IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Charles C. HORNBACK, Private (E-1), U.S. Marine Corps, Appellant	REPLY BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 13-0442/MC Crim.App. No. 201200241

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

DAVID C. DZIENGOWSKI
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7292
F:(202) 685-7426
david.dziengowski@navy.mil
Bar no. 35719

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A. The record does not support the Government's argument that Trial Counsel obeyed the military judge's instructions. She also ran afoul of numerous military justice norms.

The Government argues in its Answer that Trial Counsel obeyed the military judge's instructions. (Appellee's Br. 52, 59.) But this argument has no basis in fact. The first time the military judge instructed Trial Counsel not to use improper character evidence appears on page 164 of the record. (J.A. at 92.) The last time appears on page 534. (J.A. at 281.) Those examples form the bookends to numerous sustained objections or admonishments from the military judge, all of which concerned Military Rule of Evidence (M.R.E.) 404(b).

Seemingly then, the Government looks past the record when it argues that Trial Counsel obeyed the military judge's instructions. If Trial Counsel had, in fact, obeyed the military judge, then there would have been no need for the military judge to repeatedly define for Trial Counsel the same lateral limits of proper questioning and argument. Together, these facts belie the Government's argument that Trial Counsel obeyed the military judge's instructions. (Appellee's Br. 52, 58.) Trial Counsel repeatedly disobeyed the military judge and stepped outside the limits of M.R.E. 404(b).

But Trial Counsel violated other rules and norms besides M.R.E. 404(b). In response to the Government's assertion that Pvt Hornback "has pointed to no rule or standard violated by

Trial Counsel, other than Mil. R. Evid. 404(b)," (Appellee's Br. 48-49), Appellant notes Trial Counsel also ran afoul of: (1) M.R.E. 402 and 802 by introducing irrelevant evidence and hearsay evidence; (2) Article 37, UCMJ, by suggesting the Convening Authority desired a particular result; and (3) applicable case law by introducing facts not in evidence and by personally vouching for evidence during closing argument.[1] These examples are addressed in turn.

Trial counsel introduced irrelevant evidence on more than one occasion. For example, while examining Cpl Morris, Trial Counsel elicited evidence that Pvt Hornback stopped paying him rent while they leased an apartment together. (J.A. at 188-89.) Subsequently, the military judge sustained a defense objection on relevance grounds. (J.A. at 189.) As a second example, Trial Counsel introduced irrelevant sentencing matters during her direct examination of LCpl Carrillo while he testified on the merits. (J.A. at 153.) There, Trial Counsel asked the witness about "any additional long-term changes" he "made in life" after allegedly receiving threats from Pvt Hornback. (Id.) Once again, the military judge sustained a defense objection on relevance grounds. Trial counsel also violated

[1] Aside from the introduction of facts not in evidence, these examples are also noted in Appellant's Brief. (Appellant's Br. 29.) The Government is mistaken, then, when it argues Appellant has only shown violations of M.R.E. 404(b). (Appellee's Br. 48-49.)

hearsay rules in attempt to elicit evidence concerning Pvt Hornback's alleged involvement in a domestic violence dispute and larceny. (J.A. at 194-95, 198.) The military judge sustained objections on these grounds as well.

Next, Trial Counsel ran afoul of Article 37, UCMJ, by injecting the convening authority into the courtroom.[2] During closing arguments, she argued, "And *the command has taken . . . action in the form of these charges before you.* The government is confident that you will find him guilty beyond a reasonable doubt." (J.A. at 234 (emphasis added).) She again injected the convening authority into the courtroom when, during sentencing argument, she argued, "And lastly, *the commander's main goal* is to preserve good order and discipline." (J.A. at 282 (emphasis added).) By injecting the convening authority into the courtroom, these comments pressured the members into finding a particular result. They constitute error, and add to the misconduct here.

These specific comments also unfairly introduced facts not in evidence. See United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007) (noting trial counsel shall not introduce facts not in evidence). Until Trial Counsel's improper argument, no evidence of the convening authority's intent existed. Trial

[2] The Government erroneously argues this error is waived on appeal. (Appellee's Br. 41.) Appellant addresses this argument in Part B, infra.

Counsel did not stop there, however. She also introduced facts not in evidence when, during sentencing argument, she claimed Pvt Hornback smoked "Spice at work." (J.A. at 280.)

Additionally, Trial Counsel ran afoul of Schroder and United States v. Fletcher, 62 M.J. 175 (C.A.A.F. 2005), when she opined during closing argument, "*NAVMC 10922 . . . is probably the most simple DOD form that I have ever seen*." (J.A. at 242 (emphasis added).) This statement is her personal opinion, and it placed the prestige of the United States Government behind a critical piece of evidence. Consequently, it is improper. See Schroder, 65 M.J. at 58 (noting Trial Counsel shall not introduce personal opinions into argument). This example is discussed further, in Part D, infra.

B. Appellant did not waive error related to Trial Counsel's brazen invocation of the convening authority's intent.

The Government insists that waiver applies to the following instance of prosecutorial misconduct: "And *the command has taken . . . action in the form of these charges before you.* The government is confident that you will find him guilty beyond a reasonable doubt." (Appellee's Br. 30, 41 (citing J.A. at 234 (emphasis added)).) This Court should reject the Government's waiver argument. As a factual matter, there was no defense objection because the military judge--immediately upon hearing Trial Counsel's comments--stopped her from continuing: "*Hang on*

a second. Okay. Members, a couple things." (J.A. at 234 (emphasis added).) He then issued another instruction to the members, imploring them--as he did before--to disregard the improper comments.

In short, the military judge found Trial Counsel's comments so objectionable that he immediately tried to cure them himself. This Court should not fashion a rule that requires an appellant to either interrupt a military judge mid-instruction or raise an objection after the military judge has just attempted to resolve the error, solely to preserve an issue for appeal. Especially here, where Trial Counsel's comments suggested the intent of the convening authority, this Court should reject the Government's waiver argument. See United States v. Douglas, 68 M.J. 349, 356 n.9 (C.A.A.F. 2010) ("We note that this Court has not applied the doctrine of waiver where unlawful command influence is at issue." (quoting United States v. Johnston, 39 M.J. 242, 244 (C.M.A. 1994))).

C. The prosecutorial misconduct here is anything but minor. This Court should reject the Government's specious argument to the contrary.

According to the Government, persistently eliciting improper character evidence over judicial instruction to the contrary, raising the specter of unlawful command influence, introducing irrelevant evidence, hearsay evidence, and facts not in evidence, and personally vouching for evidence is all

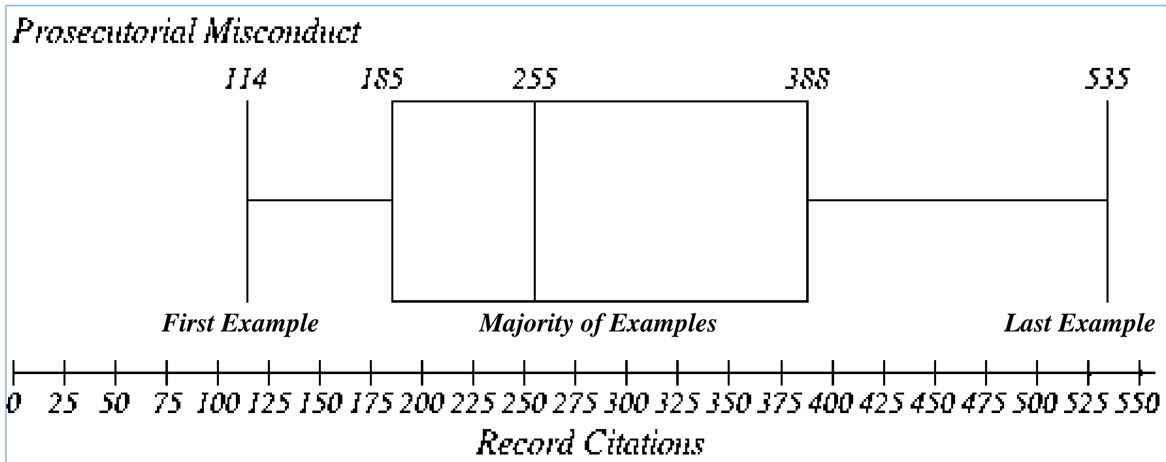
"relatively minor[.]"[3] (Appellee's Br. 40.) Worse, the Government does not even concede these matters qualify as misconduct, referring to them in its Answer as "purported misconduct[.]"[4] (Appellee's Br. 40.) Here again, this Court should reject the Government's argument.

To be sure, the facts in this case admittedly fall outside the typical presentation of prosecutorial misconduct. In United States v. Fletcher, for example, the misconduct occurred during closing argument. See 62 M.J. at 178. More recently, in United States v. Boyer, the misconduct also occurred during Trial Counsel's closing argument. See No. 201100523, 2012 CCA LEXIS 906, at *7-9 (N-M. Ct. Crim. App. Dec. 27, 2012). Here, the misconduct is not limited to Trial Counsel's closing. It permeates the entire proceeding in the presence of the members, appearing in the opening statement, witness examinations, and closing and sentencing arguments. The box plot below depicts the astonishing span of the misconduct:

[3] The Government again characterizes the misconduct as "minor" on page 38 of its Answer. (Appellee's Br. 38.)

[4] In its summary of argument, the Government puts a finer point on it: "There was no error." (Appellee's Br. 33.)

Hornback Box Plot[5]



In a 557-page record where opening statements begin at the page-113 mark, the misconduct here impacts nearly every aspect of Pvt Hornback's trial in the presence of the members. (J.A. at 45, 64-297.) As evidenced by the large box between the line segments, the majority of the misconduct occurred during Trial Counsel's examination of her own witnesses.

In Beck v. United States, the Eighth Circuit dealt with similar improper witness examinations. See 33 F.2d 107, 114 (8th Cir. 1929). There, the circuit court examined a record that featured repeated attempts by the prosecutor to elicit improper and inflammatory testimony from witnesses. Id. at 113-14. The trial judge sustained objections, "but that did not

[5] The record citations containing the alleged misconduct--presented in Table I of Appellant's Appendix (see Appellant's Br. 42-45)--account for the data points utilized to generate this box plot. Because the joint appendix only contains excerpts from the transcribed record, citations from the original record of trial are used to present an accurate and complete picture of the misconduct that occurred over the course of Pvt Hornback's trial.

dampen the ardor of counsel for long." Id. "[P]erseverance predominated," and the prosecutor continued down a forbidden path of improper colloquy. Id. at 114. The Eighth Circuit established that "[r]easonable allowance must be made for the heat of battle" with "very wide discretion vested in the trial court." Id. But importantly, that circuit court also established:

> [T]here is no excuse for offending twice, after the court has ruled upon the matter. A trial in the United States court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertaining the truth, and studied efforts to arouse them cannot be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record for convictions.

Id. Due to the pervasive prosecutorial misconduct there, the Eighth Circuit reversed and remanded for a new trial. Id.

Here, this Court should do the same. Trial Counsel resorted to "passion and prejudice" as "aids in ascertaining the truth," Beck, 33 F.2d at 114, by repeatedly eliciting improper character evidence during witness examinations. See United States v. Stockdale, 13 C.M.R. 540, 543 (N.B.R. 1953) ("A studied effort to arouse passion and prejudice is characterized by repeated and persistent asking of improper questions to which the objections of the defense have been sustained."). In Trial Counsel's mind, her improper tactics may have been the only way

to secure a conviction. After all, the military judge described the Government's evidence on the drug offenses as "so weak." (J.A. at 106.) And after Trial Counsel acknowledged that "there is no drug test in this case," (J.A. at 107), the military judge responded, "Yeah. Well, that's your problem. That doesn't change the evidentiary hurdle." (J.A. at 107.) Whatever the purpose, Trial Counsel's tactics were improper and pervaded the entire trial. Pvt Hornback was prejudiced as a result. For these reasons, this Court should set aside his findings and sentence.

D. Trial Counsel offered her personal opinion to the members on the Government's documentary evidence. And the majority of the misconduct occurred in the presence of the members.

On page 50 of its Answer, the Government claims, "In the present case, Trial Counsel's statements are merely observations and commentary regarding the evidence that was presented--not personal opinions . . . ." (Appellee's Br. 50 (citing Fletcher, 62 M.J. at 180).) To make this claim, though, the Government overlooks a critical statement of Trial Counsel. During closing argument, she argued, "*NAVMC 10922 . . . is probably the most simple DOD form that I have ever seen*." (J.A. at 242 (emphasis added).) As noted above, this statement is her personal opinion. Seemingly, it was designed to explain away benign input error. But regardless of its purpose, the personal opinion is improper. See Schroder, 65 M.J. at 58 (noting Trial

Counsel shall not introduce personal opinions into argument). It belies the Government's argument that this Trial Counsel did not offer her personal opinion. When viewed against a backdrop replete with improper questions and argument, this example further shows Pvt Hornback did not receive a fair trial. This Court should set aside the findings and sentence. But an additional matter requires correction.

The Government asserts: "Most importantly, *very little, if any,* objectionable material made it to the members." (Appellee's Br. 55 (emphasis added).) That statement is patently untrue. Each of the twenty-two examples cited as misconduct in Appellant's Brief took place in the presence of the members. (Appellant's Br. 42-45 (citing J.A. at 65, 79, 90, 96, 111, 113, 114, 138, 150-51, 153, 161, 165, 188-89, 192-93, 194-95, 223, 234, 242, 243, 280, 282).) No matter how many times the military judge tried to neutralize the misconduct with instruction, the members heard all of it, which weighs in favor of reversal.

E. The Government's attempt to distinguish Crutchfield is unavailing. The curative instructions did not neutralize the persistent and pronounced misconduct.

In United States v. Crutchfield, the Eleventh Circuit confronted a record "replete with examples of unquestionable prosecutorial misconduct . . . ." 26 F.3d 1098, 1100 (11th Cir. 1994). The prosecutor there, like here, engaged in "[s]everal

lines of questioning" that elicited irrelevant and improper character evidence. Crutchfield, 26 F.3d at 1100. To be sure, the prosecutor also "had been a previous customer of the [appellant's]", id., but the case did not turn on that fact. Instead, the Eleventh Circuit focused on the prosecutor's improper questioning and disobedience of the trial judge's instructions and rulings. Id. at 1100-03 ("[T]he record reflects numerous instances in which the prosecutor simply ignored the court's rulings on relevancy and improper character evidence objections."). The circuit court subsequently held:

> We conclude that the record supports appellant's contention that the prosecutor was guilty of multiple and continuing instances of intentional misconduct that prejudicially affected the substantial rights of both appellants.
>
> . . . .
>
> Furthermore, we are unpersuaded by the government's argument that any misconduct which may have occurred during the trial was neutralized by the court's several curative instructions and, therefore, did not affect the outcome of the proceeding. As we noted in United States v. McLain, 823 F.2d 1457, 1462 n.8 (11th Cir. 1987), '*a jury cannot always be trusted to follow instructions to disregard improper statements.' When improper inquiries and innuendos permeate a trial to such a degree as occurred in this case, we do not believe that instructions from the bench are sufficient to offset the certain prejudicial effect suffered by the accused*.

Crutchfield, 26 F.3d at 1103 (emphasis added).

Though the Government tries to distinguish Crutchfield on the less-than professional interest of the prosecutor there,

(Appellee's Br. 46), that fact is not even noted in the Eleventh Circuit's holding. Crutchfield, 26 F.3d at 1103. What is noted, however, is the continued violation of the rules of evidence despite judicial instruction to the contrary. Id. That key fact formed the basis for the Eleventh Circuit's holding. Because that is what happened here, Crutchfield is persuasive authority. The instructions from the military judge were insufficient to neutralize the misconduct.

The Government also argues that the flagrant and intentional nature of the misconduct in Crutchfield makes it inapposite here.[6] (Appellee's Br. 46.) In the same breath, the Government attempts to summon this Court's sympathy for "Trial Counsel, *a Captain*[.]" (Id. (emphasis added).) Sympathy is not deserved. At company grade, a Captain of Marines who serves as a United States prosecutor should be able to heed a military judge's *first* instruction, then correct course, and offend no more. Here, that simply did not happen. Moreover, it is no

[6] Notably, this Court need not find that Trial Counsel acted with intent to set aside the findings and sentence. Fletcher supports an objective approach to prosecutorial misconduct, focusing on its effects at trial in light of three factors that test for prejudice. 62 M.J. at 184-85. This objective approach is consistent with the approach employed by sister federal courts, which also view intent as non-dispositive or even irrelevant. See Bennett L. Gershman, Mental Culpability and Prosecutorial Misconduct, 26 Am. J. Crim. L. 121, 124-26 (1998) ("As one court put it: 'It hurts the defendant just as much to have prejudicial blasts come from the trumpet of the angel Gabriel.'" (quoting United States v. Nettl, 121 F.2d 927, 930 (3d Cir. 1941))).

rhetorical flourish to characterize this Trial Counsel's conduct as flagrant. She repeatedly violated the same rule of evidence, despite numerous instructions not to, and she introduced the intent of the convening authority to secure a conviction, despite ample notice that unlawful command influence is "the mortal enemy of military justice." United States v. Lewis, 63 M.J. 405, 407 (C.A.A.F. 2006). These two examples of misconduct easily qualify as flagrant violations of professional norms. So does her other misconduct.

Moreover, Pvt Hornback's case, like the appellant's in Crutchfield, turned on witness testimony. There was no drug test in this case. There were no recorded phone calls to support the alleged threats. Even the documentary evidence offered in support of the alleged larceny had a significant credibility component, as the defense attacked the evidence, in part, on the basis of human-input error. (J.A. at 198-99, 237-40.) In short, the Government's case was relatively weak. Given the quantity and the quality of the misconduct here, Pvt Hornback's substantial right to a fair trial was prejudiced. See United States v. Weatherspoon, 410 F.3d 1142, 1151 (9th Cir. 2005) (reversing under plain error review and finding "the possibility of prejudicial effect stemming from vouching is increased where credibility is of particular importance.").

Furthermore, the holding in Crutchfield, cited in Appellant's Brief at pages 36-38, adequately responds to the Government's curious claim that "Appellant cites nothing to demonstrate that the members could not follow these instructions . . . ." (Appellee's Br. 39.) But if more is needed, "[j]uries are presumed to follow instructions, *until demonstrated otherwise*." United States v. Washington, 57 M.J. 394, 403 (C.A.A.F. 2002) (Baker, J., concurring) (citing United States v. Holt, 33 M.J. 400, 408 (C.M.A. 1991)) (emphasis added). Here, the pronounced and persistent misconduct demonstrates otherwise. In other words, the presumption is rebutted due to persistent and pronounced misconduct that permeated Pvt Hornback's entire trial. Try as the Government may to ignore it, "empirical research demonstrates that jurors are deeply affected by prejudicial comments and . . . the impact is much greater in weak cases than in strong ones." (Appellant's Br. 37 (citing Abraham P. Ordover, Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a), 38 Emory L.J. 135, 175 (1989).) As this case was a weak one, there is no reason to believe that the members were not deeply affected by Trial Counsel's repeated, foul blows, despite the military judge's instructions.

The Government argues differently. It puts much stock into the military judge's instructions, with special emphasis on the

instruction that was given after Trial Counsel invoked the convening authority during closing argument. (Appellee's Br. 57.) The Government goes so far as to nickname this latter instruction the "master curative instruction[.]" (Id.)

But that clever tag is a misnomer. Without citing any *specific* examples, that instruction only referred *generally* to "sustained objections related to character evidence[.]" (J.A. 234-35.) The military judge did not mention, for example, the time Trial Counsel called Pvt Hornback "a criminal infection that is a plague to the Marine Corps[.]" (J.A. at 223.) He did not mention the time Trial Counsel elicited from GySgt French that Pvt Hornback had nothing to lose from "*further* NJP's [*sic*]" because "[h]e was at the bottom of the rank structure." (J.A. at 161 (emphasis added).) Nor did he mention the times when Trial Counsel elicited from witnesses that Pvt Hornback stopped paying rent, (J.A. at 189), stole a motorcycle, (J.A. at 150-51), became "bad[,]" (J.A. at 113), or worse, "combative" (J.A. at 111). The episode of vouching, moreover, was left out of the instruction. (J.A. at 242.) As for the improper sentencing argument--that had not happened yet. (J.A. at 280.) In fact, the only specific example of misconduct cited in the instruction was the one that triggered it in the first place: Trial Counsel's improper invocation of the convening authority. (J.A. at 234.)

Contrary to the Government's claim, then, this instruction was far from a "master" one. It was not the antidote needed to neutralize the serious misconduct. See, e.g., Weatherspoon, 410 F.3d at 1151 (finding the curative instructions there "did not neutralize the harm of the improper statements because they did not mention the *specific* statements of the prosecutor and were not given immediately after the damage was done[.]" (quoting United States v. Kerr, 981 F.2d 1050, 1054 (9th Cir. 1992))) (internal quotations omitted) (emphasis added); Moore v. Morton, 255 F.3d 95, 120 (3d Cir. 2001) (reversing under 28 U.S.C. § 2254 review despite "strong curative instructions" where evidence supporting conviction was weak and prosecutorial misconduct was severe); see also United States v. Beeks, 224 F.3d 741, 747 (8th Cir. 2000) (reversing where "prosecutor pursued a line of inquiry that was improper," notwithstanding defense counsel agreeing on the record that the trial court's curative instruction "was the proper instruction[.]").

In sum, the military judge's instructions were insufficient to the cure the substantial prejudice here. This Court should set aside the findings and sentence.

F. Appellant reasonably construed this Court's granted issue to encompass the "assumed without deciding" issue.

Finally, the Government ends its Answer with a bold assertion: "This Court did not grant review of whether an

assumption of prejudice was error . . . . *This Court need not answer that question*, as the issue was not granted." (Appellee's Br. 62 (emphasis added).) Given the issue presented in Pvt Hornback's Supplement to Petition for Grant of Review, and considering the revised issue subsequently granted by this Court, Appellant reasonably construed this Court desired briefing on the issue. So he briefed it.

Pvt Hornback submitted the following issue for grant of review:

> PROSECUTORIAL MISCONDUCT OCCURS WHEN A TRIAL COUNSEL OVERSTEPS THE BOUNDS OF PROPRIETY AND FAIRNESS. HERE, TRIAL COUNSEL MADE IMPROPER INQUIRIES AND ARGUMENT THROUGHOUT THE ENTIRE COURT-MARTIAL, REPEATEDLY DISOBEYING THE MILITARY JUDGE'S RULINGS. BUT THE MILITARY JUDGE GAVE A CURATIVE INSTRUCTION. GIVEN THE PERVASIVENESS OF THE MISCONDUCT, DID THE LOWER COURT ERR WHEN IT DID NOT SET ASIDE THE CONVICTION AND FINDINGS?

Suppl. to Pet. for Grant of Review, United States v. Hornback, U.S.C.A. Dkt. No. 13-0442/MC (May 8, 2013). This Court reviewed the Supplement and its issue presented, and ordered briefing on the following *revised* issue:

> WHETHER THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN FINDING NO MATERIAL PREJUDICE TO APPELLANT'S SUBSTANTIAL RIGHT TO A FAIR TRIAL AFTER IT *ASSUMED, WITHOUT DECIDING*, THAT TRIAL COUNSEL'S ACTIONS AMOUNTED TO MISCONDUCT, AND WHETHER THE MILITARY JUDGE'S CURATIVE INSTRUCTIONS SUFFICIENTLY ADDRESSED THE CUMULATIVE NATURE OF SUCH CONDUCT AS WELL AS

ANY CORRESPONDING PREJUDICE IN LIGHT OF THE FACTORS IDENTIFIED IN UNITED STATES V. FLETCHER, 62 M.J. 175 (C.A.A.F. 2005).

Order Granting Review, United States v. Hornback, U.S.C.A. Dkt. No. 13-0442/MC (Sept. 24, 2013) (emphasis added). Because the revised issue, unlike the presented issue, expressly noted the lower court's decision to assume but not decide the issue of prosecutorial misconduct, Appellant dutifully addressed it in his brief. (Appellant's Br. 30-32.)

Conclusion

Pvt Hornback's substantial right to a fair trial was materially prejudiced due to persistent and pronounced prosecutorial misconduct. Because the misconduct permeated his entire trial, the military judge's curative instructions were inadequate to neutralize it. This Court should therefore set aside the findings and sentence to provide Pvt Hornback a fair trial free from prosecutorial misconduct.

DAVID C. DZIENGOWSKI
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7292
F:(202) 685-7426
david.dziengowski@navy.mil
Bar No. 35719

Appendix

1. United States v. Boyer, No. 201100523
   2012 CCA LEXIS 906 (N-M. Ct. Crim. App. Dec. 27, 2012)

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 30, 2013.

Certificate of Compliance

This reply brief complies with Rules 24(c)-(d) and 37 of this Court's Rules of Practice and Procedure. Using Microsoft Word version 2003 with 12-point Courier New font, this reply brief contains 3,977 words, which is less than half of the type-volume specified in Rule 24(c)(1).

DAVID C. DZIENGOWSKI
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7292
F:(202) 685-7426
david.dziengowski@navy.mil
Bar No. 35719

UNITED STATES OF AMERICA v. JEREMY G. BOYER, SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201100523

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2012 CCA LEXIS 906

December 27, 2012, Decided

NOTICE: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRIOR HISTORY: [*1]
GENERAL COURT-MARTIAL.

Sentence Adjudged: 4 May 2011. Military Judge: LtCol Gregory Simmons, USMC. Convening Authority: Commanding General, Marine Corps Recruit Depot/Western Recruiting Region, San Diego, CA. Staff Judge Advocate's Recommendation: LtCol S.M. Sullivan, USMC.

COUNSEL: For Appellant: Capt Michael Berry, USMC.

For Appellee: LCDR Keith B. Lofland, JAGC, USN; Capt Mark V. Balfantz, USMC.

JUDGES: Before J.R. PERLAK, M.D. MODZELEWSKI, E.C. PRICE, Appellate Military Judges. Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.

OPINION BY: E.C. PRICE

OPINION

OPINION OF THE COURT

PRICE, Judge:

A panel of officer members, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of indecent liberties with a child and one specification of sodomy with a child under 12, in violation of Articles 120 and 125, Uniform Code of Military Justice, *10 U.S.C. §§ 920* and *925*. The members sentenced him to forfeiture of all pay and allowances, reduction to pay grade E-1, confinement for eight years, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant assigns four errors: (1) legal and factual insufficiency of his sodomy conviction; (2) admission **[*2]** of the alleged victim's [P.B.'s] recorded statement violated the *Confrontation Clause*; (3) admission of P.B.'s other hearsay statements violated the *Confrontation Clause*; and (4) the military judge abused his discretion by admitting P.B.'s out of court statements after ruling she was not competent to testify. Additionally, the appellant has petitioned for a new trial pursuant to *Article 73, UCMJ*, averring that he deserves a new trial because of P.B.'s post-trial "recantation." We specified three issues related to whether trial counsel committed prosecutorial misconduct during findings arguments. [1]

1 The specified issues included: (I) whether the trial counsel committed prosecutorial misconduct during his findings arguments, (II) if he did

> commit misconduct, whether it materially prejudiced the appellant's substantial rights, and (III) assuming material prejudice, what is the proper remedy?

After considering the record of proceedings, the parties' pleadings, and the oral arguments of counsel, we conclude that trial counsel's improper arguments on findings constitute prosecutorial misconduct that materially prejudiced the appellant's substantial rights. We will set aside the findings and **[*3]** sentence in our decretal paragraph. We find no merit in the appellant's first assigned error, and our action on the specified issues moots the remaining assignments of error. The Petition for New Trial is denied.

I. Background

On the afternoon of 25 May 2010, the appellant was with his two children and three other children in his home near Camp Pendleton. He was the only adult in the residence for approximately one hour, during which his wife, S.B., was at a medical appointment. During that timeframe, a neighbor picked up her children from the appellant's home and the appellant used his cell phone extensively.

When S.B. returned from her medical appointment, their then four-year-old daughter, P.B., immediately approached her and said "Daddy put his wink in my mouth." Record at 1035. "Wink" was a family term for penis. The appellant, then nearby on the floor playing video games with the other children, overheard P.B.'s claim, got up and approached S.B. with a confused and stunned look on his face.

S.B. took P.B. into the garage in order to speak to her alone. In the garage, P.B. said that the appellant put chocolate on his penis and put his penis in her mouth; she then made a gagging sound. **[*4]** The appellant denied any wrongdoing, but insisted that they take P.B. to the hospital for examination.

The appellant and his wife took P.B. to the hospital, where she was examined. Medical personnel discovered chocolate sauce in her hair and on her clothing, and chocolate sauce stains on her face, under her chin and on the back of her neck. P.B.'s demeanor was outgoing and cheerful, and a physician found no signs of injury or trauma. At trial, a Government expert testified that there was no forensic evidence to show that there was contact between the appellant and P.B..

During an interview by Naval Criminal Investigative Service (NCIS) special agents later that night, the appellant denied any wrongdoing. He claimed that P.B. and his three-year-old son, C.B., had poured chocolate syrup on themselves while he was distracted, and that he cleaned them up before his wife got home. During that interview, the NCIS agents misinformed the appellant that his semen had been found on P.B., but the appellant maintained his innocence, offering to pay for exculpatory forensic testing. The appellant testified at trial and again claimed to be innocent. However, cross-examination at trial highlighted **[*5]** significant inconsistencies in his version of events including: which child was holding the chocolate syrup; his precise steps in cleaning up the children; when he changed his clothing after the chocolate incident; whether and when P.B. may have observed her parents engaging in oral sexual contact; and the date of his last sexual encounter with his wife prior to the alleged sodomy of P.B..

P.B. did not testify at trial. In a pretrial *Article 39(a), UCMJ*, hearing, the military judge found P.B. incompetent to testify, concluding that she could not appreciate the importance of telling the truth in the courtroom. He also found that P.B. could appreciate the difference between the truth and a lie as a general matter, and found her statements to her mother reliable enough for admission under the excited utterance and residual exceptions to the hearsay rule. MILITARY RULES OF EVIDENCE 802, 803(2), and 807, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

At trial, among other evidence, the Government introduced P.B.'s initial statements through her mother, a drawing that P.B. made shortly after the alleged incident in which she drew her father with a penis for the first time, and a recording **[*6]** S.B. made of P.B. describing the events several months later. S.B. testified that she made the recording after P.B. claimed that the appellant had not committed the misconduct. The purported recantation occurred after S.B. told P.B. that her father could not come home because of what he had done to her. At that moment, P.B. became emotional and said that nothing had really happened, prompting S.B. to search for a recorder. When she found one several minutes later and began to record, however, P.B. retold her original account of the events and added additional detail.

The Government theory at trial focused on the detail

and consistency of P.B.'s description of the sexual activity, the corroborating physical evidence, and on inconsistencies in the defense case and the appellant's description of events.

The Defense theory at trial was reasonable doubt focused on P.B.'s complaint, credibility, possible exposure to sexually explicit information and conduct, the lack of evidence of the appellant's motive and opportunity, and the absence of physical evidence. S.B. and her mother (P.B.'s grandmother) testified that P.B. was prone to drama and exaggeration in order to get attention. They described **[*7]** a number of examples of such behavior including one incident when P.B. suffered a neck injury and then pretended to be paralyzed. After P.B. feigned paralysis, S.B. took her to the hospital where she persisted in her tale of paralysis through comprehensive medical testing and examination, only to spring from the examination table after a treating physician stated that there was nothing physically wrong with her. The appellant also described this episode in his testimony, maintaining that P.B. had never been similarly confronted in this case, although he conceded on cross-examination that she had been questioned by various parties dozens of time since the incident.

Additional facts concerning the trial counsel's findings arguments are discussed below.

II. Prosecutorial Misconduct

In response to the issues specified by the court, the appellant asserts that trial counsel's argument on findings was improper and constituted prosecutorial misconduct. He identifies six categories of trial counsel's improper comment including: (1) interjection of his personal beliefs or opinions; (2) disparaging comments about defense counsel; (3) disparaging comments about the appellant's credibility; (4) introduction **[*8]** of facts not in evidence; (5) claims that the defense was attempting to "silence" the victim, and (6) requests that the members "protect" the victim by convicting the appellant.

The appellant avers that, taken as a whole, trial counsel's comments materially prejudiced his substantial rights under *Article 59(a)*, UCMJ. He contends that defense counsel properly objected at trial; that trial counsel's improper comments were pervasive and severe; that the military judge's curative efforts were insufficient; that the evidence of guilt was "paltry"; and that there is a reasonable likelihood that the misconduct contributed to the appellant's conviction and thus materially prejudiced his substantial rights.

The Government responds that trial counsel's argument on findings was proper response to the defense theory of the case, and that any injudicious language used in argument was in response to defense counsel's mischaracterizations of the evidence and did not amount to prejudicial error. [2] Specifically, the Government contends that defense counsel's improper assertions during opening statements that P.B. was lying opened the door to trial counsel's argument that the appellant lied and that trial **[*9]** counsel's "arguably injudicious characterization" of the appellant was not disparaging in a manner that prejudiced the appellant. The Government also denied that trial counsel inappropriately interjected his personal beliefs and opinions into the trial, improperly vouched for P.B.'s credibility, or disparaged the defense counsel. The Government acknowledges that trial counsel improperly introduced facts not in evidence, but avers that the military judge's instructions cured any prejudice. We disagree.

2 The Government did not address trial counsel's repeated requests that the members "protect" P.B. in their brief.

A. The Law

"The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005)* (quoting *Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935))*. "An accused is supposed to be tried and sentenced as an individual on the basis of the offense(s) charged and the legally and logically **[*10]** relevant evidence presented." *United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007).*

While a trial counsel "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Fletcher, 62 M.J. at 179* (quoting *Berger, 295 U.S. at 88*). "[I]t is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'" *Schroder,*

65 M.J. at 58 (quoting *United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983)* and citing RULE FOR COURTS-MARTIAL 919(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Discussion). Trial counsel is also prohibited from injecting into argument irrelevant matters, such as personal opinions and facts not in evidence. *Schroder, 65 M.J. at 58*; R.C.M. 919(b) Discussion. To that end, courts have struggled to draw the "exceedingly fine line which distinguishes permissible advocacy from impermissible excess." *Fletcher, 62 M.J. at 183* (citation and internal quotation marks omitted). Improper argument is a question of law that we review *de novo. United States v. Pope, 69 M.J. 328, 334 (C.A.A.F. 2011).*

When **[*11]** determining whether prosecutorial comment was improper, the statement "must be examined in light of its context within the entire court-martial." *United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005)* (citation omitted). "Under the 'invited response' or 'invited reply' doctrine, the prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense." *Id.* (citing *United States v. Gilley, 56 M.J. 113, 120-21 (C.A.A.F. 2001)).* "In the course of reviewing whether an appellant was deprived of a fair trial by such comments, the question an appellate court must resolve is whether, viewed within the context of the entire trial . . . defense counsel's comments clearly invited the reply." *United States v. Lewis, 69 M.J. 379, 383-85* (citation and internal quotation marks omitted).

In *Fletcher*, the Court adopted a three factor balancing test to determine the impact of prosecutorial misconduct on a trial: (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*. The court reasoned that "prosecutorial misconduct by a trial counsel will **[*12]** require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id.*

B. Trial Counsel's Argument -- The Errors

First, we address the inflammatory impact of trial counsel's repeated request for the members to "protect" the victim. Second, we discuss the trial counsel's introduction of facts not in evidence. Third, we address trial counsel's disparagement of defense counsel. Fourth, we discuss trial counsel's improper argument including his personal beliefs, opinions and disparagement of the appellant.

1. Call to "Protect" the Victim

"[I]t is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'" *Schroder, 65 M.J. at 58* (quoting *Clifton, 15 M.J. at 30* and citing R.C.M. 919(b), Discussion). Asking a jury to perform a role beyond evaluating the evidence is generally impermissible. *See, e.g., United States v. Young, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)* (finding error in telling the jury "do its job"); *Brown v. State, 383 S.C. 506, 680 S.E.2d 909, 912-15 (S.C. 2009)* (finding error in asking the jury to "speak up" for child victim).

Trial **[*13]** counsel concluded his opening statement to the members with "after you hear all the facts and evidence in this case, you'll come to the right decision. You'll *protect* P.B. You will hold [the appellant] accountable for what he did to his daughter." Record at 964 (emphasis added). Briefly into his lengthy summation, trial counsel argued "you represent the people of the United States and the Marine Corps. And it will be a sad day for our Marine Corps and our country *if a child cannot be protected from their father* when they provided this overwhelming amount of consistent information, a consistent recollection of exactly what's happened." *Id.* at 1990 (emphasis added). Near the end of summation, trial counsel asserted as "fact that no one - no one to date has stood up for P.B. . . ." *Id.* at 2036. He concluded with "The government asks that *you be the first to step up and protect P.*[B.]. Listen to what she said, and listen to what she's done. Look at everything that has occurred over that last year after the incident happened *and protect her.*" *Id.* (emphasis added). Following defense counsel's closing argument on findings, trial counsel restated this theme just prior to concluding his rebuttal **[*14]** argument: "And now when you go back into that room, it is your turn to push that smoke back, to look at the evidence together, and *to protect P.*[B.]." *Id.* at 2078 (emphasis added).

We find no legal or logical relevance in trial counsel's repeated invocation to the members to "protect" P.B. in his argument on findings. [3] In context, we can identify no permissible basis to request the members to perform this role. Quite the opposite, the intended effect appears to be to appeal to the court members' protective instincts or prejudices to motivate those members to

return guilty findings. Moreover, such argument could only tend to mislead the members or prejudice the appellant.

3 Such argument may be relevant to determining an appropriate sentence. *See* R.C.M. 1001(g).

Among the many possible impacts, the members could reasonably have interpreted the call to protect P.B. as a highly prejudicial (and irrelevant) claim that she would not be safe unless her colluding parents were separated. Notably, the trial counsel called attention to the fact that the appellant's wife supported the appellant and did not believe P.B.; in his words, she was "in denial." *Id.* at 1988. The trial counsel then linked **[*15]** this state of affairs to P.B.'s welfare, arguing that "no one has stood up for P.B.," and that the members should be the "first" to do so. *Id.* at 2036. Thus, before asking the members to protect P.B., the trial counsel asserted P.B.'s isolation from those morally, legally and instinctively responsible for her safety and welfare - her parents.

These comments constitute a repeated request, indeed an appeal, to the members to perform an impermissible role beyond evaluation of the evidence - protection of the victim. It is indisputable that this case was emotionally charged given that it involved sexual misconduct with a four-year-old child. Repeated references to "protect[ing]" P.B. suggests that these words were carefully chosen to play on the natural human instinct to protect a young child - particularly when her father was the threat and in light of evidence that her mother was either unable or unwilling to protect her. In the same breath, trial counsel cued the members to remember "everything that has occurred over that last year," which would include P.B.'s brief placement in foster care, purportedly triggered by notification of state authorities that her mother allowed the appellant **[*16]** to visit P.B. without prior approval. [4] That P.B.'s recent home life was difficult, and that her mother did not believe her rendition, are facts that invite the sympathy of any caring person, but they bear no relevance on the appellant's guilt, and could only have served to unduly inflame the passions or prejudices of the court members. *Schroder, 65 M.J. at 58.*

4 In response to a member's question, S.B. testified that Child Protective Services removed her children believing "I was a non-*protective* parent." Record at 1149 (emphasis added).

Unlike most of the errors addressed below, the appellant did not object to these comments, so we review for plain error. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused. *Fletcher, 62 M.J. at 179.* We find that trial counsel's repeated appeal to "protect" P.B. constituted error. Similarly, given the strategic placement of trial counsel's appeals at the conclusion of his opening statement, at the beginning and dramatic end of his arguments on findings, and near the conclusion of his rebuttal argument, the error was plain and obvious. Such **[*17]** an argument could only serve to unduly inflame the court members' passions or prejudices and was irrelevant to determining guilt.

In the context of this trial, and for the reasons discussed below, we also conclude that trial counsel's impermissible "protect" comments materially prejudiced the substantial rights of the appellant. *See Carter, 61 M.J. at 33* ("A prosecutorial comment must be examined in light of its context within the entire court-martial.").

Assuming *arguendo* that trial counsel's repeated appeals to the members to "protect" P.B. do not constitute plain error, we exercise our authority, in the interests of justice, and take notice of this otherwise "forfeited" error. *See Art. 66(c)*, UCMJ; *see also United States v. Nerad, 69 M.J. 138, 144 (C.A.A.F. 2010)* (citing *United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991)* (holding that a CCA may disregard doctrines like waiver "in the interest of justice" to reach legal errors that would otherwise be uncognizable)).

2. Facts Not in Evidence

The trial counsel's reliance on facts not in evidence during argument is especially troublesome as his comments appeared to target the heart of the defense case, forming testimonial arguments **[*18]** that "are not given under oath, are not subject to objection based upon the rules of evidence, and are not subject to the testing process of cross-examination." *Clifton, 15 M.J. at 29.* The record is replete with examples of trial counsel's efforts to augment the record with facts not in evidence. Two notable examples were improper comments rebutting a central defense theory, the insufficiency of the evidence, specifically P.B.'s absence from trial.

In his closing argument, the defense counsel emphasized the significance of the military judge's determination that P.B. was incapable of appreciating the

seriousness of the court and incapable of understanding the importance of telling the truth. During his closing argument, trial counsel claimed that he had "studied hundreds and hundreds of trials" and was "not aware of any child ever testifying under the age of seven." Record at 2001. He later argued "And again, gentlemen, four year-olds simply rarely, if ever, testify." *Id.* at 2008. This argument is unsupported by the record and contradicted by case citations included in the Government's pleadings in this case. [5]

5 The Government's pretrial motion requesting a ruling on P.B.'s competency **[*19]** to testify included cites to two cases in which several children of similar age testified at trial. *See United States v. Morgan, 31 M.J. 43 (C.M.A. 1990)* (4-year-old victim of sexual offenses testified at trial); *United States v. Allen, 13 M.J. 597 (A.F.C.M.R. 1982)* (three 4-5 year-old victims of indecent liberties testified at trial). Appellate Exhibit II at 3.

The Supreme Court recognized that "assertions of personal knowledge [by prosecutors during argument] are apt to carry much weight against the accused when they should properly carry none." *Berger, 295 U.S. at 88*. We are particularly concerned that the trial counsel exploited his standing because, shortly after he made this misleading factual assertion about child witnesses in other cases, he characterized the defense's attempt to raise the issue of "incompetency" as "another distortion intended to distract you." Record at 2001. Trial defense counsel made a timely objection to this argument as facts not in evidence and requested a curative instruction. *Id.* at 2020-21. The military judge overruled the objection, but indicated he would again instruct the members that statements of trial counsel are not evidence.

Additionally, in **[*20]** his closing argument, trial defense counsel emphasized his inability and that of the members to question P.B. and then articulated numerous questions comprising more than 3 single-spaced typed pages in the transcript that he would have liked to ask P.B. had she testified. *Id.* at 2046-49. Trial counsel objected, in the presence of the members, to a portion of the hypothetical questions during which defense counsel indicated a "[question] was never posed to P[.B.]," stating those questions were asked the night of the incident. *Id.* at 2048. He subsequently argued in rebuttal that trial defense counsel "also brought up his--about 20 minutes of I wish they had asked that, I wish they had asked this questions [sic]. The fact is *all of those questions were asked of P.B. We wouldn't be here if they weren't.*" *Id.* at 2069 (emphasis added).

Defense counsel also objected to this argument asserting either that he had not been provided required information in discovery or that trial counsel's assertion implies that the Government has brought this action based upon facts not before the members. *Id.* at 2084-86. The military judge commented that "while I agree with you that trial counsel may have gone **[*21]** a little far in his response to [defense counsel's desired questions] this is something that you brought on yourself." *Id.* at 2086. The military judge then agreed to instruct that argument is not evidence and that the members must limit their decision on the offenses to the evidence.

By arguing the aforementioned facts not in evidence, trial counsel was "inviting the members to accept new information as factual, based upon his authority." *Clifton, 15 M.J. at 30*. Such argument was improper and constitutes error. [6]

6 Other examples of trial counsel's reliance on facts not in evidence include statements that "*All too often in these cases* where a parent is accused of molesting their child, that child is never given a voice, never given a genuine opportunity to explain exactly what happened to them. Whether it's because that child is too young to [understand or articulate what happened], the child's never given an opportunity to let the truth come forward. *More commonly*, if one of the parents is accused of molesting their child, that other parent will be in denial." *Id.* at 1988 (emphasis added). After acknowledging that there was no expert testimony on the impact of child molestation on a **[*22]** child, trial counsel asserted that "P.B. exhibiting strange behavior [months] after being molested, taken out of her home is not unusual." *Id.* at 2000. Defense counsel did not object to these comments and we find no plain error, but do consider these comments relevant to prejudice.

3. Disparagement of the Defense Counsel

Disparaging the opposing counsel presents a similar risk of distracting the jury from the evidence and encouraging them to decide the case based on which lawyer they like better. *Fletcher, 62 M.J. at 181*. In

Fletcher, the court found error where trial counsel made disparaging comments about defense counsel's style and also made comments suggesting that Fletcher's defense was invented by his counsel. The trial counsel here made two different arguments that impermissibly disparaged the defense counsel.

First, he carried too far a common line of argument about defense counsel and distraction. Critique of an opponent's case is permissible to a point, but *Fletcher* found error where the trial counsel referred to her opponent's arguments as "fiction" four times, called one argument "a phony distraction," and referred to the entire defense case as "that thing they tried to perpetrate **[*23]** on you." *62 M.J. at 182*. Likewise, other courts have drawn the line at terms like "fabricated," "woven out of the thread of desperation," or made "out of whole cloth." *United States v. Washington, 263 F. Supp. 2d 413, 434-35 (D.Conn. 2003)* (citations omitted).

Here trial counsel criticized the defense assertion of P.B.'s incompetency as a basis for reasonable doubt as "another distortion intended to distract you." Record at 2001. In response to a defense posit that the nine-year-old daughter of a neighbor who purportedly often simulated oral sex with varying objects as a likely source of P.B.'s sexually advanced knowledge, the trial counsel argued "this child was attacked by the defense and Sergeant Boyer, because they didn't think that she would be able to have a voice. They didn't think that she would be able to defend herself." *Id.* at 2004. Trial counsel similarly criticized the "desperate level, the desperate lengths that defense counsel are trying to go through to distract you from the evidence," and repeatedly characterized the defense as "grasping at straws." *Id.* at 2005-06. Later, he decried the "nonsense the defense has thrown on you." *Id.* at 2014. One of the themes of his **[*24]** rebuttal was that the defense had "popped smoke, calling it reasonable doubt, and now they are scurrying in different corners trying to hide." *Id.* at 2067; *see also* 2075, 2078.

These comments are disparaging and address the trustworthiness of counsel, not just the state of the evidence. When a prosecutor personalizes the case in this manner, it creates an unfair advantage as the Government begins most trials with the members' trust in the good faith of prosecutors. *See Berger, 295 U.S. at 88*. That advantage presents yet another non-evidentiary factor that could unduly influence the outcome, and the word choice here crossed the line into impermissible error.

Second, the trial counsel asserted that the defense had tried to "silence" P.B.. Trial counsel argued that "the defense has done everything they can to silence P.B." Record at 1991. He then articulated "five areas in which the defense and [P.]B.'s father are *trying to silence her.*" *Id.* at 1992. "Again, the defense is using P.[B.] being a four-year-old child against her and they're making *every attempt to silence everything that she's done and said to get their client off the hook.*" *Id.* at 1999.

Defense counsel objected, asserting that **[*25]** use of the term "silence" suggested defense counsel had done something "impermissible," "something wrong," and "can lead the members to wonder if there is something additional out there." *Id.* at 2021. We find trial counsel's response at trial telling. He claimed that the term, "silence" was to salvage P.B.'s credibility, and then immediately noted that "[t]here is also evidence . . . that [S.B.] has destroyed evidence, which I haven't even commented on . . . ." *Id.* The military judge disagreed with defense counsel's interpretation, and instructed the members to base their determination on their recollection of the evidence and that counsel's argument isn't evidence.

We disagree with the trial judge and conclude that trial counsel's use of the words "silence" in reference to the defense was disparaging, inflammatory argument and error. *See United States v. Xiong, 262 F.3d 672, 675 (7th Cir. 2001)* ("Disparaging remarks [suggesting] defense counsel has lied to or withheld information [can] caus[e] the jury to believe that the defense's characterization of the evidence should not be trusted and [] that a finding of not guilty would be in conflict with the true facts of the case."). Here **[*26]** trial counsel asserted three times that the defense had attempted to "silence P.B.." His response to the defense objection and immediate reference to alleged destruction of evidence by S.B. suggests use of this inflammatory term was not a "slip of the tongue," but instead a calculated, clearly inflammatory choice of words. *Carter, 61 M.J. at 34*.

In context, use of the word "silence" reasonably implies that defense counsel or the accused has done something impermissible. That risk was acute in this case, where the "silent" victim was the accused's daughter and where her mother's doubts regarding P.B.'s story were acknowledged by both parties. It is intuitive that parents exert a powerful influence over their children, reasonably to include participation in proceedings or

responses to questions to determine competency, and that therefore P.B.'s absence may have been influenced by the appellant or his counsel. This concern may be vitiated, but is not eliminated, by the military judge's instruction that he had determined that P.B. was not competent to testify. Record at 1986.

4. Personal Beliefs, Opinions and Disparagement of the Appellant

It is improper for a trial counsel to interject himself **[*27]** into the proceedings by expressing a "personal belief or opinion as to the truth or falsity of any testimony or evidence." *Fletcher, 62 M.J. at 179* (citations and internal quotation marks omitted). When trial counsel offers personal opinions, they become "a form of unsworn, unchecked testimony and tend to exploit the influence of [the] office and undermine the objective detachment which should separate a lawyer from the cause for which [he] argues." *Id. at 179-80* (citation and internal quotations omitted). There are many ways a trial counsel might violate the rule against expressing a personal belief or opinion including "giving personal assurances that the Government's witnesses are telling the truth" and "offering substantive commentary on the truth or falsity of the testimony and evidence." *Id. at 180* (citing *Young, 470 U.S. at 18-19*). This is commonly referred to as "vouching," and often occurs when prosecutors "use . . . personal pronouns in connection with assertions that a witness was correct or to be believed." *Id.* Also, "calling the accused a liar is a 'dangerous practice that should be avoided.'" *Id. at 182* (quoting *Clifton, 15 M.J. at 30 n.5*).

Trial counsel offered his "take" **[*28]** that the appellant's testimony was "rehearsed" and "disingenuous." Record at 2032. This was a personal assessment, and as the word "rehearsed" suggests, there was an unmistakable implication that defense counsel was complicit and would go to "desperate lengths" to distract the members from the truth. *Id.* at 2005. He also asserted in varying forms that the appellant lied to the NCIS and/or the members more than 10 times in argument. And the Government fairly argues that saying the appellant lied was an "invited response" to defense tactics. However, we do find that it was error for trial counsel to disparage the appellant so thoroughly and repeatedly by arguing at least ten times that he was lying. The comments here ventured far into the "gray zone" of improper opinion and disparagement of the accused and were the subject of the appellant's objection prior to argument. *Id.* at 1974.

The trial counsel also repeatedly interjected his personal beliefs and opinions into these proceedings. For example, "[w]e know that her father, the person who did this, has provided a variety of different accounts of exactly what happened." *Id.* at 2072. "The government hopes that we haven't come to a point **[*29]** . . . where you are going to let someone who is clearly guilty walk away because of forensic evidence that you wouldn't expect to find in the first place." *Id.* at 2077.

Other personal assessments included: "Mr. W [a government witness] came down, defended his daughter, defended himself, and was honest," *id.* at 2004; that it was "ridiculous" for the appellant to "waffle" on the witness stand when he did not remember something, *id.* at 2016; and that "[w]e have to listen to [PB]," *id.* at 2069.

Trial counsel also told a detailed "personal story" in the first-person singular, describing a child that he knew, in an attempt to bolster P.B.'s credibility by illustrating through a personal anecdote that children do not have inherent sexual knowledge, and even if exposed to sexual information are unable to place that knowledge into proper context. *Id.* at 2071.

Even putting aside the irrelevance of this commentary, it is error because the trial counsel's personal perspective--reinforced by the repeated use of the personal pronoun--is necessarily not based on the evidence. It risks creating the inference that P.B. is telling the truth not because of anything offered during the trial, but instead because **[*30]** trial counsel has the ability to evaluate children and has found P.B. credible. The Supreme Court could have been commenting on these same facts when it warned against the danger that "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Young, 470 U.S. at 18-19* (citing *Berger, 295 U.S. at 88-89*).

C. Prejudice

"[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *Id. at 11*. We are mindful that the distinction between proper and improper argument is

bounded by "exceedingly fine line[s]." *Fletcher, 62 M.J. at 183*. We turn to the three-part test articulated in *Fletcher* to determine whether "the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id. at 184*.

1. Severity of the Misconduct

"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 **[*31]** throughout the findings argument or 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.* (citing *United States v. Modica, 663 F.2d 1173, 1181 (2d Cir. 1981))*.

We have highlighted the passages that we find most troubling, but in total there are dozens of improper comments, appearing on more than 25 of the 53 pages of trial counsel's transcribed arguments on findings. Viewed individually, no one comment is particularly significant or prejudicial. In the aggregate, however, the effect is severe. The trial counsel asked the members to protect P.B. four times, three of which were among the last lines of his arguments, while also asserting that the defense had "silence[d]" the alleged victim. He referred to facts not in evidence at least six times; two of those "facts" directly rebutted key aspects of the central defense theory on insufficiency of the evidence.

Like *Fletcher,* there are "more than two dozen instances in which the trial counsel offered [his] personal commentary on the truth or falsity of the testimony and evidence." *62 M.J. at 181*. We acknowledge that **[*32]** in a case where witness credibility is a central issue, some such commentary is perhaps likely, and would rarely constitute reversible error. However, when in such a high volume, and in combination with other errors, the repeated juxtaposition of the Government's truthful witnesses with an allegedly lying accused becomes more like prejudicial name-calling than a proper marshalling of evidence. *See Hodge v. Hurley, 426 F.3d 368, 379-80 (6th Cir. 2005)*.

The brevity of the deliberations also favors the appellant. After pretrial litigation on nine separate days and an eight-day trial, the members deliberated for only two hours, less time than it took trial counsel to argue. In *Fletcher*, the court weighed this factor in the appellant's favor where the members deliberated for four hours after a three-day trial. *62 M.J. at 185*.

The remaining factors do not clearly favor either party. The trial counsel's misconduct was not confined to his rebuttal, and in fact most of it came during his initial (and much lengthier) summation. This is a small portion of the overall trial, but an important one. And, as we will discuss below, there were essentially no rulings from the military judge for the trial **[*33]** counsel to abide by.

2. Curative Measures

Generally, potential harm from improper comments can be cured through a proper curative instruction. *See United States v. Ashby, 68 M.J. 108, 123 (C.A.A.F. 2009)*. Like the military judge in *Fletcher*, however, this military judge essentially gave a "generic limiting instruction reminding the members that 'what the attorneys say is not evidence.'" *62 M.J. at 185*. When requested to provide more specific limiting instructions, the military judge declined to do so.

Of note, prior to closing statements, the defense counsel alerted the trial judge that he believed the trial counsel was going to engage in improper argument. The trial defense counsel cited as the basis for his concern the PowerPoint presentation that trial counsel had prepared for his closing and trial counsel's improper argument in an earlier trial. The defense counsel provided the military judge with a copy of *Fletcher*, and requested that the judge instruct trial counsel not to call his client a liar, make disparaging comments about defense counsel, or inject his personal beliefs. Record at 1974. The judge declined to provide tailored instructions or guidance to counsel, instead stating **[*34]** that at that time he "[was] in no position to determine that fine line for counsel [and] ha[d] to trust that counsel know what the rules are and will follow them." *Id.* at 1975.

Following completion of trial counsel's argument in rebuttal and prior to the members commencing deliberations, defense counsel objected to trial counsel's reliance on facts not in evidence. Yet, with the exception of repeated and essentially generic instructions that arguments of counsel are not evidence, the military judge declined to provide any specific limiting or curative instructions.

We conclude that the military judge's minimal curative efforts were insufficient to overcome the severity of the trial counsel's misconduct. With the exception of several "argument is not evidence" instructions, the military judge provided no targeted or curative instructions. As the Court of Appeals for the Armed Forces has long-recognized "[c]orrective instructions at an early point might have dispelled the taint of the initial remarks." *Fletcher, 62 M.J. at 185* (quoting *United States v. Knickerbocker, 25 C.M.A. 346, 2 M.J. 128, 129, 54 C.M.R. 1072 (C.M.A. 1977))*. We conclude under these facts that "'it is impossible to say that the evil influence upon **[*35]** the [members] of these acts of misconduct was removed by such mild judicial action as was taken.'" *Id.* (quoting *Berger, 295 U.S. at 85*).

3. Weight of the Evidence

Courts often do not find unfair prejudice if the evidence is "overwhelming," *Young, 470 U.S. at 19*, but a closer case presents a greater risk that the misconduct influenced the result. *See, e.g., United States v. Carroll, 26 F.3d 1380, 1390 (6th Cir. 1994)*. That risk is present here, where the evidentiary picture was mixed. Although the evidence supporting the conviction is relatively strong and we have concluded that the findings were legally and factually sufficient, there is inherent doubt based upon the victim's tender age, absence from trial due to the military judge's competency determination, and her history of exaggeration. In addition, the short window of time in which these offenses could have occurred and the lack of forensic evidence do not weigh in favor of the Government.

To be clear, the Government's circumstantial case was strong and, combined with the appellant's unpersuasive testimony, could have weighed heavily in the members deliberations. However, the evidence is by no measure "overwhelming." This was a **[*36]** close, emotionally charged child sexual abuse case - so much so that a single instance of inflammatory rhetoric or a well-placed fact from outside the record could have tipped the balance in the Government's favor.

III. Conclusion

We are mindful that "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *Young, 470 U.S. at 11*. However, the cumulative impact of trial counsel's strategic and repeated invocation that the members "protect" the young child victim from her sexually abusive father, and trial counsel's argument of facts not in evidence that deliberately targeted crucial points of contention seriously affected the fairness of this trial.

Standing alone, many of trial counsel's remaining improper comments would likely have been deemed not prejudicial, particularly in light of the military judge's repeated admonition that arguments of counsel were not evidence. However, under these facts, trial counsel's use of the words "silence" the victim, disparagement of the defense counsel, defense case and the appellant, and insertion of his personal beliefs and opinions clearly enhanced the potential impact and prejudice of the improper **[*37]** "protect" argument. In fact, trial counsel's improper comments were not "slight or confined to a single instance, but . . . pronounced and persistent, with a probably cumulative effect upon the jury which cannot be regarded as inconsequential." *Fletcher, 62 M.J. at 185* (quoting *Berger, 295 U.S. at 89*).

Simply put, trial counsel's multiple improper comments crossed the "exceedingly fine line which distinguishes permissible advocacy from improper excess." *Id. at 183* (citation and internal quotation marks omitted). In such a close and emotionally charged case, there is simply too high a risk that the members were swayed by trial counsel's inflammatory and multiple invitations to consider factors outside of the evidence. Further, we conclude that trial counsel's improper comments, taken as a whole, were so inflammatory and damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone. *Id. at 184*. After balancing the three *Fletcher* factors, we conclude that setting aside the findings and sentence is the proper remedy.

Accordingly, the findings and sentence are set aside. *Art. 59(a)* and *66(c)*, UCMJ. A rehearing is authorized.

Chief Judge PERLAK **[*38]** and Senior Judge MODZELEWSKI concur.