IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| UNITED STATES,<br>Appellee/<br>Cross-Appellant | ) | ANSWER ON BEHALF OF APPELLEE/<br>BRIEF ON BEHALF OF CROSS-<br>APPELLANT |
| v. | ) | Crim. App. Dkt. No. 201400315 |
| Beau T. MARTIN,<br>Sergeant (E-5)<br>U.S. Marine Corps<br>Appellant/<br>Cross-Appellee | ) | USCA Dkt. No. 15-0754/MC |

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


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UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

## Granted Issue

WHETHER THE COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE HUMAN LIE DETECTOR TESTIMONY OFFERED BY THE ALLEGED VICTIM'S HUSBAND WAS NOT MATERIALLY PREJUDICIAL.

## Certified Issue[1]

DID TRIAL DEFENSE COUNSEL INVITE ERROR WHEN HE OPENED THE DOOR TO HUMAN LIE DETECTOR TESTIMONY DURING THE CROSS-EXAMINATION OF THE VICTIM'S HUSBAND?

## 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 (2012), because Appellant's/ Cross-Appellee's[2] approved sentence included a bad-conduct discharge. This Court has jurisdiction over this case pursuant to Article 67(a)(2)-(3), UCMJ, 10 U.S.C. § 867(a)(2)-(3) (2012).

## Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of wrongful sexual contact, the lesser-included offense of aggravated sexual assault, in violation of Article 120(m), UCMJ, 10 U.S.C. § 920(m) (2007). The Members sentenced Appellant to reduction to pay grade E-1 and a bad-conduct discharge. The Convening Authority approved

[1] For judicial economy, the United States consolidated the granted and certified issues.
[2] Hereinafter "Appellant."

the sentence as adjudged and, except for the punitive discharge, ordered it executed.

On June 18, 2015, the lower court affirmed the findings and sentence. *United States v. Martin*, No. 201400315, 2015 CCA LEXIS 250 (N-M. Ct. Crim. App. June 18, 2015). Appellant filed a Petition for Review, which this Court granted on October 7, 2015. On November 5, 2015, the United States filed a Certificate for Review.

## Statement of Facts

A. Appellant was CRI's direct supervisor. Appellant digitally penetrated CRI's vagina without her permission. CRI told her mentor and her husband within a few weeks of the incident.

1. Shortly after CRI reported to her first duty station, Appellant invited her to a party at a staff sergeant's home.

CRI enlisted in the Marine Corps in February 2011. (J.A. 66.) She reported to her first command in August 2011. (J.A. 66, 68.) There, Appellant was her platoon sergeant and direct supervisor. (J.A. 68.) A few weeks after she arrived, Appellant invited her to a pre-deployment farewell party. (J.A. 69, 348.)

CRI attended the party with her husband, Corporal (Cpl) AI. (J.A. 35, 69.) Both CRI and Cpl AI were then privates first

class.[3] (J.A. 36.) Other attendees included Mr. West,[4] CLE, Cpl Layman, the owners of the house (a staff sergeant and his wife), the neighbors, and a few others. (J.A. 70, 77, 348.) CRI drank enough to make her feel intoxicated. (J.A. 70-71, 75.)

CRI vomited at the party from a combination of the alcohol and her medical condition, gastroparesis.[5] (J.A. 42, 75.)

2. After falling asleep in the guest bedroom, CRI awoke to Appellant digitally penetrating her vagina.

CRI and her husband slept in a guest bedroom. (J.A. 37, 47, 77, 349.) Cpl AI slept on his side, facing the wall, on the side of the bed that was against the wall. (J.A. 47, 78, 349.) CRI slept on her back. (J.A. 79, 349.) They slept under a sheet, fully clothed. (J.A. 47, 79, 100, 349.)

CRI awoke and found Appellant's hand inside the front of her pants, under her panties. (J.A. 79-80, 349.) CRI felt Appellant's fingers inside her vagina. (J.A. 81, 349.) Appellant was kneeling on the floor next to the bed and CRI made eye contact with him. (J.A. 80-81, 179, 349.) A dim light from

[3] CRI was a civilian at the time of trial. Appellant refers to her as LCpl CI.
[4] Mr. West was then a lance corporal. (J.A. 70.)
[5] CRI entered the Marine Corps with gastroparesis, a condition that makes her vomit, but it worsened following boot camp, and she was placed on limited duty after reporting to her first command. (J.A. 68.) She was medically separated against her wishes in July 2013. (J.A. 67-68.)

the window and the hallway illuminated the room so that CRI could positively identify Appellant. (J.A. 80, 349.)

CRI initially froze, but after approximately three to five minutes, she rolled away from Appellant and attempted to wake her husband by shaking his shoulder. (J.A. 81-83, 349.) Appellant's hand then came out of her pants. (J.A. 82-83.) While attempting to wake her husband, CRI felt the sheet fall off of her. (J.A. 83.) Appellant then left the room. (*Id.*) CRI did not scream or lash out at Appellant. (*Id.*)

Thereafter CRI went to the bathroom and returned to the bed crying. (J.A. 84, 350.) She fell back to sleep and woke her husband in the morning. (J.A. 84-85, 350.) They went home and CRI showered and lay in bed the rest of the day. (J.A. 85, 350.)

3. CRI told her mentor, Cpl Visconti, shortly after the incident.

Approximately one week after the incident, CRI went on an exercise aboard a Naval ship. (J.A. 85-86.) In the berthing area of the ship, CRI told her mentor, Cpl Visconti, what Appellant did to her at the party. (J.A. 88.) CRI expressed concern with how to handle the situation because Appellant was her direct supervisor. (J.A. 88.)

When CRI returned to work following the exercise, Appellant had already left for deployment. (J.A. 88.) Cpl Visconti and

CRI continued to discuss the incident after the exercise, and Cpl Visconti encouraged CRI to report it, but CRI declined. (J.A. 89.)

4. CRI told her husband, Cpl AI, shortly after the incident.

CRI told her husband "within a week or so of it happening." (J.A. 86.) When she told him, Cpl AI reacted in "disbelief." (*Id.*)

5. Cpl Visconti reported the allegations to the command approximately one year after the incident. NCIS then interviewed CRI, and the United States charged Appellant with sexual assault.

In approximately October 2012, Cpl Visconti reported the incident to the command. (J.A. 89.) CRI believed that Cpl Visconti did it to protect her because Appellant had returned from deployment and CRI did not want to be around him. (J.A. 89-90.)

Following the report, Naval Criminal Investigative Service (NCIS) interviewed CRI. (J.A. 93.) CRI signed a sworn statement the next day. (J.A. 185, 348-52.)

The United States charged Appellant with sexually assaulting CRI by digitally penetrating her vagina with his finger.[6] (J.A. 11.)

[6] The United States also charged Appellant with wrongful sexual contact of CLE and CRI by slapping their buttocks with his hand.

B. During *voir dire*, the Members agreed to assess witness credibility based on the Military Judge's instructions. They also agreed to resolve doubt in favor of Appellant if they were "not convinced one way or another."

Trial Counsel informed the Members during *voir dire* that the Military Judge would instruct that they have a duty to determine the credibility of the witnesses. (J.A. 372.) The Members agreed they could follow the Military Judge's instructions and assess all witness credibility based on the Military Judge's instructions. (J.A. 372)

During the Defense's *voir dire*, the Members acknowledged that they must resolve any doubt in favor of Appellant if "at the close of all the evidence" they were "not convinced one way or the other." (J.A. 373.)

C. The Parties presented opening statements.

1. Trial Counsel provided a cursory review of the Government's case.

Trial Counsel opened by telling the Members that "this is a case about a sergeant who abused his position as [a noncommissioned officer in charge (NCOIC)] and a sergeant who wouldn't take no for an answer." (J.A. 274.) Trial Counsel briefly described the party and then previewed the Government's witnesses. (J.A. 274-76.) Regarding Cpl AI, Trial Counsel indicated that he would testify to being in the bed next to his

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(J.A. 11.) Appellant was acquitted of these offenses. (J.A. 353.)

wife, that he is a heavy sleeper, and that "there's no way it could have been him that touched his wife." (J.A. 276.)

2. Trial Defense Counsel introduced the Defense's theory that the Government's "storytellers" accused Appellant.

Trial Defense Counsel began by noting: "Evolving truth. It doesn't make sense, does it? Because the truth doesn't evolve. It doesn't waiver. [sic] It doesn't falter. Truth endures; stays true; stays constant." (J.A. 276.) Trial Defense Counsel continued that the Government's evidence consisted of "story tellers" who were "not trustworthy." (J.A. 277.) Trial Defense Counsel then previewed the testimony of the Government's three "story tellers"——CLE, Mr. West, and CRI. (J.A. 277-280.)

Regarding Mr. West, Trial Defense Counsel explained that he was biased against Appellant. (J.A. 279.) Trial Defense Counsel also previewed that Marines from the unit would testify that Mr. West was "not trustworthy." (J.A. 279.)

Regarding CRI, Trial Defense Counsel explained that the Members would see how and why her story had changed: (1) CRI did not want to report anything; (2) CRI's story differed from Mr. West's; and, (3) CRI had a motive to fabricate based on her receipt of benefits from the Veteran's Administration (VA). (J.A. 279-80.)

Trial Defense Counsel concluded with the theme that "stories evolve" but the truth does not, and "stories are not

the truth." (J.A. 280.) Therefore, Trial Defense Counsel told the Members that, at the close of the case, he would ask the Members to find Appellant not guilty. (*Id.*)

D. Seven witnesses testified during the Government's case-in-chief, including Cpl Visconti, to whom CRI reported the misconduct; Mr. West, an eyewitness to Appellant's misconduct; and Cpl AI, CRI's husband.

The following seven witnesses testified during the Government's case-in-chief: CLE, Mrs. Jennings, Cpl Visconti, Mr. West, Cpl AI, CRI, and Special Agent Holladay.[7] (J.A. 23, 24.)

1. Cpl Visconti testified that during an exercise shortly after the party, CRI revealed that Appellant put his hands in her pants.

Cpl Visconti worked in the same section as CRI and Appellant. (J.A. 194-95.) Appellant was Cpl Visconti's section NCO prior to his deployment. (J.A. 194-95.) Cpl Visconti met CRI shortly before they participated in the exercise together. (J.A. 195.) Cpl Visconti was then a lance corporal. (J.A. 197.)

Cpl Visconti testified that within weeks of the party, CRI told her that she awoke at the party to find Appellant's hands in her pants. (J.A. 197-99, 204.) CRI said that she was in bed with her husband and Appellant was standing next to her on the side of the bed. (J.A. 204-05.) This disclosure happened

[7] CLE and Mrs. Jennings testified primarily to the incidents concerning CLE, of which Appellant was acquitted.

during the exercise, and in the berthing area of the ship. (J.A. 199.) CRI appeared sad and detached. (J.A. 200.) Cpl Visconti encouraged CRI to report, but CRI "didn't find the need to deal with it," because Appellant had deployed and CRI did not expect to see him again. (J.A. 199-200.)

Cpl Visconti and CRI discussed this incident several times after the exercise. (J.A. 200-03, 205.)

About nine to twelve months after the incident, after a sexual assault training, Cpl Visconti reported the incident to a staff sergeant; CRI was unaware Cpl Visconti was making the report. (J.A. 200-01.) Appellant had returned to the unit from deployment, and Cpl Visconti "felt [she] needed to step up" because his return had negatively affected CRI. (J.A. 201-02.) CRI thanked Cpl Visconti for reporting it. (J.A. 202.)

2. Mr. West testified to being in the room with CRI, seeing Appellant crawl under the covers of CRI's bed, and hearing CRI say stop.

Mr. West enlisted in the Marine Corps in July 2009. (J.A. 128.) In December 2012, he reached his end of active service date.[8] (J.A. 168.) He separated with an honorable discharge through the VEERP (Voluntary Enlisted Early Release Program). (J.A. 159, 243.)

[8] Mr. West testified that his last day was December 22, 2013. (J.A. 439.) It appears that this is a typographical error or Appellant misspoke. (J.A. 438-39.) His last day was in December 2012, shortly after he received non-judicial punishment. (J.A. 167, 173.)

Mr. West worked in the same section as CRI and Appellant. (J.A. 128-29, 157, 161.) Appellant was also Mr. West's supervisor. (J.A. 159.) Before Appellant deployed, Mr. West and Appellant had both a personal and professional relationship. (J.A. 129.)

Mr. West attended the party, but did not drink alcohol. (J.A. 130.) He eventually went to sleep in the same bedroom as CRI and her husband. (J.A. 147.) Mr. West testified that CRI and her husband (Cpl AI) were in the bed next to the door, he was against the wall, and both were under the covers with their clothes on. (J.A. 148, 178.) Appellant was on the floor between the beds. (J.A. 148, 150, 178.) Cpl Layman was in the corner of the room. (J.A. 149-50.) The room was dark except for a light shining towards the bed in which CRI and her husband were sleeping. (J.A. 150-51.)

Shortly after everyone lay down to sleep, Mr. West saw Appellant stand up, climb under the covers of CRI's and her husband's bed, and lay next to CRI. (J.A. 152.) Mr. West then saw movement under the covers and heard CRI say, "Stop it. Stop touching me. Why are you in the bed? Move back over there." (J.A. 153.) CRI tried to wake her husband by nudging his shoulder, but was unsuccessful. (J.A. 153-54.) Mr. West then saw Appellant return to the floor between the beds. (J.A. 154.)

Mr. West did not intervene because CRI handled it and Appellant stopped. (J.A. 154.)

Approximately five minutes after the incident, Appellant, Mr. West, and Cpl Layman went downstairs at the request of the host's wife. (J.A. 155.)

Mr. West indicated that he spoke with CRI the following Monday at work and she told him that "she thought she was dreaming." (J.A. 158.)

On cross-examination, Trial Defense Counsel challenged Mr. West's character for truthfulness, motive to fabricate, and bias. (J.A. 167-73, 343.) Specifically, Trial Defense Counsel confronted Mr. West about: (1) receiving an administrative counseling in October 2012 for false official statement and malingering; (2) receiving NJP in December 2012 for unauthorized absence for which Appellant had recommended the maximum punishment; and, (3) allegedly making a bomb threat to the command in July 2013. (J.A. 165-69.) Trial Defense Counsel also questioned Mr. West's inaction concerning the alleged sexual assault. (J.A. 170-72.)

On redirect, Mr. West explained that his misconduct was isolated to his last three months on active duty as he was trying to check out of the command. (J.A. 173.) He also explained that he left it to CRI's choice to report, and that

CRI had expressed a desire to "leave it alone" because Appellant was deploying. (J.A. 174.)

In response to a Member's question, Mr. West indicated that CRI did not state where she was being touched. (J.A. 177, 180.)

3. Cpl AI testified about his observations of his wife before, during, and after the party. He indicated on cross-examination that he told NCIS that he was not "entirely convinced" that his wife was assaulted.

   a. Cpl AI testified on direct to sleeping under the covers with his wife at the party and CRI attempting to wake him by kicking his leg and nudging his shoulder. He also indicated that CRI was more "jumpy" after the incident.

Cpl AI enlisted in the Marine Corps in February 2011. (J.A. 33.) Approximately eight months later, Cpl AI reported to his first duty station around the same time as his wife. (J.A. 34-35.) At the time of trial, Cpl AI had known his wife for eight years. (J.A. 34.) They had met his freshman year of high school, and they pursued a long distance relationship as they lived in different states. (*Id.*)

Shortly after reporting to his command, Cpl AI attended the party with his wife. (J.A. 35.) Cpl AI testified that he and CRI slept in a guest bedroom at the residence. (J.A. 36, 37, 47.) Cpl AI slept on his side, facing the wall, on the side of the bed that was against the wall. (*Id.*) They slept under the covers, fully clothed. (*Id.*)

During the night, CRI attempted to wake him by kicking his legs and shaking his shoulder. (J.A. 48-49.) He "vaguely woke up" and told her to stop. (*Id.*) He is a deep sleeper, and at the time, Cpl AI thought she may have wanted a glass of water or for him to stop snoring. (*Id.*)

During the investigation, Cpl AI told NCIS that he might have been the one who touched his wife. (J.A. 51, 371.) At trial he explained that he knew it was not him because he had not done anything like that before. (J.A. 51.) And, he also noticed a change in his wife's behavior following the assault in that she was more "jumpy." (J.A. 51-52.) He explained that "[s]he wouldn't be acting the way she does nowadays, like, if it would have been me." (J.A. 51.)

b. Cpl AI admitted on cross-examination that he was not "entirely convinced" that his wife was assaulted.

On cross-examination, Cpl AI indicated that a couple of weeks to a month after the party, CRI told him that something happened to her at the party. (J.A. 57.) CRI did not mention that it was Appellant. (*Id.*) Cpl AI was in disbelief at first and thought his wife may have dreamed it. (*Id.*) He stated: "I honestly——I was——I was——its [sic] not like I didn't believe her, sir. But it, kind of, it didn't make too much sense to me." Trial Defense Counsel continued:

Q. So you weren't entirely convinced that this happened then?
A. No, sir.

Q. And you told NCIS that?
A. Yes, sir.

Q. You thought that, hey, maybe——maybe it happened maybe didn't happen?
A. Yes, sir.

(J.A. 58.)

c. On redirect, Cpl AI indicated that he believed his wife and that she was telling the truth.

On redirect, the following exchange occurred:

Q. Now, you just told the defense counsel that you had your doubts?
A. Yes, sir.

Q. You do believe your wife, though, correct?
A. I do, sir.

Q. And she's telling the truth?
A. She is, sir.

Q. And why do you think that?
A. The way——the way that it's affected her, the way that she's changed, the way that it's affected our marriage——the way that it's negatively impacted us just as a family——we have two kids, we have three dogs, and she's just depressed. And I understand that a mother is, obviously, is stressed out from all that, especially with me deploying again. But even on good days, she'll just snap sometimes. And just the way that it's affected her, something as big as it had on her wouldn't have happened over a small situation, sir.

(J.A. 63.)

d. On re-cross, Trial Defense Counsel confronted Cpl AI with his prior testimony wherein he expressed his belief that his wife's behavioral changes were not related to the incident with Appellant.

Cpl AI agreed that he and his wife had a "chaotic household" with "a couple of kids, a couple of dogs." (J.A. 64.) Cpl AI had also deployed in 2012 and was preparing for a second deployment. (J.A. 64.) Cpl AI admitted that he testified in a prior hearing that he believed his wife's stress, anxiety, and depression were not related to the incident, but rather had to do with her getting out of the Marine Corps and her pregnancy. (J.A. 64.)

4. CRI testified consistently with her previous statements to Cpl Visconti, her husband, and NCIS. Appellant challenged her description of the event, her motives to fabricate, and her character for truthfulness.

CRI testified on direct to the circumstances described above. See, *supra*, at pp. 2-6.

Trial Defense Counsel opened his cross-examination by asking CRI if she understood why they were there. (J.A. 95.) He asked: "You understand we're here to find the truth?" (J.A. 95.) Trial Defense Counsel then confronted CRI on several issues.

First, Trial Defense Counsel confronted CRI about the party and circumstances concerning the incident. (J.A. 98-106.)

(a) Trial Defense Counsel elicited details about the size of the bed and Appellant's position in relation to the bed. (J.A. 100.) CRI explained that she was in a full-size bed with her husband and Appellant was perpendicular to the bed and kneeling. (*Id.*).

(b) Trial Defense Counsel questioned CRI about not being sure about what happened:

> Q: You testified at first you weren't really sure what was happening?
> A: I was confused as to why someone was touching me.
>
> Q: You recall waking up and thinking you were dreaming, not knowing what's going on and then you kind of came too [sic]?
> A: I wasn't dreaming, no.
>
> Q: So you never told anyone——you never said, that I was dreaming or maybe I imagined it?
> A: No.
>
> Q: Eventually, you realize what's going on?
> A: Yes.
>
> Q: And then you look over and you apparently see [Appellant]?
> A: Yes.

(J.A. 100-01.)

(c) Trial Defense Counsel questioned CRI about her reaction to the assault:

> Q: And then you believe——you said that it lasted three to five minutes or so?
> A: That's what it felt like, yes.
>
> Q: And during that three to five minutes you don't say anything?

A: I was——I felt paralyzed, like, I couldn't speak, I couldn't move.

Q: You didn't——you didn't reach out, try to move a hand or anything?
A: No.

Q: You didn't scream?
A: No.

Q: You didn't shift your weight at all, try to push anyone off?
A: No.

DC: So you just, kind of, laid there?
CRI: Yes.

. . .

Q: So you never said, "no," you never said, "stop," you never said anything like that?
A: No.

(J.A. 101-02.)

(d) Trial Defense Counsel questioned CRI concerning the whereabouts of other people at the time of the assault. CRI explained that Appellant and her husband were in the room, but she did not believe there were any witnesses to the assault. (J.A. 101, 105.) She also indicated that she heard people socializing in the house, including Mr. West. (J.A. 103.)

Second, Trial Defense Counsel questioned CRI about being medically separated for gastroparesis and receiving benefits as a result. (J.A. 106-114.) CRI explained that she did not get a disability rating from the Department of Defense because it was a pre-existing condition. (J.A. 108.) But in June 2013, the VA

notified her that it proposed that she receive a thirty percent disability rating for gastroparesis and a seventy percent disability rating for post-traumatic stress disorder, for a combined disability rating of eighty percent and a monthly payment of $1745.00. (J.A. 109.)

Third, Trial Defense Counsel questioned CRI about allegedly lying to her command about her due date:

> Q: So from October 21st to 3 December, your job was during——that was on maternity leave?
> A: That was maternity leave, and I had special libo before that.
>
> Q: Okay. And when you actually returned——or during this time, during when you're taking this liberty——I'm sorry, this leave, you actually lied to the command about the due dates, didn't you?
> A: No, I did not.
>
> . . .
>
> Q: Did you ever tell your command that you need additional time for your maternity leave?
> A: I never told them I needed any additional time at all. I kept them updated of my situation while I was on –-
>
> Q: So the command never confronted you on the issue of this maternity?
> A: They did.

(J.A. 116-17.) CRI further explained that her command confronted her and read her her rights, but she invoked, "and that was the end of it." (J.A. 119.) After six weeks of maternity leave, CRI returned to work and was transferred to a different unit. (J.A. 116.)

In response to a Member's question, CRI indicated that Appellant was wearing a black shirt and pajama pants and that he did not remove any of his clothing. (J.A. 123, 125.) CRI also indicated that she did not recall that Appellant tried to get in bed with her. (J.A. 123.)

5. The final government witness——Special Agent Holladay——provided the foundation for admission of CRI's prior consistent statement given to NCIS in March 2013 to rebut allegations of improper influence or motive.

Special Agent Holladay, NCIS, interviewed CRI on March 7, 2013. (J.A. 184.) CRI provided a statement wherein she explained how she awoke at the party to Appellant's hand down her pants rubbing her vagina. (J.A. 349.)

The Military Judge admitted CRI's statement to NCIS under Mil. R. Evid. 801(d)(1)(B) as a prior consistent statement to rebut the charge of motive to fabricate in order to receive benefits from the VA. (J.A. 355-57.)

E. Four witnesses testified during the Defense's case: MSgt Nolasco, Sgt Orsburn, MSgt Delacruz, and SSgt Seller.[9] MSgt Nolasco and Sgt Orsburn challenged Mr. West's character for truthfulness, MSgt Nolasco challenged CRI's credibility, and SSgt Seller challenged CRI's truthfulness.

1. MSgt Nolasco challenged Mr. West's character for truthfulness and CRI's credibility.

MSgt Nolasco was Mr. West's and CRI's section chief. (J.A. 209.) He worked with them for approximately eight months in 2012. (J.A. 209-211, 214.) MSgt Nolasco opined that Mr. West had a character and reputation for untruthfulness. (J.A. 211, 219.) He also expressed a concern that CRI was being dishonest with the command about her due date. (J.A. 212.) CRI "had her pregnancy going on" in October and November 2012, and she was approaching her due date. (J.A. 211-12.) The command had a concern about CRI's reported due date:

> Well overall, we had kept on getting different word as far as what her actual due date was. So any time when we were first told what her due date was, she would not come in for those couple days. And then after a couple weeks that's when one of our staff NCOs had actually talked to the hospital to find out when her due date was.

(J.A. 213.) The command read CRI her rights and considered imposing NJP, but she went into labor. (*Id.*)

On cross-examination, MSgt Nolasco indicated that his opinion of Mr. West was based in part on the counseling and NJP

[9] The Defense also introduced a Stipulation of Expected Testimony concerning allegations involving CLE. (R. 599-600.)

Mr. West received. (J.A. 215.) The command imposed NJP seven days before his end of active service date, because Mr. West went to an appointment instead of physical training. (J.A. 215-16.) MSgt Nolasco also indicated that his opinion of Mr. West was based in part on the opinions of his platoon sergeants, including Appellant, as he relied on and trusted them. (J.A. 217-18.) MSgt Nolasco noted that Appellant, who had returned from deployment in approximately September 2012, had expressed dissatisfaction with Mr. West's performance. (J.A. 216-17.)

Regarding CRI, MSgt Nolasco indicated that CRI had not associated any due date issues with the sexual assault allegations which were previously reported. (J.A. 218.)

2. Sgt Orsburn challenged Mr. West's character for truthfulness.

Sgt Orsburn was Mr. West's supervisor for approximately one year in 2011 and 2012. (J.A. 223-24.) He opined that Mr. West had a character and reputation for untruthfulness. (J.A. 225.) Specifically, he stated "work-related 50/50, it just kind of depended. But other than that, I couldn't really trust him at all, sir." (*Id.*) As to Mr. West's reputation, Sgt Orsburn indicated, "I would say the exact same thing as friend-based." (*Id.*)

3. SSgt Seller challenged CRI's character for truthfulness. SSgt Seller admitted that CRI made an equal opportunity complaint against him.

CRI was under Staff Sergeant (SSgt) Seller's charge in approximately February to June 2012 for two to three months. (J.A. 230-31.) Based on oversight and reports from four NCOs in the office, SSgt Seller believed her truthfulness "was questionable in nature." (J.A. 230.)

SSgt Seller admitted that CRI filed an equal opportunity complaint against him alleging that he discriminated against her because she was pregnant. (J.A. 231.) CRI alleged that he pulled her hair, sexually assaulted her, and had her inventory quadcons[10] in the sun. (J.A. 232, 234.) SSgt Seller denied the allegations, but admitted that he "was founded to" pulling her hair. (J.A. 233-34.) As a result of the complaint, SSgt Seller had to report to the first sergeant for a "very stern talking to." (J.A. 231-32.) SSgt Seller was then transferred out of the command. (J.A. 232.)

[10] A steel container used for storage and shipping. *See United States v. Ramirez*, No. 201500123, 2015 CCA LEXIS 396 (N-M. Ct. Crim. App. Sept. 24, 2015).

F. Eight witnesses testified in rebuttal: Cpl Visconti, Mr. West, Mr. Jackson, Mr. McClure, Mr. Hartness, Ms. Handley, SSgt Rios, and Mr. Niles.

1. Cpl Visconti testified concerning the circumstances of CRI's equal opportunity complaint against SSgt Seller.

Cpl Visconti explained that in approximately mid-2012, SSgt Seller told CRI, "If you're so good, you wouldn't have gotten pregnant in the first place." (J.A. 271.) SSgt Seller also had Cpl Visconti and CRI, who were both pregnant, inventory embark gear in the hot sun. (*Id.*) These instances partly formed the basis for CRI's equal opportunity complaint against SSgt Seller. (*Id.*) The Military Judge instructed the Members to consider the complaint solely for evaluating the basis for SSgt Seller's opinion of CRI's character for truthfulness. (J.A. 268.)

2. Mr. West testified concerning his minor infractions during his final months in the Marine Corps.

Appellant returned to the command in approximately October 2012, and assumed responsibility as Mr. West's direct supervisor. (J.A. 236.) Thereafter, Mr. West was "targeted" and "picked on" at the command. (*Id.*) Mr. West had two minor infractions as he was preparing to leave the Marine Corps. (J.A. 242.) Mr. West missed physical training on both occasions——the first because he was on duty, and the second because he was at medical checking out. (J.A. 237.) He received NJP after the second incident. (*Id.*)

On cross-examination, Trial Defense Counsel asked Mr. West: "Have you been anything less than truthful with these members?" (J.A. 241.) Mr. West responded, "I've been completely truthful with these members, yes, sir." (*Id.*)

3. Mr. Jackson testified concerning Mr. West's minor infractions during his final months in the Marine Corps.

Mr. Jackson worked with Mr. West in late 2012. (J.A. 245.) He observed a change in the treatment of Mr. West upon Appellant's return from deployment. (J.A. 248, 250.) Having checked out of the same command as Mr. West, Mr. Jackson indicated that everyone is required to go to the VA to complete the check-out process. (J.A. 246.) Mr. Jackson believed that Mr. West received NJP because Mr. West went to the VA to complete the check-out process despite his command's direction otherwise. (J.A. 247.) Appellant was the person who likely refused to let him go. (*Id.*) Mr. Jackson opined that Mr. West had a character and reputation for being a truthful person. (J.A. 253-54.)

On cross-examination, Trial Defense Counsel asked Mr. Jackson: "So Mr. West is nothing but truthful with you?" (J.A. 251.) Mr. Jackson responded, "Yes, sir." (*Id.*) Mr. Jackson also agreed that MSgt Nolasco had a "good basis" to judge Mr. West's credibility except "when it applies to someone else's word to him." (J.A. 251-52.)

4. Mr. McClure testified to Mr. West's character for truthfulness.

Mr. McClure served with Mr. West for approximately twenty months and was his roommate for a portion of that time. (J.A. 254-55.) They had a personal and professional relationship. (J.A. 255.) He opined that Mr. West had a character for truthfulness. (J.A. 256.) Mr. McClure did not know Mr. West's reputation for truthfulness, but as to his reputation in general, Mr. Jackson indicated: "Malingering kind of, like, he's not——he does things to get out of things." (*Id.*)

5. Mr. Hartness testified to Mr. West's character for truthfulness.

Mr. Hartness served with Mr. West for approximately three-and-one-half years and was his roommate for approximately one year. (J.A. 258-59.) They had a personal and professional relationship. (J.A. 259.) He opined that Mr. West had a character for truthfulness. (*Id.*) He also observed a marked difference in the way Appellant treated Mr. West following Appellant's return to the unit. (J.A. 260.) It appeared that Mr. West "had a very difficult time" checking out of the command. (J.A. 261.)

6. Ms. Handley testified to the change in CRI's due date.

Ms. Handley is CRI's mother. (J.A. 265.) Ms. Handley, her mother, and her other daughter flew to see CRI expecting to be

with CRI when she gave birth. (J.A. 266-67.) But CRI's expected due date changed, and the baby was born after they departed. (J.A. 267.)

7. SSgt Rios testified to CRI's character for truthfulness.

Staff Sergeant (SSgt) Rios was CRI's direct supervisor after CRI transferred. (J.A. 361.) She worked with CRI every day for approximately one year. (J.A. 362.) SSgt Rios opined that CRI had a character and reputation for being "extremely trustworthy." (J.A. 364.)

8. Mr. Niles testified to CRI's character for truthfulness.

Mr. Niles was CRI's pastor at the church she attended when she was in high school. (J.A. 366.) CRI participated in youth activities and social events at the church——she was "pretty active." (*Id.*) Mr. Niles was present when CRI was sworn in to the Marine Corps and he performed the wedding ceremony for CRI and Cpl AI. (*Id.*) He opined that CRI had a character for being "a very truthful person." (J.A. 367.)

G. The Military Judge instructed on findings.

1. The Military Judge instructed on the credibility of the witnesses.

The Military Judge instructed as follows:

> You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness's intelligence, ability to observe and accurately remember, sincerity, and

> conduct in court, friendships, relationships, prejudices, and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict.
>
> In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie.
>
> Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth. The credibility of each witness's testimony should be your guide in evaluating testimony and not the number of witnesses called.
>
> Evidence has been received as to the bad character for truthfulness of Ms. CLE, Mrs. CRI, and Mr. West. Evidence of good character for truthfulness of Mrs. CRI and Mr. West has also been introduced. You may consider this evidence in determining their credibility.
>
> . . .
>
> You have heard evidence that Ms. CLE and Mrs. CRI made statements prior to trial that may be consistent with their testimony here at this trial. If you believe that such a consistent statement was made, you may consider it for its tendency to refute the charge of recent fabrication, improper influence, or improper motive. You may also consider the prior consistent statement as evidence of the truth of the matters expressed therein. You may not draw any inference or conclusions from portions of these statements that have been redacted.

(J.A. 283-84, 346-47.)

2. The Military Judge instructed the Members on their duty to independently weigh the evidence.

The Military Judge also instructed the Members that "you may properly believe one witness and disbelieve several other

witnesses whose testimony is in conflict with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in the case rests solely upon you, the members of the court." (J.A. 282, 346.)

3. Neither Party objected to the instructions.

The Military Judge provided the Parties with the final version of the instructions. (J.A. 345-47, 370.) Neither Party objected. (J.A. 370.)

H. The Parties argued on findings.

1. Prior to argument, the Military Judge cautioned Trial Defense Counsel on the use of CRI's receipt of benefits as a motive to fabricate.

The Military Judge cautioned Trial Defense Counsel prior to argument regarding his anticipated use of CRI's receipt of benefits. (J.A. 368.)

> And I guess I want to make clear as far as how I interpreted the evidence was that, these are benefits that she has since received, benefits that she received following the reporting of this incident. I don't know of any evidence that showed that she knew that this was a monetary benefit that she would receive when she told Corporal Visconti; and, therefore, if the argument is instead going to be it's a motive to embellish or sustain something that was initially false because of these benefits, that's one thing, but I don't——I wouldn't be comfortable with you all arguing that the whole thing came up that she made the whole——you know, the initial discussion that she had with Corporal Visconti or anybody else came about because she knew that she could receive the VA benefits and this money. Is that——are we clear on that?

(*Id.*) Trial Defense Counsel understood. (J.A. 369.)

2. Trial Defense Counsel attempted to argue that "the government wants you to believe beyond a reasonable doubt that it did [happen], when her own husband is not convinced."

As summarized in Trial Defense Counsel's closing argument slides, the Defense's theme was that Appellant was not guilty because the Government's witnesses were untruthful and had motives to fabricate. (J.A. 343-44.) Towards the end of his argument, Trial Defense Counsel challenged CRI's credibility through Cpl AI's testimony. (J.A. 322-23, 344.) The slides supporting his argument on this point stated: "Cpl [AI]" on the first line, and "Her Own Husband" on the second line in a slightly smaller font. (J.A. 344.)

Trial Defense Counsel argued that Cpl AI, who knew his wife, thought that "she was having a bad dream" and "[h]er story didn't make sense." (J.A. 323.) Trial Defense Counsel also argued that the Members should not be convinced of Appellant's guilt because "her own husband" was not convinced: "He told NCIS that he was not convinced that this happened. He told that to NCIS, her own husband. I'm not convinced that happened. And the government wants you to believe beyond a reasonable doubt that it did, when her own husband is not convinced." (*Id.*) The Military Judge instructed the Members to disregard the last sentence upon objection by Trial Counsel. (*Id.*)

3. Trial Counsel argued in rebuttal.

Trial Counsel argued in rebuttal that the witnesses were truthful. (J.A. 328-342.) In two paragraphs of Trial Counsel's twelve-page rebuttal argument, Trial Counsel focused on Cpl AI's testimony. (J.A. 336.) Trial Counsel first argued that when CRI tried to wake him at the party, Cpl AI responded as if it was "just another night." (*Id.*) Trial Counsel then explained why Cpl AI may have reported having doubts to NCIS. (*Id.*) Trial Counsel argued that Cpl AI did not "want to accept the fact that [he] allowed it to happen." (*Id.*) He continued, "[b]ut he came back and he told you, verbatim, that he believed his wife, that he did think——that he did think it happened, that he saw a remarkable change in his wife's affect right after this event, that this marked a turning point." (*Id.*)

**Summary of Argument**

First, Appellant injected the question of CRI's truthfulness on cross-examination by questioning Cpl AI whether he was "entirely convinced" that his wife was assaulted. Thus any error was invited by the Defense.

Second, Appellant has not met his burden to establish plain error because his cross-examination of Cpl AI opened the door to a fair reply, even though it resulted in admission of human lie detector testimony.

Finally, even if plain and obvious error, considering factors derived from this Court's precedent including the severity of the error, curative measures taken, and the strength of the Government's case, Appellant suffered no prejudice: the lay witness's statement rebutting testimony elicited by Trial Defense Counsel in the midst of a strong case did not materially prejudice Appellant's substantial rights.

**Argument**

> APPELLANT INVITED ERROR BY QUESTIONING CPL AI ON CROSS-EXAMINATION WHETHER HE WAS "ENTIRELY CONVINCED" THAT HIS WIFE WAS ASSAULTED. THUS, HE IS ENTITLED TO NO RELIEF. MOREOVER, NO PLAIN ERROR OCCURRED BECAUSE THE GOVERNMENT'S RESPONSE WAS A FAIR REPLY IN THE CONTEXT OF THE ENTIRE TRIAL. FURTHER, EVEN IF PLAIN AND OBVIOUS ERROR, APPELLANT SUFFERED NO PREJUDICE.

A. Appellant provoked the admission of human lie detector testimony.

1. When an appellant induces or invites error, the error is not countenanced on appeal.

"A party may not complain on appeal of errors that he himself invited or provoked the [lower] court . . . to commit." *United States v. Wells*, 519 U.S. 482, 488 (1997). Thus, "invited error does not provide a basis for relief." *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996); *see also United States v. Eggen*, 51 M.J. 159, 162 (C.A.A.F. 1999); *United States v. Mazza*, No. 200400095, 2008 CCA LEXIS 623 (N-M. Ct. Crim. App. Jul. 17, 2008), *aff'd*, 67 M.J. 470 (C.A.A.F. 2009).

This principle "is long established in both civilian and military jurisprudence." *United States v. Resch*, 65 M.J. 233, 239 (C.A.A.F. 2009) (Stucky, J., dissenting) (citing *Johnson v. United States*, 318 U.S. 189, 200 (1943); *United States v. Maxwell*, 7 C.M.R. 632, 659 (A.F.B.R. 1952)). "Where invited error exists, it precludes a court from invoking the plain error rule and reversing." *United States v. Baker*, 432 F.3d 1189, 1216 (11th Cir. 2005) (internal quotations omitted); *see also United States v. Sarras*, 575 F.3d 1191, 1216 (11th Cir. 2009) (finding claim that court erred in permitting expert to testify that she believed victim "invited error" and "unreviewable" because testimony elicited by appellant).

2. This Court in *Raya* and *Eggen* declined to grant relief when alleged human lie detector testimony was invited by the defense.

This Court refused to recognize error when alleged human lie detector testimony was elicited by the defense on cross-examination in *Raya*, and by the government in rebuttal in *Eggen*.[11] *Raya*, 45 M.J. at 254; *Eggen*, 51 M.J. at 160-62.

In *Raya*, a social worker testified on cross-examination that the alleged victim "is not somebody that's vindictive and

[11] This Court has similarly refused to grant relief under the invited error doctrine in other contexts. *See United States v. Dinges*, 55 M.J. 308 (C.A.A.F. 2001) (any error in admission of victim's testimony was invited as defense called victim, not government); *United States v. Anderson*, 51 M.J. 145, 153 (C.A.A.F. 1999) (declining to allow appellant to retreat from unsuccessful trial strategy).

wanting to get back. She wanted to get out of it. She thought she could handle it. She didn't want to have to be reminded of him. She wanted to stay away from him." 45 M.J. at 253. The appellant alleged that this testimony improperly implied that the victim was truthful. *Id.* The *Raya* court declined to grant relief, presuming that the military judge disregarded any improper testimony and invoking the invited error doctrine. *Id.* at 254.

The *Eggen* Court expanded the invited error doctrine announced in *Raya* to matters elicited by the prosecution in rebuttal. 51 M.J. at 162. The defense had elicited testimony from the government's expert that people can fake emotions and that the victim was possibly faking his emotions. *Id.* at 160. On redirect, the expert testified that he did not believe that the victim was faking his emotions. *Id.* at 161. Neither party objected to the testimony. *Id.* The Court rejected the appellant's allegation that the trial court erred by allowing the expert to comment on the alleged victim's credibility. *Id.* at 160, 162. Thus, the Court found that "any error was invited by the defense." *Id.* at 162.

3. When Appellant questioned Cpl AI's opinion whether he was "entirely convinced" that his wife was assaulted, he injected the issue of Cpl AI's perception of CRI's truthfulness. Thus any error was invited by Appellant. He is entitled to no relief.

Here, Cpl AI testified on redirect that he believed CRI and that she was telling the truth. (J.A. 63.) Like *Eggen*, this testimony stemmed from the Defense's injection of Cpl AI's perception of CRI's truthfulness on cross-examination. Indeed the Defense changed the conversation from Cpl AI's opinion on why he was not responsible for the touching that was developed on direct to Cpl AI's perception of whether his wife was telling the truth, *i.e.*, whether he was "entirely convinced" that his wife was assaulted. (J.A. 58.) Therefore, Appellant's actions negate any error and preclude review of this issue by this Court.

B. Appellant cannot meet his burden to show plain and obvious error. Cpl AI's testimony on redirect that CRI was telling the truth was a fair response after Appellant questioned Cpl AI whether he was convinced that his wife was assaulted.

"Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (quoting *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)). 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." *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010) (citations omitted). "An obvious error materially prejudices the substantial rights of the accused when it has 'an unfair prejudicial impact on the [court members'] deliberations." *Knapp*, 73 M.J. at 37 (quoting *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998) (quoting *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986)).

An appellant has the burden of persuading the court that all three prongs have been met. *United States v. Olano*, 507 U.S. 725, 734-45 (1993) (finding defendant bears the burden of establishing prejudice in plain error, a factor that distinguishes plain error from preserved error); *United States v. Jones*, 68 M.J. 465, 473 n.11 (C.A.A.F. 2010).

As an exception to forfeiture, plain error is intended to be used on direct appeal and should be used "sparingly, solely in those circumstance in which a miscarriage of justice would otherwise result." *United States v. Ruiz*, 54 M.J. 138, 143 (C.A.A.F. 2000) (citation omitted). This Court reviews for plain error *de novo*. *Mullins*, 69 M.J. at 116.

1. <u>The Government is permitted a fair response to claims made by the Defense, thus any error here was not plain</u>.

In an adversarial trial setting, "it is important that both the defendant and prosecutor have the opportunity to meet fairly

the evidence and arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988); *see also United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (recognizing *Robinson's* holding). Thus, a party may sometimes introduce otherwise inadmissible evidence if the opposing party opens the door to such rebuttal evidence. *See United States v. Banks*, 36 M.J. 150, 162 (C.A.A.F. 1992). For example, profile evidence is generally inadmissible. *Id.*; *see also United States v. Beltran-Rios*, 878 F.2d 1208, 1213 (9th Cir. 1989). However, it may be permitted in "narrow and limited circumstances" such as if "admitted in rebuttal when a party 'opens the door' by introducing potentially misleading testimony." *Id.*

Similar to profile evidence, which "implicates the very concerns underlying the prohibition against human lie detector testimony," both experts and lay witnesses are prohibited from offering conclusions to the truthfulness of an alleged victim in making a particular statement, *i.e.*, offering human lie detector testimony. *Brooks*, 64 M.J. at 329; *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003) (citing *United States v. Robbins*, 52 M.J. 455, 458 (C.A.A.F. 2000)). This Court recognized in *United States v. Cacy*, 43 M.J. 214, 218 (C.A.A.F. 1995), that the defense's theory can open the door to rebuttal concerning the believability of a witness' testimony.

This Court's precedent reviews rebuttal comments under the separate and distinct "invited response" or "invited reply" doctrine. *See United States v. Lewis*, 69 M.J. 379, 384 (C.A.A.F. 2010) (comment must be examined in context to determine whether improper). "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." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005). This Court examines the defense's comments "within the context of the entire trial" to determine whether the comments "clearly invited the reply." *Gilley*, 56 M.J. at 121 (quoting *United States v. Young*, 470 U.S. 1, 11 (1985)).

Here, because the Defense initiated testimony as to credibility, any error in responsive testimony on the same subject was not plain.

2. In furtherance of the Defense's theme of innocence in the context of a trial of untruthful Government witnesses with motives to fabricate, Appellant pointedly attacked Cpl AI's perception of CRI's truthfulness on cross-examination, and then used Cpl AI's response to argue for an acquittal. As in *Lewis*, the Military Judge was not obligated to treat Cpl AI's response as objectionable.

In *Lewis*, this Court declined to find error when the trial counsel suggested on cross-examination of a defense witness and during rebuttal argument that the appellant had the burden of proof. *Lewis*, 69 M.J. at 383-84. The trial defense counsel

mentioned in his opening statement that the defense was going to prove that the appellant was not guilty. *Id.* at 381. The trial counsel then questioned the defense's expert on cross-examination about whether he had uncovered any exculpatory evidence or found evidence that the appellant did not commit the crime. *Id.* The expert had not. *Id.*

When the parties argued on findings, the trial counsel focused on the evidence presented during his case. *Id.* The defense argued that it had delivered on its promise to show that the appellant was innocent. *Id.* at 383-84. In rebuttal, trial counsel argued that the defense's own expert did not find any exculpatory evidence. *Id.* at 384. After closings, the military judge instructed that the government had the burden of proof. *Id.*

Finding no error in the defense's cross-examination of the defense's expert and the trial counsel's rebuttal argument, the *Lewis* Court relied on the following: (1) the defense's strategy promised an affirmative showing of innocence; (2) the defense had an expert testify to promote that strategy; (3) trial counsel's questions to the expert on cross-examination were proper; (4) the defense's argument reiterated the defense's strategy; and, (5) the trial counsel could rely on the defense's posture of the case and evidence presented to provide a basis

for questioning the expert witness and arguing in closing. *Id.* at 384-85.

Similarly here, within the context of the entire trial, Trial Defense Counsel's question to Cpl AI about whether he was "entirely convinced" that his wife was assaulted invited a reply on his perception of whether she was telling the truth.

From opening to closing, the Defense focused on the Government's allegedly untruthful witnesses with alleged motives to fabricate. (J.A. 276, 302.) The Defense opened its case by pointing out that the Government's evidence consisted of "storytellers" who were not trustworthy. (J.A. 277.) To promote the theory that he was being accused by Government storytellers, the Defense attacked CRI's and Mr. West's character for truthfulness on cross-examination and through its own witnesses.

Trial Defense Counsel continued the theme of accusations by storytellers during closing argument. (J.A. 302.) Trial Defense Counsel's closing slides prominently displayed the theory with regard to CRI that "her own husband" was not convinced——an issued introduced by Appellant in *voir dire*. (J.A. 323, 344, 373.) Trial Defense Counsel even attempted to argue that "the government wants you to believe beyond a reasonable doubt that it did [happen], when her own husband is not convinced." (J.A. 323.) But the Military Judge properly

recognized that Trial Defense Counsel mischaracterized Cpl AI's testimony. (*Id.*)

Moreover, on redirect, Trial Counsel appropriately referenced Cpl AI's testimony on cross-examination to place the questions in the proper context and limited his questions to directly rebut the assertion that Cpl AI may not have been "entirely convinced" that his wife was assaulted. (J.A. 63.) Appellant has not met his burden to show error.

C. Even if the introduction of human lie detector testimony was plain and obvious error, and not invited by Appellant, Appellant has not met his burden to establish prejudice.

1. This Court's precedent, although somewhat inconsistent, examines three factors for assessing prejudice: the severity of the error, curative measures taken, and the strength of the Government's case.[12]

This Court's precedent does not clearly articulate the factors to consider when assessing the prejudicial impact of human lie detector testimony. However, an examination of the precedent reveals that this Court considers the severity of the error, the curative measures taken, and the strength of the government's case.

[12] The lower court applied a seven-factor test first established by the Air Force Court in *United States v. Jones*, 60 M.J. 964, 969 (A.F. Ct. Crim. App. 2005). *Martin*, 2015 CCA LEXIS 250, at *11-*12. The lower court's test is essentially encompassed within the three-factor test proposed herein.

a. The *Marrie* Court found no prejudice considering the severity of the error and the strength of the government's case.

In *Marrie*, a child sex abuse case, the government's expert testified that "it is extremely rare" that preteen boys would falsely report. *United States v. Marrie*, 43 M.J. 35, 41 (C.A.A.F. 1995). The *Marrie* Court found error, but no prejudice based on the victim's "entire testimony in context with the other evidence in the record." *Id.* at 42.

b. The *Birdsall* Court found prejudice considering the severity of the error and the strength of the government's case.

In *United States v. Birdsall*, 47 M.J. 404, 409 (C.A.A.F. 1998), a child sex abuse case, the government's experts testified that the children were victims of sex abuse and incest and the allegations were neither unfounded nor coached. The *Birdsall* Court found prejudicial error noting: it was a credibility contest between the victims and the appellant, there was no physical evidence, the appellant testified and denied the allegations, and the evidence came from two doctors that magnified the impact on the members "in an extremely close case." *Birdsall*, 47 M.J. at 410-11.

c. The *Robbins* Court found no prejudicial plain error considering the severity of the error.

In *Robbins*, the government's expert testified that a case review committee substantiated allegations of child sex abuse

against the appellant. *Robbins*, 52 M.J. at 456. A civilian lay witness also testified that the victim appeared truthful when the victim reported the allegations to her. *Id.* at 457. Such testimony was offered for the limited purpose of establishing a foundation for the hearsay statements. *Id*. The *Robbins* Court found no prejudicial plain error: the statements were incidental to establishing an appropriate foundation and the military judge was presumed to rely only on admissible evidence. *Id.* at 458.

d. The *Whitney* Court found no prejudice considering the curative measures taken and the strength of the government's case.

The appellant in *Whitney* had undergone a polygraph examination. *United States v. Whitney*, 55 M.J. 413, 414 (C.A.A.F. 2001). During trial, the agent who administered the polygraph testified that he told the appellant that he did not believe he was being truthful. *Id.* at 415. The military judge promptly issued a curative instruction. *Id.* The *Whitney* Court found no prejudice considering the military judge's "quick remedial action" and the victim's "credible, persuasive testimony." *Id.* at 416.

e. The *Kasper* Court found no prejudice considering the severity of the error and curative measures taken.

In *Kasper*, the government's expert testified to the appellant's truthfulness regarding her use of ecstasy. *Kasper*, 58 M.J. at 319-20. The *Kasper* Court found prejudicial plain

error because the military judge failed to instruct following the impermissible testimony and the testimony involved a central issue in the case. *Id.* at 320.

f. The *Brooks* Court found prejudice considering the severity of the error, curative measures taken, and the strength of the government's case.

In *Brooks*, the government's expert suggested that "there was better than a ninety-eight percent probability that the [child] victim was telling the truth." *Brooks*, 64 M.J. at 329. The *Brooks* Court found prejudicial plain error: the case hinged on the victim's credibility, there was no other evidence, the victim's testimony was inconsistent, the expert's testimony put a qualified stamp of truthfulness on the victim's story, and the military judge did not give a curative instruction. *Id.* at 330.

g. The *Mullins* Court found no prejudice considering the severity of the error, curative measures taken, and the strength of the government's case.

The government's expert testified in *Mullins* that there was approximately a one in two hundred chance that the victim was lying. *Mullins*, 69 M.J. at 116. The *Mullins* Court found no prejudice: the military judge gave a credibility instruction at the end of the expert's direct examination and before deliberations, the expert clarified that her opinion was based on her personal experience, not scientific studies, and the members had other reasons to believe the victim. *Id.* at 117-18.

h. The *Knapp* Court found prejudice considering the severity of the error, curative measures taken, and the strength of the government's case.

In *Knapp*, the government's expert testified that he was trained to "divine a suspect's credibility from his physical reactions to the questioning," and that he observed nonverbal cues indicating deception during his interrogation of the appellant. *Knapp*, 73 M.J. at 35, 37. In finding prejudicial plain error, the *Knapp* Court relied on: the severity of the error (in a he-said, she-said case, the appellant's testimony was discredited by the lie detector testimony and the lie detector testimony was offered on a central matter——whether the appellant was truthful), the military judge failed to give an immediate cautionary instruction, and the strength of the government's case (the only evidence contradicting the appellant was the victim's testimony, but she was too inebriated to remember, and the appellant's confession, that he alleged was a result of a prolonged interrogation). *Id.* at 36-38.

2. Appellant's proposed two-factor test misconstrues this Court's precedent and the precedent of the Courts of Criminal Appeals.

Appellant asserts that this Court should apply two factors delineated in *Kasper* to examine the prejudicial impact of human lie detector testimony——whether it went to a central issue and whether the military judge provided detailed guidance to the

members. (Appellant's Br. at 12.) Appellant's test reads *Kasper* and other precedent of this Court too narrowly.[13] Appellant's test needlessly constricts what the United States characterizes as the severity prong. Whether the testimony goes to a central issue is relevant, but it is merely one piece of the examination of the severity of the lie detector testimony. Indeed, *Kasper* itself relied on other factors in finding prejudicial plain error, including that the government introduced the evidence, the defense objected to subsequent introduction of the evidence, and a member's question illustrated the possibility of impermissible usage. 58 M.J. at 320.

3. The three-factor test is similar to this Court's approach to analyzing prejudice resulting from prosecutorial misconduct.

Similar to the admission of human lie detector testimony, relief will be granted for prosecutorial misconduct only 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) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). *See also Knapp*, 73 M.J. at 37. The *Fletcher* Court identified three

[13] Appellant's test similarly reads the lower court's precedent in *United States v. Jackson*, 74 M.J. 710 (A. Ct. Crim. App. 2015) and *United States v. Smith*, No. 201400106, 2014 CCA LEXIS 602 (N-M. Ct. Crim. App. Aug. 21, 2014) too narrowly.

factors to analyze and assess the prejudicial impact of prosecutorial misconduct: (1) the severity of the misconduct; (2) curative measures taken; and, (3) the strength of the government's case. *Id.* at 184.

This Court then identified five factors to assess the severity prong: (1) the raw number of instances of misconduct; (2) whether the misconduct was confined to the trial counsel's rebuttal or spread 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.*

Like *Fletcher*, this Court's precedent further informs the severity factor, including: (1) whether the testimony had a scientific stamp of approval, *Mullins*, 69 M.J. at 117; *Birdsall*, 47 M.J. at 410; (2) the role of the parties in prompting the testimony, *Kasper*, 58 M.J. at 320; *United States v. Schlamer*, 52 M.J. 80, 86 (C.A.A.F. 1999); *Eggen*, 51 M.J. at 160-62; (3) whether the testimony was introduced on a central or peripheral matter, *Knapp*, 73 M.J. at 37; *Birdsall*, 47 M.J. at 410; *Robbins*, 52 M.J. at 457-58; and, (4) the impact on other testimony, *Knapp*, 73 M.J. at 37.

Comparing the test established to assess the prejudicial impact from prosecutorial misconduct to lie detector testimony is appropriate given the overall concern in both instances of

ensuring "the members convicted the appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184. *See also Mullins*, 69 M.J. at 118 (upholding conviction when "sufficient other evidence" demonstrated members "were able to come to a decision in the case without relying on any credibility determinations offered by [the expert]").

D. Applying the *Fletcher*-like factors, Appellant suffered no prejudice——the error was not severe, the Military Judge gave the standard credibility instruction, and the Government's case was strong.

1. In context, Cpl AI's statement that he believed his wife was telling the truth was not severe.

a. Cpl AI's testimony did not have a scientific stamp of approval.

"Human lie-detector" testimony is "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case." *Knapp*, 73 M.J. at 36 (quoting *Brooks*, 64 M.J. at 328). Both experts and lay witnesses are prohibited from offering conclusions as to the truthfulness of an alleged victim in making a particular statement. *Kasper*, 58 M.J. at 315 (citing *Robbins*, 52 M.J. at 458).

As discussed *supra*, the controlling case law overwhelmingly concerns experts providing opinions about truthfulness based on their claimed expertise. *See, e.g., Knapp,* 73 M.J. 33 (investigator claimed to discern deception based on physical responses); *Brooks*, 64 M.J. 325 (child abuse expert testified

concerning percentage of children who made false claims); and *Birdsall*, 47 M.J. 404 (C.A.A.F. 1998) (medical experts testified that child sexual abuse allegations were substantiated). Cf. *Mullins*, 69 M.J. at 116 (expert's opinion on victim's credibility based on personal experience).

Here, Cpl AI did not assert any expertise in judging honesty. Cpl AI simply testified on redirect that he believed that CRI was telling the truth based on his perceived change in her behavior after the party. (J.A. 63.) This testimony is a far cry from a statement that he was uniquely capable of discerning when his wife was telling the truth. As in *Mullins*, where the expert's opinion was based on personal experience rather than claimed expertise or scientific proof, "the testimony did not carry the same weight with the panelmembers as the testimony offered in *Brooks*." *Mullins*, 69 M.J. at 117.

b. Introduction of the human lie detector testimony was prompted by the Defense.[14]

An examination of who prompted the introduction of the testimony is relevant to assessing the prejudicial impact of such testimony. *See Kasper*, 58 M.J. at 320; *Schlamer*, 52 M.J. at 86. Most of this Court's precedent involves situations where

[14] While the United States contends that invited error precludes review of the question of prejudice, if this Court disagrees, the role of each party in eliciting the testimony is one factor that this Court can consider when examining the severity of the error.

a government witness testifies as a human lie detector in response to questions by the trial counsel. *See Brooks*, 64 M.J. at 327; *Kasper*, 58 M.J. at 319. But in *Eggen,* actions by the defense opened the door for examination by the trial counsel, and this Court considered the defense's role in finding no prejudicial plain error. *Id.*

Likewise, in *Schlamer*, this Court found no plain error when the government's expert testified on redirect to his opinion that the appellant did not falsely confess. 52 M.J. at 86. On cross-examination the defense had suggested that the expert elicited a false confession from the appellant. *Id.* The *Schlamer* Court held that although the question on redirect was improper, any error did not rise to the level of plain error because "the term false confessions was introduced during the defense cross-examination." *Id.*

As discussed *supra*, the Defense injected the question of CRI's credibility on cross-examination, and opened the door to a fair reply.

c. <u>The lie detector testimony was incidental to the United States' case</u>.

Whether the testimony involves a central issue or a peripheral matter is a factor to consider in assessing prejudice. *Knapp*, 73 M.J. at 37; *Kasper*, 58 M.J. at 320; *Robbins*, 52 M.J. at 458. The *Robbins* Court found no prejudice

although a witness testified that she did not believe the child-victim was lying when the victim told her that she had been abused by her stepfather. 52 M.J. at 457-58. Importantly, the witness's testimony was incidental to establishing a foundation for admissibility of the statements under a hearsay exception. *Id.* at 458. In contrast, in *Knapp* and *Kasper*, the testimony was offered on the ultimate issue——whether Appellant was truthful. *Knapp*, 73 M.J. at 37.

Here, although the testimony went to a central issue——CRI's truthfulness——like *Robbins*, introduction of the lie detector testimony was incidental to the United States' case. In fact, Cpl AI's testimony on redirect only served to rebut testimony elicited by the Defense on cross-examination. (J.A. 58.) Trial Counsel asked two questions on this issue and appropriately referenced Cpl AI's testimony on cross-examination to place the questions in the proper context. (J.A. 63.) Trial Counsel also limited his questions to directly rebut the assertion that Cpl AI may not have been "entirely convinced" that his wife was assaulted. (J.A. 63.) Thereafter, Trial Counsel did not exploit the evidence or use it to argue for a conviction. *See United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997) (no prejudice when trial counsel did not exploit evidence of second drug use that may have been improperly admitted in rebuttal).

When analyzing this factor, it cannot be underscored that the Defense used Cpl AI's response elicited on cross-examination to argue for an acquittal. Indeed, the Defense asked the Members to acquit because "her own husband" was not convinced. (J.A. 323.)

For these reasons, the severity of the error was minor.

d. The lie detector testimony was mitigated by testimony elicited by Appellant that CRI was not truthful.

In finding prejudicial error, the *Knapp* Court considered the impact of the lie detector testimony in context with the other evidence. 73 M.J. at 37. The appellant was charged with sexual assault, and he testified to the underlying sexual activity, but stated it was consensual. *Id.* He had previously told that to investigators before his will was overborne over a lengthy interrogation. *Id.* at 34. The victim did not remember due to her level of intoxication. *Id.* at 37. The agent who interrogated the appellant testified that he was trained to divine a suspect's credibility, and the appellant exhibited signs of deceit. *Id.* at 36-37. The *Knapp* Court noted that the agent's profession of expertise to divine the truth discredited the only issue before the members——whether the appellant was truthful. *Id.* at 37.

Considering Cpl AI's testimony in context, as correctly found by the lower court, any prejudice here was mitigated by

testimony elicited by the Defense that CRI was not truthful. *Martin*, 2015 CCA LEXIS 250, at *12. Although Appellant asserts that CRI had a reputation for being a liar, no evidence supports. Indeed, his citations clearly reference CLE. (Appellant's Br. at 14.) Nonetheless, the Defense did elicit testimony that CRI was not truthful: (1) Cpl AI admitted on cross-examination that he initially did not believe his wife, (J.A. 58); (2) MSgt Nolasco, a Defense witness, expressed a concern that CRI was not being truthful with the command about her due dates,[15] (J.A. 212); and, (3) SSgt Seller, a Defense witness, stated that CRI's truthfulness was "questionable in nature" and indicated that CRI falsely accused him of sexually assaulting her, (J.A. 230, 233). Thus, unlike *Knapp*, there was other evidence upon which the Members could rely to assess CRI's credibility.

[15] Appellant cites an e-mail from MSgt Nolasco that was attached as an Appellate Exhibit to support his claim that CRI was lying about her due dates. (Appellant's Br. at 14, J.A. 126.) But MSgt Nolasco's testimony was much more limited in scope than the e-mail. (J.A. 126, 212-13.) MSgt Nolasco testified to having a concern that CRI was being dishonest about her due dates, but did not elaborate on the details as MSgt Nolasco did not have first-hand knowledge to do so. (J.A. 358-60.)

2. The standard credibility instruction mitigates any potential prejudice. This Court's precedent supports that curative measures are but one factor in this Court's assessment of prejudice.

a. The lack of a defined test for assessing prejudice causes confusion especially as it pertains to the impact of curative measures taken by the military judge.

As with the prejudice test for human lie detector testimony generally, this Court's precedent does not conclusively articulate the test for assessing the impact of curative measures taken by a military judge. Appellant appears to argue for a *per se* approach to prejudice when a military judge fails to issue prompt curative instructions. (Appellant's Br. at 20.) But this Court's precedent does not support such a result. *Knapp*, 73 M.J. at 38 (Baker, C.J., dissenting); *see also Mullins*, 69 M.J. at 117; *Whitney*, 55 M.J. at 416.

Indeed, the *Mullins* Court considered the immediate instruction, the standard instruction, the military judge's action in response, and the strength of the government's case. 69 M.J. at 117. Similarly, the *Whitney* Court considered the military judge's quick remedial action as one factor in the Court's assessment of prejudice. 55 M.J. at 416. Thus, under *Mullins* and *Whitney*, the failure to instruct is merely one factor to consider when examining the prejudicial impact of human lie detector testimony.

In contrast, the *Kasper* Court suggested that the failure to instruct is *per se* prejudicial error: "the failure to provide appropriate guidance to the members constituted plain error." 58 M.J. at 320. The *Knapp* Court similarly concluded that the failure to appropriately instruct was prejudicial error. 73 M.J. at 38.

The lack of a defined test has resulted in an inconsistent application of the law by the Courts of Criminal Appeals, or at least the appearance of such.[16]

b. A careful review of *Knapp* and *Kasper* support that curative measures are one factor to consider when assessing whether improper lie detector testimony had an unfair prejudicial impact on the members' deliberations.

Appellant asserts that the *Knapp* Court held "that the standard credibility instruction is not an appropriate remedial action to mitigate the prejudicial impact of human lie detector testimony." (Appellant's Br. at 21.) Not so. The Court's holding was not so limited: "We hold that the agent's testimony was impermissible 'human lie detector testimony' and, that under the circumstances of this case, it materially prejudiced Appellant's defense." *Knapp*, 73 M.J. at 34.

[16] *See Martin*, 2015 CCA LEXIS 250, at *11-*12; *Jackson*, 74 M.J. at 716-17; *Smith*, 2014 CCA LEXIS 602, at *9-*10; *United States v. Cook*, No. 201200518, 2013 CCA LEXIS 1073, *23-*24 (N-M. Ct. Crim. App. Dec. 31, 2013); *United States v. Hall*, No. 37700, 2013 CCA LEXIS 4, *12-*13 (A.F. Ct. Crim. App. Jan. 4, 2013).

Moreover, a detailed review of *Knapp's* prejudice analysis proves that it is but one factor in assessing prejudice. *Id.* at 37-38. As discussed *supra*, in assessing prejudice (in terms of *Fletcher*-like factors), the *Knapp* Court considered the severity of the error, the curative measures taken, and the strength of the government's case. *Id.* In context, the failure to instruct undermined the Court's confidence that the improper testimony did not prejudicially impact the members' deliberations, *i.e.*, the lack of curative measures outweighed the other factors. *Id.* This led the Court to conclude that "[u]nder these circumstances . . . the military judge's failure to appropriately instruct the members to disregard this testimony was prejudicial error." *Id.*; see also *Kasper*, 58 M.J. at 320 ("Under the circumstances of this case, the failure to provide such guidance constituted prejudicial plain error.).

Although the resulting prejudice in *Kasper* and *Knapp* hinged on the failure to instruct, both cases still considered the other factors. An interpretation otherwise would result in a *per se* prejudice test, which conflicts with this Court's precedent in *Mullins* and *Whitney*.

c. Establishing a prejudice standard akin to that applied in prosecutorial misconduct cases will promote consistency in the application of the law by the Courts of Criminal Appeals.

In *United States v. Frey*, 73 M.J. 245, 251 (C.A.A.F. 2014), this Court declined to grant sentencing relief despite finding that the Military Judge's curative instructions did not cure the improper argument, and in fact, made the situation worse. The *Frey* Court weighed the severity of the misconduct, the curative measures, and the strength of the government's case as outlined in *Fletcher*. *Id.* at 249-51. The Court found that the first two factors favored the appellant. *Id.* However, the weight of the evidence supporting the sentence was such that the Court was "confident that [a]ppellant was sentenced on the basis of the evidence alone." *Id.* at 249 (quoting *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013)). *See also United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014) (curative measures factor favored government because military judge acted effectively to protect members from potentially improper evidence); *cf. Fletcher*, 62 M.J. at 185 (curative efforts insufficient to overcome severity of misconduct).

This Court's application of the *Fletcher* factors promotes consistency and clarity when assessing the prejudicial impact of prosecutorial misconduct. Regarding the treatment of curative measures, the *Fletcher* precedent supports that they are but one

factor in the overall prejudice analysis. Adoption of a similar approach in the realm of human lie detector testimony comports with this Court's precedent and leads to a more consistent application of the law.

d. The Military Judge's instruction on the credibility of the witnesses and the evidence mitigates any prejudice.

Although the Military Judge here did not issue a prompt curative instruction, she did instruct the Members that they had a duty to determine the credibility of the witnesses and the evidence. (J.A. 346-47.) Indeed, the Military Judge instructed that the final credibility determination "rests solely upon you, the Members of the court." (J.A. 346.) Members are presumed to follow the instructions, and Appellant does not allege that they failed to do so here. *United States v. Harrow*, 65 M.J. 190, 201 (C.A.A.F. 2007). In fact, the Members indicated in *voir dire* that they would follow the Military Judge's instructions and assess each witness's credibility as instructed by the Military Judge. (J.A. 372.)

3. The Government's case against Appellant was strong.

Appellant's Brief suggests that the Government's case was based solely on inconsistent testimony of Mr. West and improperly bolstered testimony of CRI by Cpl AI. (Appellant's Br. at 14-19.) But that argument ignores the Government's third

witness——Cpl Visconti——to whom CRI reported the allegations, and the Government's eight rebuttal witnesses that discounted Cpl West's credibility concerns and rebutted claims that CRI had a character for untruthfulness. Overall, the Member's had other reasons to believe CRI. *See Mullins*, 69 M.J. at 117-18.

a. CRI credibly testified that she awoke to Appellant's hand in her pants, penetrating her vagina. Appellant's attempts to discredit her testimony fail.

CRI, who has a character and reputation for truthfulness, awoke to Appellant's hand in her pants, penetrating her vagina. (J.A. 79-80, 349, 364, 367.) She told this to her mentor, Cpl Visconti, shortly after being violated by her direct supervisor. (J.A. 88.) She also told NCIS after Cpl Visconti reported the allegations almost a year later. (J.A. 89-90, 349.) Then, after yet another year, CRI testified consistently with her statements to Cpl Visconti and NCIS. (J.A. 355-57.)

Appellant's attempts to discredit CRI fail. First, as discussed *supra*, the Record does not support that CRI had a reputation for being a liar. (Appellant's Br. at 14.) In fact, the only Marine who did question her character for truthfulness was the one who CRI filed an equal opportunity complaint against subjecting him to a stern counseling and a transfer. (J.A. 231-32.)

Second, per CRI's mother, CRI's due date did change, causing her mother to miss the birth, thus undermining Appellant's claim that CRI was untruthful with her command. (J.A. 265-67; Appellant's Br. at 14.)

Third, in a footnote, Appellant asserts that CRI had a motive to fabricate based on her receipt of benefits from the VA. (Appellant's Br. at 19.) But as recognized by the Military Judge prior to closings, there was no evidence that showed CRI knew about the VA benefits prior to telling Cpl Visconti. (J.A. 368.) Therefore, the only possible argument on this issue was CRI's motive to embellish or sustain something that was initially false. (J.A. 368.)

b. The Members had no reason not to believe Cpl Visconti.

Appellant makes no mention of Cpl Visconti when discussing the strength of the Government's case. (Appellant's Br. at 13-15.) Cpl Visconti pointedly testified that within weeks of the party, CRI told her that she awoke at the party to Appellant's hands in her pants. (J.A. 197-99, 204.) Cpl Visconti was the lead witness addressing Appellant's actions against CRI and she had no reason to lie. Indeed, the Defense did not attack her character or reputation for truthfulness, but argued that "she seems like a good NCO, concerned NCO." (J.A. 312.) And unlike other witnesses, the Defense did not include a slide in closing

on Cpl Visconti to highlight any inconsistent testimony, bias, or reasons to lie. (J.A. 343-44.)

c. Mr. West did not have the "serious credibility problems" as suggested by Appellant.

Appellant attempts to disparage Mr. West's credibility by asserting that he was administratively separated for his misconduct. (Appellant's Br. at 15.) This misstates the facts—Mr. West was separated with an Honorable discharge upon reaching his end of active service date. (J.A. 159, 168, 243.)

Moreover, Appellant attempts to undermine Mr. West's credibility due to allegations of misconduct involving Mr. West and Mr. West's alleged bias against Appellant. (Appellant's Br. at 14.) But Appellant fails to mention that: (1) Mr. West's misconduct was confined to his final three months in the Marine Corps after Appellant had returned to the unit from deployment, (J.A. 242); (2) the command "targeted" and "picked on" Mr. West after Appellant returned from deployment, (J.A. 236); (3) Mr. West was having a difficult time checking out of the command, which was likely attributable to Appellant, (J.A. 247, 261); (4) three witnesses testified that Mr. West had a character for truthfulness, (J.A. 253-54, 256, 259); (5) one witness testified that Mr. West had a reputation for being a truthful person, (J.A. 253-54); and, (6) one of the two Defense witnesses who testified that Mr. West had a character for untruthfulness based

his opinion in part on Mr. West's receipt of NJP and Appellant's expressed dissatisfaction with Mr. West's performance, (J.A. 215-16, 251-52). Thus, contrary to Appellant's assertion, Mr. West did not have "the serious credibility problems" suggested by Appellant.

d. Although the testimony of the witnesses did not perfectly align, both Mr. West and Cpl AI corroborated CRI's testimony concerning Appellant's actions against her.

Appellant attempts to undermine CRI's account of the incident by identifying inconsistencies with Mr. West's testimony. (Appellant's Br. at 15.) But such inconsistencies are expected considering the trial occurred over two years after CRI was assaulted. Despite the passage of time, Mr. West corroborated CRI's account in several ways.

First, both CRI and Appellant recalled a dim light shining toward CRI's bed. (J.A. 80, 150-51.)

Second, Mr. West placed Appellant in the room and in the bed with CRI and her husband. (J.A. 148.) Whether he was in the bed (as recalled by Mr. West), (J.A. 152), standing next to the bed (as recalled by Cpl Visconti), (J.A. 204-05), or kneeling by the bed (as recalled by CRI), (J.A. 100), Appellant was in a position where he had the opportunity and ability to touch CRI's vagina. The fact that CRI felt the sheet fall off of her when she rolled over to wake her husband suggests that

Appellant was at least somewhat under the covers and in the bed with CRI. (J.A. 83.)

Third, Mr. West saw Cpl AI sleeping in the bed with CRI in the same position as described by both CRI and Cpl AI. (J.A. 47, 78, 148, 178-79.)

Finally, Mr. West saw CRI roll over and nudge Cpl AI on the shoulder. (J.A. 153-54.) A fact also corroborated by Cpl AI. (J.A. 48-49.)

As identified by Appellant, one of the Members recognized a discrepancy in the testimony. (J.A. 125, Appellant's Br. at 15.) But the Military Judge instructed the Members to weigh discrepancies and "consider whether it resulted from an innocent mistake or a deliberate lie." (J.A. 346.) There is no evidence that the Members failed to follow this instruction.

4. Balancing the *Fletcher*-like factors, the lie detector testimony had no prejudicial impact on the Members' deliberations.

Appellant suggests that Cpl AI's "firm belief" that CRI was telling the truth magnified the prejudicial impact of his testimony. (Appellant's Br. at 16-17.) But the Members' conviction on the lesser-included offense proves otherwise. (J.A. 353.) If Cpl AI's belief that his wife was telling the truth truly impacted the Members' deliberations, the Members would have surely convicted on the greater offense. But as the question to Mr. West revealed, the Members had a concern with

whether there was actual penetration as alleged on the charge sheet, when Cpl Visconti only testified to being told about a touch. (J.A. 11, 180, 198.) As the lower court stated, "we are doubtful that testimony from Cpl CI that he believed his wife had a significant impact on the members' deliberations." *Martin*, 2015 CCA LEXIS 250, at *12-*13.

Balancing the *Fletcher*-like factors, the improper testimony had no prejudicial impact on the Members' deliberations——the impact of the improper testimony was minimal, the Military Judge instructed on credibility, and the Government's case was strong. Although the Military Judge did not provide an immediate curative instruction, the strength of the other factors should convince this Court that Appellant was convicted on the basis of the evidence alone.

**Conclusion**

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

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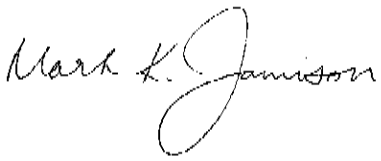

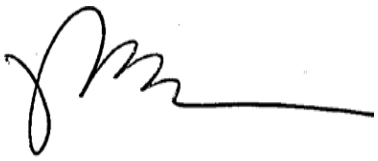

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