IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee/ Cross-Appellant	)	REPLY BRIEF ON BEHALF OF APPELLEE/CROSS-APPELLANT
v.	)	Crim. App. Dkt. No. 201400315
Beau T. MARTIN, Sergeant (E-5) U.S. Marine Corps Appellant/ 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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UNITED STATES CIRCUIT COURT OF APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801-946

STATUTES, RULES, OTHER SOURCES

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

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[1] 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

[1] Hereinafter "Appellant."

sentenced Appellant to reduction to pay grade E-1 and a bad-conduct discharge. The Convening Authority approved 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.

On November 6, 2015, Appellant filed his Brief on the granted issue. On December 7, 2015, the United States filed a consolidated brief, answering the granted issue and briefing the certified issue. On January 20, 2016, Appellant filed a consolidated brief, replying to the United States' Answer on the granted issue and answering the certified issue. The United States replies to the certified issue.

Statement of Facts

A. CRI attended a party with her husband, Cpl AI. Appellant touched CRI's vagina at the party when CRI was sleeping in a bed with her husband.

CRI attended a party with his her husband, Cpl AI. (J.A. 35, 69.) Cpl AI and CRI slept together in a bed in the guest bedroom at the residence. (J.A. 47.) Cpl AI slept on the side of the bed that was against the wall. (J.A. 47.)

CRI awoke during the night 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.) Thereafter CRI went to the bathroom and returned to the bed crying. (J.A. 84, 350.)

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.*)

B. Cpl AI testified to his observations of his wife before, during, and after the party.

1. Cpl AI testified on direct to his opinion that he did not touch CRI.

During the night, CRI attempted to wake Cpl AI by kicking his legs and shaking his shoulder. (J.A. 48-49.) He "vaguely woke up" and told her to stop. (*Id.*)

During the investigation, Cpl AI told a Naval Criminal Investigative Service (NCIS) agent that he might have been the one who touched his wife. (J.A. 51, 371.) Cpl AI explained:

> I'm the kind of person that if it's even remotely an option I think about it like that. I guess I'm, like, a by-the-numbers-type of person. So, I mean, my wife could have thought about, you know, maybe it could have been another night. But just the way she has been since then, then I know it wasn't me. She wouldn't be acting the way she does nowadays, like, if it would have been me. Even if it was something that she wasn't expecting from me she wouldn't be acting that way.

(J.A. 51.) He further explained that he did not typically engage in "extreme sexual" touching in the middle of the night—only "cuddling." (*Id.*)

Cpl AI then described how CRI's behavior changed after the party:

> [S]he's always been, like, jumpy if you startled her, like anybody would be. But I remember times, like probably the biggest time . . . she was cooking something in the kitchen. Like the stove was on, I came up behind her, I put my arms around and . . . she hit something off the stove just because she freaked out. And probably another, like, main thing I can think of is if—obviously, you can't hear very well in the shower. If I ever, like, walked into the bathroom while she was showering—she would . . . not scream but like get jumpy just because she doesn't like—she knows it's me. I would assume she knows it's me who is walking in to the room but it just freaks her out.

(J.A. 52.) The following exchange then occurred:

> Q: And you would had [sic] previously lived together before this assault, correct?
> A: Yes, sir.
>
> Q: So you would have basis to judge how her behavior was before and how her behavior was after?
> A: Yes, sir.
>
> Q: And so there was . . . a marked change in her behavior right at the point of the sexual assault?
> A: Yes, sir.
>
> Q: Did she sleep the same after the assault?
> A: Um, kind of the same . . . if you were to ever try and wake her up—like, if I were to try and just shake her to wake her up she would literally . . . like, hyperventilate—I guess she would . . . like, jump out of bed and, like figure out who—who it was, who was, like trying to wake her up. Which—I mean, I kind of didn't really think too much into that because if someone were like trying to shake me to wake me up and I wasn't sure who it was I would—I would kind of freak but it just—it seemed weird

to me, sir, is the best way I can say it. She, kind of, would just jump out of bed and, kind of, just be, like, scared.

Q: And she did not act like that before the sexual assault?
A: No, sir.

(J.A. 52.)

2. 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:

Q: And eventually, maybe a week or two later, a couple weeks later, a month later, how long after did she actually tell you?
A: She didn't—she never—I don't ever remember her saying [Appellant] did this. But I remember her saying a couple weeks to a month or so later, sir that when she—like, someone did something to her when she went to the bathroom that night and then and when she went into the stairwell at some point, sir.

Q: When she initially told you she didn't give anything in detail, did she?
A: No, sir.

(J.A. 57.) Cpl AI expressed disbelief and testified that he was not "entirely convinced" that it happened:

Q: And you initially thought that maybe she imagined it?
A: I just—I was kind of in disbelief.

Q: You thought maybe she dreamed it?
A: Something like that, sir, yes.

Q: The story didn't really make too much sense to you?
A: I just figured that if something like that would have happened, then, like—I know I was thinking, like, where was I in this?

Like, what, you know, I figured it was something that—at least in my case if something like that were to happen to me, sir, I would—I would have stopped it or done something, like, instantly, sir.

Q: And, initially when you talked to NCIS you, kind of, told them you didn't really remember too much?
A: Yes, sir.

Q: And you first thought that was, hey, maybe it was you who did it?
A: Yes, sir.

Q: You questioned her yourself about it too, didn't you?
A: Yes, sir.

Q: And at no point after that did you ever—hey this is what happened and then you never went and reported it to anyone, did you?
A: I honestly . . . its [sic] not like I didn't believe her, sir. But it, kind of, didn't make too much sense to me. I always think of things as the way I would handle them, which I know in a marriage is kind of bad, sir. But that is just the way I rationalize stuff is how would I handle it. Where I know she handles things a lot different than I do.

Q: Okay. 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. 57-58.)

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

Cpl AI clarified on redirect that CRI told him that someone "grabbed her" in the stairwell and that "more stuff happened in the bathroom" after the incident in the bedroom. (J.A. 62-63.) The Military Judge instructed the Members that the purpose of the testimony was to clarify Cpl AI's testimony about what CRI had told him about a separate incident other than the one charged, which had "nothing to do with this trial." (J.A. 63.)

The following exchange then 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.)

4. 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.)

C. Trial Defense Counsel argued for an acquittal based on the testimony that he elicited from Cpl AI on cross-examination.

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.*)

D. Master Sergeant Nolasco challenged CRI's credibility.

Master Sergeant (MSgt) Nolasco—a Defense witness— expressed a concern that CRI was being dishonest with the command about her due date. (J.A. 212.) The command read CRI her rights and considered imposing NJP, but she went into labor. (*Id.*) MSgt Nolasco did not testify to CRI's character or reputation for truthfulness. [2]

[2] While Appellant avers that the United States misstated key facts including evidence concerning CRI's credibility, the Record indeed supports the United States' characterization of the testimony. (Appellant's Br. at 2-3.) The United States stated in its Answer, and again herein, that MSgt Nolasco challenged CRI's credibility. (Appellee's Br. at 20.) But he did this through a specific act—not an opinion of CRI's character for truthfulness. (J.A. 212.) Indeed, the only witness to challenge CRI's character for truthfulness was Staff Sergeant Sellers. (Appellee's Br. at 58; J.A. 230.)

Argument

A. Appellant's attempt to read Cpl AI's testimony on direct to include an opinion that CRI was telling the truth fails. Without challenge, Cpl AI testified on direct only to his opinion why he could not have touched his wife—an opinion falling squarely within the ambit of Mil. R. Evid. 701. During direct examination, Cpl AI did not opine that CRI was truthful.

Appellant's argument that he was not responsible for the admission of human lie detector testimony—and that he did not invite any error—is based on the faulty premise that the United States first elicited testimony about the credibility of CRI's allegations. (Appellant's Br. at 10.) But, the United States did not present evidence on direct that Cpl AI "doubted his wife's credibility." (Appellant's Br. at 10.) To the contrary, Cpl AI testified that, based on his perception of CRI's marked change in behavior, his opinion was that he could not have touched his wife—testimony falling squarely under Mil. R. Evid. 701. (J.A. 51.)

1. Within the confines of Mil. R. Evid. 701, Cpl AI opined on direct that he knew he that could not have touched his wife.

Lay opinion testimony under Mil. R. Evid. 701 is admissible if it is: (1) rationally based on the witness's perception, and (2) helpful to a clear understanding of the witness's testimony or to the determination of a fact in issue.[3]

[3] Mil. R. Evid. 701 is modeled after Fed. R. Evid. 701. Supplement to Manual for Courts-Martial (MCM) (2012 ed.), Appx. 22 at A22-58.

Mil. R. Evid. 701; *United States v. Norman*, 74 M.J. 144 (C.A.A.F. 2015). Cpl AI's testimony on direct satisfies both prongs.

a. Cpl AI's opinion was rationally based on his perception of CRI's change in behavior.

Lay opinion testimony must be based on "direct observation and judgment." *United States v. Eslinger*, 70 M.J. 193 (C.A.A.F. 2011); *see also United States v. Meling*, 47 F.3d 1546 (9th Cir. 1995).[4] In *Meling*, the Court of Appeals for the Ninth Circuit found no error in the admission of a 911 operator's opinion that was rationally based on her perception of the appellant's demeanor during the call. The appellant was accused of poisoning his wife to collect life insurance. *Meling*, 47 M.J. at 1550. After his wife collapsed from the poison, he called 911 and feigned hysteria. *Id.* at 1551. The 911 operator was permitted to testify to her opinion that he feigned hysteria because her testimony "was rationally based on her perception of [the appellant's] agitation during his emergency call." *Id.* at 1557. The court noted that even though the entire 911 call was played, "the jury was not in the same position as the 911 operator to compare [the appellant's] behavior with that of other emergency callers or to assess whether it was abnormal." *Id.*; *see also*

[4] This Court seeks guidance from judicial interpretations of Federal Rule of Evidence 701, "the model for its military counterpart." *United States v. Byrd*, 60 M.J. 4, 6 (C.A.A.F. 2004).

United States v. Ohrt, 28 M.J. 301, 303-04 (C.A.A.F. 1989) (noting importance of proper foundation under Mil. R. Evid. 701).

As in *Meling*, Cpl AI's opinion was based on his observations of CRI's behavior—as Appellant agrees, no one was in a better position to provide such an opinion. (Appellant's Br. at 19) (noting that "Cpl AI presumably knew his wife better than the child psychologists from *Brooks ever* knew their patients.") Indeed, Cpl AI provided the proper foundation for his opinion by explaining that he lived with CRI prior to the party, and that he saw a marked change in her behavior thereafter. (J.A. 50-51.)

b. Cpl AI's opinion was helpful to understand his testimony and to determine a fact in issue.

Opinion testimony is generally not helpful "where it does no more than instruct the factfinder as to what result it should reach." *Norman*, 74 M.J. at 149 (quoting *United States v. Littlewood*, 53 M.J. 349, 353 (C.A.A.F. 2000)); *see also United States v. Jayyousi*, 657 F.3d 1085, 1125 (11th Cir. 2011) (lay opinion not helpful "when it does nothing more than give one side's understanding of the evidence"). Human lie detector testimony is not helpful because members are "quite capable of resolving matters of credibility, guilt, and innocence." *United States v. Petersen*, 24 M.J. 283, 284 (C.M.A. 1987).

In *United States v. Thompson*, 708 F.2d 1294, 1296 (8th Cir. 1983), the Court of Appeals for the Eighth Circuit found no plain error in the admission of lay

opinion testimony from several co-conspirators concerning whether the appellant was involved in the commission of certain acts. The conspiracy concerned the theft and transportation of farm and construction equipment. *Id.* One co-conspirator (Mathis) testified that he went to a location with the appellant and another co-conspirator (Johnson) to look at machinery and that the appellant transported a machine to a warehouse. *Id.* at 1298. He also testified that the appellant was present for the arrival of two tractors and that the appellant drove one of the tractors off the trailer. *Id.* Based on these observations, Mathis opined that someone other than Johnson was involved, and that that person was the appellant. *Id.* This testimony was based on facts within his personal knowledge, and was "helpful to a clear understanding of [the] witness's testimony and the determination of the facts in issue." *Id.* at 1299.

Similar to the lay opinion testimony in *Thompson*, Cpl AI opined that someone other than him touched his wife. (J.A. 51.) But Cpl AI's testimony did not even go as far as the permissible lay opinion testimony in *Thompson*—Cpl AI never stated that he believed that Appellant was the perpetrator. (J.A. 51.) Indeed, Cpl AI stated on cross-examination that he did not recall CRI ever telling him that Appellant did it. (J.A. 57.)

Moreover, Cpl AI's explanation of his opinion was properly limited to his observations of his wife's behavior without delving into whether he believed his

wife was telling the truth. *Cf. United States v. Knapp*, 73 M.J. 33, 37 (C.A.A.F. 2014) (while agent could have described appellant's physical reactions to interrogation and that those reactions caused him to continue questioning him, agent went too far by opining that he could determine credibility from appellant's physical reactions).

Further, Cpl AI's properly limited opinion was helpful for the Members to understand why he told NCIS that he could have been the one who touched his wife. (J.A. 51.) Therefore, Cpl AI's testimony was admissible under Mil. R. Evid. 701.

2. Appellant mistakenly asserts that Cpl AI's testimony was improper because the Members might infer that he believed his wife. But Rule 701 only imposes limits on a lay witness's opinion testimony, it does not restrain the members from drawing inferences based on that testimony.

Appellant asserts that Cpl AI's direct examination could have "relayed to the members how Cpl AI initially questioned whether [CRI] was telling the truth, or whether she could have been mistaken or confused about her allegations." (Appellant's Br. at 11.) But "Rule 701 imposes limits only upon lay testimony that is "in the form of" opinions or inferences."[5] *United States v. Davis*, 127 F.3d 68

[5] Fed. R. Evid. 701 was amended in 2011—"The Committee deleted all reference to an 'inference' on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "'opinion.'" Fed. R. Evid. 701 Notes of Advisory Committee on 2011

(D.C. Cir. 1997). And the *Davis* court declined to extend Rule 701 to inferences that the jury may have drawn from lay opinion testimony. *Id.* at 71.

The defendant in *Davis* was stopped for having a cracked windshield and cocaine was found under his seat. *Id.* at 70. The defendant's friend was in a car ahead of the defendant, and was stopped by another officer for running a stop sign. *Id.* at 71. At the defendant's trial, the friend admitted on direct examination that he falsely denied knowing the defendant, even though the officer had not told him that drugs had been found in the defendant's car. *Id.* The defendant argued that this testimony contravened Rule 701 because it "amounted to testimony that it was [his friend's] 'opinion' or 'inference' that [the defendant] had drugs in his car." *Id.* The *Davis* court found this characterization of the testimony "unpersuasive" noting that the friend "neither was asked for, nor gave, an opinion on the question whether his friend had drugs in the car." *Id.*

As in *Davis*, Appellant here seeks to extend Mil. R. Evid. 701 to inferences that the Members may have drawn from Cpl AI's testimony. Indeed, Cpl AI never testified on direct that he believed his wife was "telling the truth" or to how "Cpl

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amendments. The Committee noted that "[c]ourts have not made substantive decisions on the basis of any distinction between an opinion and an inference" and that "[n]o change in current practice is intended." *Id.* 2013 amendments to Mil. R. Evid. 701 followed suit—"The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility." Supplement to MCM (2012 ed.), Appx. 22 at A22-59.

AI came to believe her." (J.A. 51-52.) To the contrary, as discussed *supra*, Cpl AI only testified that he knew it was not him because of her change in behavior. (*Id.*) Any inferences the Members may have drawn from this testimony is of no importance—the Rule only "imposes limits on a witness' testimony about his [opinions], it does not restrain the jury itself from drawing them." *Davis*, 127 F.3d at 71.

B. This Court need not reach the issue of prejudice. Appellant injected error—he is entitled to no relief.

Appellant's argument that his cross-examination did not open the door to human lie detector testimony rests entirely on his faulty premise that he was merely eliciting "more details to undermine the Government's point that Cpl AI believed his wife." (Appellant's Br. at 12.) But as discussed in section A, *supra*, the direct examination of Cpl AI did nothing more than provide proper opinion testimony that he could not have done it—not that he believed any of CRI's allegations. (Appellant's Br. at 14.)

Moreover, Appellant himself elicited the very type of evidence that he asserted was error below and that is the subject of the certified and granted issues here. (J.A. 5, 58.) Appellant then used the evidence to argue for an acquittal. (J.A. 323.) Had the United States asked Cpl AI on direct if he was convinced that his wife was assaulted, that would have been error—it would have "usurp[ed] the jury's exclusive function to weigh evidence and determine credibility." *United*

States v. Birdsall, 47 M.J. 404, 410 (C.A.A.F. 1998). Thus, while the United States agrees that an accused has the right to an effective cross-examination, (Appellant's Br. at 12-13), and to attack the credibility of Government witnesses, (Appellant's Br. at 17), Appellant cannot complain of an error on appeal that he himself invited or provoked. *United States v. Wells*, 519 U.S. 482, 488 (1997). "[I]nvited error does not provide a basis for relief." *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996).

C. Appellant misconstrues the United States' position concerning the lower court's finding of plain error. The question is whether Cpl AI's testimony on redirect was a fair response—not whether the testimony itself was human lie detector testimony.

Appellant asserts that the question whether Cpl AI's testimony on redirect is human lie detector testimony is irrelevant and not before this Court. (Appellant's Br. at 18.) This misconstrues the United States position—the United States has not challenged the lower court's finding of plain error regarding the testimony itself. The certified question, however, does ask this Court to consider whether Trial Defense Counsel invited error by opening the door to human lie detector testimony. This necessarily includes an analysis of whether the testimony elicited on redirect was a fair response under this Court's precedent. *See United States v. Gilley*, 56 M.J. 113, 122 (C.A.A.F. 2001) (under plain error review court analyzes whether defense counsel "clearly invited the reply") (quoting *Lawn v. United States*, 355 U.S. 339, 360 n.15 (1958)). *See also United States v. Young*, 470 U.S.

1, 11 (1985) ("issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's 'invited response,' taken in context, unfairly prejudiced the defendant"). (Appellee's Br. at 34-40.)

Conclusion

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

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Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on February 1, 2016.

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