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998). Further, the Supreme Court has suggested that courts may deny relief in a case in which the alleged error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings without deciding that an appellant's substantial rights were prejudiced by the alleged error. *See United States v. Cotton*, 535 U.S. 625 (2002); *Johnson v. United States*, 520 U.S. 461, 470 (1997).

B. Improper argument inquiries are necessarily fact-intensive and case-specific.

A long line of precedent exists for evaluating allegations of prosecutorial misconduct. The Supreme Court explains that prosecutorial misconduct occurs when "a prosecuting attorney oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal case." *Berger v. United States*, 295 U.S. 78, 85 (1935). "While prosecutorial misconduct does not automatically require a new trial or the dismissal of the charges against the

accused, relief will be granted if the trial counsel's misconduct 'actually impacted on a substantial right of an accused (i.e., resulted in prejudice).'" *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (*citing United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

In a closing argument, "trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). When evaluating claims of improper argument, "the words used by the trial counsel [in her closing argument] are a *necessary factual predicate* to our decision." *Fletcher*, 62 M.J. at 179 n.2 (emphasis added). The question of whether a trial counsel's argument is improper is therefore more case-specific than other areas of prosecutorial misconduct. *Compare id. with United States v. Terlep*, 57 M.J. 344, 349 (C.A.A.F. 2002) (no plain error because trial counsel's argument that witness told the truth "could reasonably be construed as simply calling the court's attention to the victim's fortitude.")

C. Trial Counsel's assessments of the Defense case did not constitute improper argument, because he did not personally vouch for witnesses, interject his personal beliefs into the proceedings, or disparage the Defense theory of the case.

"The touchstone of whether an argument is improper is . . . the argument itself viewed in its entire context." *Baer*, 53 M.J. at 239. Viewed in context of the entire argument, Trial

Counsel's comments during summation were not improper, because he did not personally vouch for witnesses, interject his personal beliefs into the proceedings, or disparage the Defense theory.

1. Trial Counsel did not personally vouch for the accuracy of any witness or evidence.

Improper vouching includes "the use of personal pronouns *in connection with* assertions that a witness was correct or to be believed." *Fletcher*, 62 M.J. at 180 (citation omitted)(emphasis added). The *Fletcher* court noted that "prohibited language includes, 'I think it is clear,' 'I'm telling you,' and 'I have no doubt,'" while "acceptable language includes 'you are free to conclude,' 'you may perceive that,' or 'a conclusion that may be drawn.'" *Id*. The distinction here is that, in personally vouching for the truth or falsity of certain evidence, a prosecutor "places the prestige of the government behind a witness through personal assurances of the witness's veracity." *Id*. (*quoting United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)).

The circumstances in *Fletcher* epitomize this rule, and provide clear examples of improper vouching. In that case, the trial counsel "repeatedly vouched for the credibility of the Government's witnesses and evidence." *Id*. As one example, the trial counsel there stated, "We know that that was from an

amount that's consistent with recreational use, having fun and partying with drugs." *Id*. She also offered an opinion that the Government's expert witness was "the best possible person in the whole country to come speak with us about this." *Id*.

Here, Appellant notes three instances of alleged "vouching": that Trial Counsel uttered the phrase "we should believe them," in reference to LCpls MB and DR; second, that Trial Counsel stated "You should believe him," in relation to LCpl AK; and third, that LCpl AK "was believable." (Appellant's Br. at 25.) But these statements are distinguishable from the improper comments in *Fletcher* because they are merely observations and commentary on the evidence that was presented—*not* personal opinions that place the Government's prestige behind the evidence. The broader context shows that the Trial Counsel was not interjecting his own beliefs here. On the contrary, in all three instances Trial Counsel was describing the witnesses' consistency and composure while testifying.

First, regarding LCpls MB and DR, Trial Counsel noted how each was perceived by their command at the time of Appellant's assaults: "And we should believe them that that's why they didn't tell[,] because they wanted it to go away. They testified that they're hesitant. This has been a big pain for them. Two years of testimony. Their entire command knows. Who would believe a female Marine?" (J.A. 56.) Trial Counsel here

was describing the events surrounding their testimony—— particularly, that the testimony of these two witnesses had remained steadfast and consistent for two years in spite of their commands' initial doubts——and commenting that such steadfastness and consistency makes them credible.

Similarly, Trial Counsel's description concerning LCpl AK's testimony was also an observation of AK's non-verbal demeanor while testifying. "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." (J.A. 57.) Trial Counsel here simply made observations regarding LCpl AK's demeanor while on the stand, and argued that this enhanced his credibility. Likewise, Trial Counsel's statement about LCpl AK during rebuttal does not purport to interject his own opinions, but rather merely described LCpl AK's demeanor as "[h]e testified to exactly what happened that night." (J.A. 57.)

Evaluating the full context of Trial Counsel's argument, it is clear this case accords more with the circumstances in *Terlep*, in which the trial counsel noted during argument that "the victim 'has weathered the storm of this whole incident with dignity and with a courageous spirit to get up there and tell you what happened that night, *to tell you the truth*.'" 57 M.J. at 347 (emphasis added). The *Terlep* court determined the trial counsel there did not vouch for the witness, but rather that the

argument could be construed "as simply calling the court's attention to the victim's fortitude in performing her civic duty as a witness." *Id*. at 349.

For these reasons, Trial Counsel here did not vouch for any witness during closing argument, and therefore Appellant has not demonstrated plain or obvious error.

2. Trial Counsel's observations concerning the Defense theory of the case were proper, supported by the evidence, and responsive to inflammatory Defense argument.

Prosecutors also "breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence." *United States v. Young*, 470 U.S. 1, 7 (1984). The *Fletcher* court demonstrated that this duty can be breached where the "trial counsel described the Government's evidence as 'unassailable,' 'fabulous,' and 'clear,'" while impugning the Defense evidence as "'nonsense,' 'fiction,' 'unbelievable,' 'ridiculous,' and 'phony.'" *Fletcher*, 62 M.J. at 180. It was also error in *Fletcher* for the trial counsel to opine that "It's so clear from the urinalyses that he was doing it over and over," as opposed to quoting the Government expert's opinion. *Id*.

Trial Counsel here used the words "absolutely ridiculous" and "absolutely preposterous" in his closing argument, and also stated there "were not that many conspiracies in the JFK

assassination." (J.A. 53-54.) But as the Court in *Young* cautioned, "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context." 470 U.S. at 11. "In this context, defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant." *Id*. at 12.

Here, the Defense theory of the case, from the opening statement through to the closing argument, was that LCpl AK maliciously invented a "fanciful story" accusing Appellant of an assault that did not occur. (J.A. 25.) During opening statement, Defense Counsel characterized LCpl AK's account as a "strange, fanciful story," returning to those words time and again. (J.A. 25-26.) During closing argument, Defense Counsel picked up this theme again. He compared the Government's case unfavorably to "a plate of lukewarm mashed potatoes." (J.A. 69.) He called the Government's attempt to elicit the testimony of LCpls MB and DR "comical." (J.A. 71.) Additionally, Defense Counsel based his closing on the spurious, unfounded presumption that the Government was withholding evidence:

> He's innocent. The reason we don't have anything that points to his innocence is because the government didn't give it to you. They didn't give you the reports that could have been generated, the evidence that could have been shown, which would have pointed to PFC Solomon's evidence——innocence. If you wanted

> to see it, it should have came [sic] from that table. I can't hammer on that theme hard enough.

(J.A. 72.)

This is not to suggest that Defense Counsel erred or argued improperly, but rather to provide the context in which Trial Counsel made his comments here. The purpose of the Trial Counsel's closing argument was to refocus the Members on the facts of the present case, and away from what he fairly characterized as a "smoke and mirrors" conspiracy theory, in which several unrelated actors supposedly were working against Appellant over a period lasting more than two years. (J.A. 54.) While Trial Counsel's decision to use the words "absolutely ridiculous" and "absolutely preposterous" was perhaps imprudent, this response was invited by the Defense theory, *cf. Young*, 470 U.S. at 11-15, and was an apt characterization of the state of the evidence. Consequently, considered in context, Trial Counsel's argument was not improper.

D. Trial Counsel's response to the Defense theory was not a personal attack on the defense attorney.

"When one attorney makes personal attacks on another, there is the potential for a trial to turn into a popularity contest . . . [in which] the members may be convinced to decide the case based on which lawyer they like better." *Fletcher*, 62 M.J. at 181. In *Fletcher*, the court evaluated a situation in which "trial counsel openly criticized defense counsel by

accusing him of scaring witnesses, cutting off witnesses and suborning perjury from his own client." *Id*. The trial counsel in that case also drew a sharp contrast between her "style" and the defense attorney's, drawing particular attention to the defense attorney's tactic of "overpowering and yelling and cutting people off cross examinations and wild argument"; she stated, "I think it is actually going to play for once in this case." *Id*. The *Fletcher* court found these comments to be error, where the defense counsel objected. *Id*. at 182.

Here, in contrast, there was no objection, and the Trial Counsel's comments were not inflammatory or personal, as they were in *Fletcher*. The Trial Counsel merely noted that the Defense theory relied on the idea that several witnesses were independently lying about separate events, in an elaborate scheme to wrongly convict the Appellant. (J.A. 53.) As noted directly above, this was fair response to the Defense theory and fair comment on the evidence.

Also unlike *Fletcher*, Trial Counsel here did not draw express contrast between his style and Defense Counsel's, or try to impugn Defense Counsel for employing standard cross examination techniques. Rather, Trial Counsel here limited his criticism to the Defense theory of the case, saying that the Defense Counsel "has hinted at a conspiracy between [LCpls MB and DR] trying to frame his client. . . . If this is a

conspiracy, he should say it explicitly while they're in the room." (J.A. 53.) This was not a personal attack, but rather a direct response to the Defense theory of the case.

E. Trial Counsel's rebuttal argument was not misleading.

Contrary to Appellant's assertion, (Appellant's Br. at 29-30), Trial Counsel did not lie to the Members during rebuttal when he said "We don't know if [Appellant's DUI arrest] was before, we don't know if it was after the assault on [LCpls MB and DR]" on November 15, 2009. (J.A. 73.) On the contrary, Trial Counsel was here commenting on the witnesses' testimony, which had already been admitted pursuant to Mil. R. Evid. 413, and which had been called into question by the Defense evidence. It was never conclusively established, at this trial or the last, when exactly the assaults on LCpls MB and DR occurred relative to Appellant's apprehension at the Camp Pendleton gate. This confluence of events potentially created some doubt during Appellant's previous court-martial resulting from those incidents, but it certainly did not establish that Appellant did not commit the assaults.

Here Trial Counsel sought to reasonably explain the witnesses' testimony: "Doesn't it make the most sense that right after he's spotted in the room by both [LCpls MB and DR] that he runs right out of the room, runs to get into his car, and tries to get outside the gate?" (J.A. 73.) This was a fair comment

based on the evidence presented at trial, and did not mislead the Members.[2]

In summary, the Government concedes that Trial Counsel's closing argument "could have been more artfully drawn." *Accord United States v. Paige*, 67 M.J. 442, 445 (C.A.A.F. 2009) (Stucky, J., concurring). But Trial Counsel here did not "cross[] the line of permissible conduct established by the ethical rules of the legal profession." *Young*, 470 U.S. at 14. Therefore, these inartful comments do not rise to the level of plain or obvious error.

F. Even assuming plain or obvious error, Trial Counsel's argument did not prejudice Appellant.

In improper argument cases, the plain error rule "defines prejudice under the third prong to require the appellant to show the error 'had an unfair prejudicial impact on the jury's deliberations.'" *Paige*, 67 M.J. at 454 (Stucky, J., concurring) (*quoting United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986)). "Improper argument does not require reversal unless

[2] Appellant's Brief places significant emphasis on the fact that Appellant was apprehended "while *coming onto the base*, at 0158 on the night of November 15, 2009." (Appellant's Br. at 30.) This fact does not affect analysis of Trial Counsel's argument, however. Trial Counsel's argument included the reasonable inferences that Appellant jumped in his car at some point prior to 0158 that morning and tried to get away from the scene, as well as that LCpls MB and DR were perhaps mistaken about the precise time they were assaulted. (J.A. 73.) The Record is silent as to how long Appellant was off-base before returning; there is consequently no direct evidence to contradict Trial Counsel's argument that the assaults did in fact occur.

'the trial counsel's comments, taken as a while, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.'" *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (*quoting Fletcher*, 62 M.J. at 184); *see also United States v. Mejia-Lozano*, 829 F.2d 268, 274 (1st Cir. 2009) ("We must . . . determine whether the offending conduct so poisoned the well that the trial's outcome was likely affected."). The prejudicial impact of improper argument is evaluated by balancing three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. *Fletcher*, 62 M.J. at 184. Here, the Trial Counsel's misconduct, assumed *arguendo*, was not severe, and the weight of the evidence supporting the conviction was strong.

1. Trial Counsel's misconduct, assumed *arguendo*, was not severe.

Indicators of severity include:

> (1) the raw numbers——the instances of misconduct as compared to the overall length of the argument; (2) whether the misconduct was confined to the trial counsel's rebuttal or spread . . . throughout the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge.

Id. In *Fletcher*, the court determined that the misconduct "permeated [trial counsel's] entire findings argument," and did

"not stand as isolated incidents of poor judgment in and otherwise long and uneventful trial." *Id*.

Here, in contrast, the improper argument was not pervasive. The most imprudent statement——comparing the Defense theory to conspiracy theories related to the Kennedy assassination——was a minor point in the middle of the findings argument. (J.A. 54.) Unlike the trial counsel in *Fletcher*, the Trial Counsel here did not constantly impugn the motives of Defense Counsel, suggest that Defense Counsel was suborning perjury, or imply that the Members should convict Appellant because of Defense Counsel's style of argument. Indeed, there is no evidence in the Record to suggest the Members were persuaded by any of Trial Counsel's unwise statements discussed herein.

This case accords more with the circumstances in *Paige* and *Schroder*, where the inappropriate comments derived directly from the evidence presented, were isolated to discrete circumstances, and did not permeate the entire trial. *Paige*, 67 M.J. at 451-52; *Schroder*, 65 M.J. at 58. An even closer analog is *United States v. Modica*, 663 F.2d 1173 (2d Cir. 1981), from which the *Fletcher* court drew its standard for judging prejudice. 62 M.J. at 184. In *Modica*, "the prosecutor's offending behavior was confined to his summation: his opening statement and his conduct throughout the six-day trial were free of improper remarks. This was not a trial marked by passion and prejudice." 663 F.2d at 1181.

Appellant's trial lasted four days, and all alleged misconduct occurred during the summation phase. There has been no allegation the Trial Counsel committed other misconduct prior to his arguments on findings. Like *Modica*, *Paige*, and *Schroder*, and unlike *Fletcher*, Appellant's trial "was not marked by passion and prejudice." *Id*.

2. The Military Judge's curative instructions were not substantial, but the weight of evidence against Appellant was strong.

The Military Judge here, like the military judge in *Fletcher*, issued only a boilerplate instruction prior to deliberations that arguments are not to be considered as evidence. Therefore, if this Court determines Trial Counsel's comments constituted plain error, the Government concedes this factor weighs against it.

The weight of evidence against Appellant was comparatively strong, however. Though circumstantial, LCpl AK's account was supported by other witnesses who testified to his demeanor on the night of the incident——Corporal Herbert and Staff Sergeant Mayers——and the fact that LCpl AK immediately reported the offense. (J.A. 39, 42.) Additionally, the circumstances surrounding Appellant's prior assaults of LCpls MB and DR constituted compelling evidence of Appellant's propensity to sneak in and molest sleeping Marines under the cover of darkness.

In light of this substantial evidence, Trial Counsel's improper argument, *arguendo*, did not prejudice Appellant.

For these reasons, if this Court determines Trial Counsel's argument constituted plain or obvious error, it should not grant Appellant relief because Appellant did not suffer material prejudice to any substantial right.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court on January 30, 2013. I also certify that this brief was electronically served on Appellate Defense Counsel, LT Ryan Mattina, USN, on January 30, 2013.

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