

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Michael Z. PABELONA
Chief Hospital Corpsman (E-7)
U.S. Navy,

Appellant

APPELLANT'S REPLY BRIEF

USCA Dkt. No. 16-0214/NA

Crim.App. Dkt. No. 201400244

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

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Issue Granted

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Discussion

A. The Government mischaracterizes the record.

Because the trial defense counsel did not object at trial, Appellant asserted in his brief that the improper argument is reviewed for plain error.¹ The Government, however, in a gross mischaracterization of the record, attempts to take this a step further by implying that the defense actually condoned the prosecutor’s arguments. It states in its brief, “Here, Appellant never objected, and even conceded at one time that Trial Counsel’s comments about the evidence were ‘fair argument.’”²

Specifically, the Government refers to the trial defense counsel’s acknowledgment, “What trial counsel just described sounded like fair argument to us.” However, this quote is taken out of context and comes from a discussion of

¹ See Appellant’s Br. at 9.

² Appellee’s Br. at 7.

yet another questionable tactic on the part of the trial counsel. During sentencing, Appellant introduced several fitness reports into evidence. The prosecutor then created a PowerPoint containing altered copies of these reports on which he scrawled the word “thief” across the bottom. Concerning Appellant’s objection,

MJ: Has the defense had the opportunity to review the government’s PowerPoint presentation yet?

ADC: We have, sir.

MJ: Are you going to have any objections that that?

ADC: Sir, our objections are to the --- I believe there’s three evaluations ----

MJ: Um-huh.

ADC: ---- that the defense put into evidence, and the government has taken those and added the word “thief” to the bottom of it.

MJ: Um-huh.

ADC: Our objection would be to the addition of the handwritten words from the government “thief” on those evaluations.

MJ: Okay. Any objections to any of the other documents?

ADC: No, sir.

MJ: All right. So it’s to those three evaluations where the government has written in the word “Thief?”

ADC: That's correct, sir.

MJ: Trial counsel?

ATC: They're demonstrative aids, sir. I mean they put them into evidence, and I want to explain that he would not have been in the --- he wouldn't have even been in those promotable categories or that early promote category if the truth of what he was doing at that time had been reflected in those fitness reports.

MJ: Okay. So these fitness reports all span time periods in which the alleged acts occurred, correct?

ATC: That's correct, sir.

MJ: Okay. All right. Defense, do you dispute the fact that government can use the word "thief" in their argument?

ADC: Absolutely not, sir. What trial counsel just described sounded like fair argument to us.

MJ: Okay. But you still have a problem with them writing the word on the evaluation?

ADC: Yes, sir. It's the manipulation of the documentary evidence that's been submitted in the record ----

MJ: It's the what again? I'm sorry.

ADC: The manipulation ----

MJ: Manipulation.

ADC: ---- of the documentary evidence.

MJ: Okay. Well, I mean this is not the original obviously. They're not writing on original exhibits. . . .³

The military judge then overruled Appellant's objection and allowed the prosecutor to use the altered fitness reports in his PowerPoint. But when the trial

³ J.A. at 152-53.

resumed, the prosecutor never made the argument explaining that Appellant “wouldn’t have even been in those promotable categories or that early promote category”—which is the argument the defense thought was reasonable—when showing the altered fitness reports. It is in this context that the defense made its “fair argument” comment.

In addition, the Government’s proposed “thief” argument regarding the promotable categories on the fitrep would have come during sentencing and referenced conduct of which Appellant was already *convicted*, not that for which he was merely accused. But the prosecutor’s personal attacks of which Appellant complains all occurred during his argument on the merits—prior to any convictions.⁴

Finally, the trial defense counsel never acceded to the propriety of any arguments actually made to the members. To the contrary, he did just the opposite. Defense counsel objected to the Government’s attempt during sentencing to introduce evidence that Appellant went to a strip club. This colloquy followed:

ATC: I’m not going to say he’s a stripper --- I’m not going to say he’s a sleazebag, sir.

ADC: They called him an idiot yesterday, so sleazebag would seem to be fair game today, sir, and because of that tenuous connection, sir, under --- if not under 1001, under 403.⁵

⁴ See Appellant’s Br. at 6.

⁵ R. at 777 (attached as Appendix).

B. The Government wrongly argues that Appellant exaggerates the number of improper statements.

The Government argues repeatedly that “Appellant attempts to make Trial Counsel’s comments appear more numerous by separating a single comment into two.”⁶ But, in fact, it was the prosecutor who insisted on repeating his improper statements for emphasis. Appellant merely points out each time this was done.

C. The Government wrongly argues that the Prosecutor’s statements were not personal opinions, but merely reasonable inferences.

The Government argues that the “arguments of the United States were not Trial Counsel’s personal opinions” But this flies in the face of what the trial counsel said on the record. For example, he stated, “I want to make one thing perfectly clear for the record, I don’t think the accused is a mastermind at all. I think he’s an idiot, and that’s why he got caught, and he’s also a con artist and this is his last con.”⁷ Other examples are when the trial counsel said, “that doesn’t sound cooperative to *me*[,]”⁸ “but *I* think it’s pretty obvious that”⁹ and “*I* didn’t hear any reasonable doubts.”¹⁰

⁶ Appellee’s Br. at 14; *see also* Appellee’s Br. at 15 (“Again, this was part of the same comment above, only split into two separate comments by Appellant.”); *id.* at 19 (“Appellant again splits these comments up to attempt to give the appearance these comments were more numerous.”); *id.* at 20 (“Again, Appellant is dividing what is essentially one comment into two, in order to exaggerate their importance and number.”); *id.* at 21 (“Appellant again attempts to separate in order to exaggerate number of perceived ‘improper’ comments.”)

⁷ J.A. at 144.

⁸ J.A. at 139 (emphasis added).

And lest his attempts to convey his opinions to the members were not clear, the trial counsel brought it home with these concluding comments:

[T]here's a couple of things I guarantee you'll hear . . . 'The government is inhuman.' 'They're just monsters,' right? We're just monsters. Well, look, this is me. Right? Not a monster.¹¹

D. The Government's reliance on common knowledge is misplaced.

The Government counters Appellant's contention that the trial counsel argued facts not in evidence by asserting that the comments in question merely stated matters of common knowledge. For example, it asserts that it was a "reasonable inference" to characterize the ATM transaction at "The Venetian 1 Anaheim CA" as a withdrawal at a strip club. But it is unreasonable to expect that members sitting on a court-martial in Italy—where this trial occurred—would possess any "common knowledge" about an address in Anaheim, California. Indeed, the only way the Government is able to support this contention is by citing the club's website which was not introduced into evidence.¹²

Conclusion

The Government's brief is effective in demonstrating what proper arguments at trial *could have* looked like. Indeed, if the prosecutor argued to the members in the same manner the Government's brief does to this Court, there would have been

⁹ J.A. at 175 (emphasis added).

¹⁰ J.A. at 143 (emphasis added).


¹¹ J.A. at 171.


¹² Appellee's Br. at 32.

far fewer problems. For instance, instead of saying Appellant’s wife was “full of it” the trial counsel might have argued to the members that “one of two sides is lying;” instead of commenting on his “pathetic excuses” he might have pointed out inconsistencies in Appellant’s statements.¹³

But what the trial counsel chose to do was to appeal to emotion by inserting his personal opinions into his arguments, launching into vicious ad hominem attacks on Appellant, and arguing facts not in evidence. It is difficult to imagine a scenario in which referring to Chief Pabelona as a “deadbeat,” “pathetic excuse for a husband,” an “idiot,” and noting that he “sleeps in a bed of lies,” could be considered fair inferences or fair characterizations.

These tactics cannot be countenanced by this Court and Appellant respectfully requests that the findings and sentence be set aside.


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¹³ *Id.* at 17-18.

Appendix

Record Transcript page 777.

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on July 28, 2016.

Certificate of Compliance

This brief complies with the page limitations of Rule 24(b). This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word version 2010 with 14-point Times New Roman font.



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APPENDIX

ATC: I'm not going to say he's a stripper --- I'm not going to say he's a sleazebag, sir.

ADC: They called him an idiot yesterday, so sleazebag would seem to be fair game today, sir, and because of that tenuous connection, sir, under --- if not under 1001, under 403.

MJ: What's the foundation you're going to lay for this being a strip club?

ATC: The agent has investigated that she did her internet search and found out what it was.

MJ: So it's based on an internet search?

ATC: That's how, you know, investigations work. I mean ---

MJ: I'm not saying you shouldn't use the internet. That's an easy way to get information about that. I'm going to --- I'm going to allow you --- I do find it proper aggravation that --- the ways that the accused was spending money or that he was not spending it on his --- that the BAH differential he received and shortly thereafter spending money in all these places, I mean is this different than his other spending habits before he got the BAH? Is this different?

ATC: Yeah, I don't see --- I don't see any strip clubs in there, but ---

MJ: But I mean all this other stuff, Godiva Chocolates, Forever 21, all this other stuff.

ATC: Yeah, that one ----