IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee,	)	UNITED STATES' ANSWER
v.	)	Crim. App. No. 201400224
Michael Z. PABELONA, Hospital Corpsman Second Class (E-5) U.S. Navy Appellant	)	USCA Dkt. No. 16-0214/NA

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

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36051

JAMES M. BELFORTI
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678
Bar no. 36443

BRIAN K. KELLER

Acting Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 31714

SUZANNE M. DEMPSEY
Major, U.S. Marine Corps
Acting Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059
Bar no. 36266

INDEX

Page

TABLE OF AUTHORITIES

Page

NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

UNITED STATES CIRCUIT COURT OF APPEALS CASES

STATUTES AND RULES

Uniform Code of Military Justice, 10 U.S.C. §§ 801-941:

ABA Criminal Justice Standards for the Prosecution Function (3rd ed. 1993):

Issue Presented

PROSECUTORS MUST ACT WITHIN THE BOUNDS OF PROPRIETY. HERE, IN FRONT OF MEMBERS, THE PROSECUTOR EXPRESSED HIS OPINION OF APPELLANT INCLUDING, "I THINK HE'S AN IDIOT," OPINED ON DEFENSE-FRIENDLY EVIDENCE, CHARACTERIZED APPELLANT'S STATEMENTS AS "RIDICULOUS," VOUCHED FOR GOVERNMENT - FRIENDLY EVIDENCE, DIAGNOSED APPELLANT AS SCHIZOPHRENIC, ASKED MEMBERS TO DISREGARD DEFENSE ARGUMENTS, AND TOLD MEMBERS THAT APPELLANT "SLEEPS IN A BED OF LIES." WAS THIS PLAIN ERROR?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included sixteen months of contingent confinement. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(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 false official statement and one specification of larceny, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907 and 921 (2012). On February 14, 2014, the Members sentenced Appellant to sixty days of confinement, sixty days of

restriction, forfeiture of all pay and allowances, reduction to pay-grade E-5, a fine in the amount of $60,000.00, and to serve additional confinement of sixteen months if the fine was not paid.

On October 15, 2015, the United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. On December 4, 2015, Appellant filed a Petition for Review with this Court. On April 21, 2016, this Court granted the Petition.

Statement of Facts

A. Appellant entered into a sham marriage which he used to collect tens of thousands of dollars.

Appellant married Yadira Nohemi on February 3, 2011. (J.A. at 38, 178.) On February 23, 2011, Appellant updated his NAVPERS 1070/602 Dependency Application/Record of Emergency Data, indicating that Yadira Nohemi was his spouse. (J.A. 38, 180, 182.)

On May 5, 2011, during check-in, Appellant filled out forms indicating Yadira was a U.S. citizen. (J.A. 40.) The next day, Appellant updated his Servicemember's Group Life Insurance Election and Certificate, listing his mother as his sole beneficiary. (J.A. 41.) Appellant also submitted a request for Basic Allowance for Housing (BAH) based upon Yadira's location. (J.A. 44, 197.) On May 11, 2011, the Commanding Officer, U.S. Naval Hospital, Naples, Italy, approved Appellant's BAH request. (J.A. 198.)

In late 2012, a member of Appellant's command suspected Appellant might be in a fraudulent marriage for the purposes of collecting additional allowances, and reported the suspicion to the Naval Criminal Investigative Service (NCIS). (J.A. 31-33, 90.)

The NCIS agent collected Appellant's personal and military financial records. (J.A. 44-54.) The records revealed that at the time of his marriage to Yadira Nohemi, Appellant owed approximately $55,000.00 in consumer debt. (J.A. 45-49.) At the same time, Appellant had approximately $49.00 and $5.00 in his checking and savings accounts, respectively. (J.A. 51-52.) The Agent's investigation revealed that Appellant and Yadira Nohemi had never lived at the same residence. (J.A. 36, 40, 42-43, 58, 62-63, 67.) The investigation further revealed that Yadira Nohemi was an undocumented alien from Honduras. (J.A. 58, 67-68.)

When questioned by NCIS, Appellant said Yadira was introduced to him by a former co-worker, Mr. Sergio Newsome. (J.A. 59, 61, 67.) Mr. Newsome was married to Yadira's sister. (J.A. 37, 67.) Appellant could not recall who was at his wedding or where his wedding took place. (J.A. 59-60.) Mr. Newsome was the witness at his wedding. (J.A. 60.) Appellant said he was providing support to Yadira by paying her car insurance. (J.A. 62.) Yadira Nohemi did not have a

driver's license. (J.A. 62.) Yadira Nohemi said that the only support Appellant provided was paying for her cell phone. (J.A. 89.)

HM1 Partido-Jacobo, Appellant's best friend and roommate, testified as a witness for the United States. (J.A. 78, 80.) HM1 Partido-Jacobo and Appellant lived together before Appellant transferred to Naples, Italy, in 2011. (J.A. 79-80.) When Appellant married, he was sharing a residence with HM1 Partido-Jacobo in California. (J.A. 84.)

Appellant told HM1 Partido-Jacobo that he married because he needed money—he married to receive BAH. (J.A. 80-81.) HM1 Partido-Jacobo never met Appellant's wife, nor did he ever see any pictures of her. (J.A. 83-84.)

While stationed in Italy, Appellant took leave eighteen times, but never returned to the United States. (J.A. 199-200.) Appellant did take leave to visit France and other Italian cities. (J.A. 52-54, 91, 199-200.) Financial records showed Appellant repeatedly purchased designer clothing, shoes, and watches. (J.A. 52-54.) Appellant discussed his material possessions with his co-workers, including his watch collection that included a Rolex valued at over $15,000.00. (J.A 85, 88.) Due to his expensive tastes, Appellant's co-workers called him "Prada-Mike." (J.A. 87-88.)

Appellant received nearly $2,000.00 per month for his BAH. (J.A. 86.) Between March 2011 and April 2013, Appellant received more than $45,000.00 in BAH based on his marriage. (Pros. Ex. 5[1].)

B. The Military Judge instructed the Members that "arguments of counsel are not evidence."

The Military Judge provided the Members with the standard instruction on the credibility of the evidence. (J.A. 94.) He also instructed the Members that they were expected to use their own common sense and their knowledge of human nature and the ways of the world. (J.A. 94.) He also gave the standard instruction regarding credibility of witnesses. (J.A. 95.) Additionally, the Military Judge provided an instruction to the Members regarding comments and questions he may have made throughout the trial as well as an instruction defining the argument of counsel. (J.A. 96-97.)

C. Trial Defense Counsel did not object to Trial Counsel's closing argument.

Appellant's own counsel stated that "I'm going to tell you what actually happened based upon the facts we saw" and said he was "going to talk about what the government is alleging and how that really doesn't make sense with the facts."

[1] Prosecution Exhibit 5 contains approximately 400 pages of Appellant's bank records. In the interests of judicial convenience and economy, Appellant and the United States did not include all of these documents in the Joint Appendix, but Appellant agrees that he received over $45,000.00 in BAH from his marriage.

(J.A. 120.) Trial Defense Counsel never objected to the argument of Trial Counsel. (J.A. 96-118, 135-145.)

During pre-sentencing, the Military Judge asked Trial Defense Counsel whether he objected to Trial Counsel using the word "thief" in his argument; Trial Defense Counsel replied: "[a]bsolutely not, sir. What trial counsel just described sounded like fair argument to us." (J.A. 153.)

Other facts relating to Trial Counsel's arguments are incorporated into the argument below.

Summary of Argument

As Appellant was prosecuted for crimes of dishonesty, Appellant has not demonstrated that the comments of Trial Counsel are error, let alone plain or obvious error. Even assuming plain and obvious error, Appellant has not carried his burden to demonstrate prejudice: he received a fair trial, and the Members acquitted him of half of the Charges.

Argument

APPELLANT FORFEITED REVIEW OF HIS ALLEGATIONS OF PROSECUTORIAL MISCONDUCT. TRIAL COUNSEL'S ARGUMENTS WERE NOT PLAIN ERROR BECAUSE REFERRING TO AN ACCUSED AS A "LIAR" IS NOT ERROR IN A PROSECUTION FOR CRIMES OF DISHONESTY. EVEN IF TRIAL COUNSEL'S ARGUMENTS ARE PLAIN ERROR, APPELLANT FAILS TO DEMONSTRATE PREJUDICE, AND THE ACQUITTALS INDICATE HE RECEIVED A FAIR TRIAL.

A. Allegations of prosecutorial misconduct are forfeited absent objection.

When the appellant fails to object at trial, allegations of prosecutorial misconduct are reviewed for plain error. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011). Appellant must therefore prove that "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id*. The plain error doctrine "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Fisher*, 21 M.J. 327, 328-29 (C.M.A. 1986).

Here, Appellant never objected, and even conceded at one time that Trial Counsel's comments about the evidence were "fair argument." (J.A. 153.) This Court thus applies the plain error analysis.

B. There is no error, let alone plain or obvious error. When considered in context, Trial Counsel's comments did not breach any legal norm or standard. Given the nature of the offenses, it was fair for Trial Counsel to comment on Appellant's honesty and the credibility of his arguments.

1. Prosecutorial misconduct, under *Meek*, depends on a contextual reading of whether comments or actions violate ethical rules.

Prosecutorial misconduct is generally defined as "action or inaction by a prosecutor in violation of some legal norm or standard, *e.g*., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996); *see also United States v. Hornback*, 73 M.J. 155, 159-60 (C.A.A.F. 2014). The Supreme Court has explained that prosecutorial misconduct occurs when "a prosecuting attorney oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal case." *Berger v. United States*, 295 U.S. 78, 85 (1935).

> [A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from *improper methods calculated* to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88 (emphasis added). Challenged statements are reviewed in context rather than in isolation. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (quotations omitted).

a. Though a trial counsel may not express his personal opinions in argument, he is free to argue that members should reach an opinion based on the evidence presented.

"The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Criminal Justice Standards for the Prosecution Function 3-5.8(b) (3rd ed. 1993) (J.A. 214); *see also United States v. Davidson*, 452 Fed. Appx. 659, 664 (6th Cir. 2011). However, "the prosecutor may argue all reasonable inferences from evidence in the record." ABA Criminal Justice Standards for the Prosecution Function 3-5.8(a) (3rd ed. 1993) (J.A. 214); *Id*. ("However, a prosecutor is free to argue that the jury should arrive at a particular conclusion based upon the record evidence, including the conclusion that the evidence proves the defendant's guilt."). "Prosecutors can argue the record, highlight any inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence." *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008); *see also United States v. Newman*, No. 933289, 1993 U.S. App. LEXIS 32082, *29 (6th Cir. Dec. 7, 1993) (no prosecutorial misconduct where prosecutor repeatedly called defense's submitted evidence "phony" and "bogus" because there was evidence in the record to indicate the evidence may have been fabricated).

b. Vouching occurs when a trial counsel places the prestige of the government behind evidence. Arguing that a witness is or is not telling the truth based on the evidence and inferences therefrom is not vouching.

Vouching is derived from the same standards that prohibit personal opinions. *See supra* at 9. "Improper vouching occurs when the trial counsel 'places the prestige of the government behind a witness through personal assurances of the witness veracity.'" *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005) (quoting *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)). "Prosecutors may, however, argue reasonable inferences based on the evidence, including that one of the two sides is lying." *United States v. Wilkes*, 662 F.3d 524, 540 (9th Cir. 2011) (internal citations and quotation marks omitted). "Furthermore, prosecutors are permitted to respond to defense counsel's attempts to impeach the credibility of government witnesses." *Id.*; *see also Necoechea*, 986 F.2d at 1278-79 (finding the prosecutor did not improperly vouch by eliciting testimony about the truthfulness provision of a witness's plea agreement because it was offered in response to defense counsel's attacks on the witness's credibility).

c. Generally counsel may not argue facts not in evidence, but it is proper for a trial counsel to comment on "matters of common knowledge within the community."

"The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice." ABA Criminal Justice Standards for the Prosecution Function 3-5.9 (3rd ed. 1993) (J.A. 214); *see also Fletcher*, 62 M.J. at

183 (citing *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983)). "This Court has held that it is proper for a trial counsel to comment during argument on contemporary history or matters of common knowledge within the community." *Id*. (quoting *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994)). A counsel may comment on "any. . .matter 'upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all.'" *Id*. (quoting *United States v. Jones*, 2 C.M.A. 80, 87 (1952)).

d. A trial counsel should not make disparaging comments about a defense counsel or an accused.

"The prosecutor should support. . .the dignity of the trial courtroom. . .by manifesting a professional attitude toward. . .opposing counsel [and] defendants. . ." ABA Criminal Justice Standards for the Prosecution Function 3-5.2(a) (3rd ed. 1993) (J.A. 214); *see also Fletcher*, 62 M.J. at 181. However, there is an "exceedingly fine line which distinguishes permissible advocacy from improper excess" which "is to be drawn within the concrete terrain of specific cases." *Id*.; *see also United States v. White*, 486 F.2d 204, 207 (2d Cir. 1973).

2. Trial Counsel's comments, when considered in context, do not violate any ethical rule or norm, but are arguments based on reasonable inferences from the evidence. No misconduct occurred.

When considering Trial Counsel's comments in context and in light of the evidence presented at trial, there was no prosecutorial misconduct. Appellant's

theory of the case was that the United States had no evidence that he had the requisite intent to enter a fraudulent marriage at the time of the marriage. Appellant's own counsel stated that "I'm going to tell you what actually happened based upon the facts we saw" and that he was "going to talk about what the government is alleging and how that really doesn't make sense with the facts." (J.A. 120.) The arguments of the United States were not Trial Counsel's personal opinions of Appellant, Appellant's counsel, or evidence presented favoring either side, but rather were observations and commentary regarding the evidence presented.

Here, the United States' entire case was built around presenting evidence of Appellant's falsehoods. The false official statements were the basis for proving the larceny and conspiracy charges and the statements made by Appellant to a witness were essential to the obstruction of justice charge.

Evidence adduced at trial indicated that Appellant had been interviewed by a member of the Office of Personnel Management (OPM) regarding his security clearance and by NCIS as part of the criminal investigation into the charges. (J.A. 35, 70, 73-74.) During the interviews Appellant provided numerous factual statements, many of them later confirmed to be false. (J.A. 58, 60-63, 66-67, 71, 75.) NCIS also interviewed the woman with whom Appellant claimed to be in a non-fraudulent marriage, (J.A. 65, 92), the friend and former supervisor who

introduced Appellant to this woman, (J.A. 65, 76, 92), and his roommate who the United States alleged Appellant attempted to get to alter his testimony or statements. (J.A. 72, 77.)

Appellant said that his friend, co-worker, and former supervisor introduced him to his future wife. (J.A. 61, 67, 71, 75.) Appellant said that this friend was married to his wife's sister. (J.A. 67.) Appellant did not recall who was present at his marriage ceremony, but the documentation showed that his friend, co-worker, and brother-in-law, were present at the ceremony. (J.A. 60.) Appellant claimed he did not know his wife was not a legal resident of the United States until after they were married. (J.A. 61.) Appellant initially claimed he contacted a lawyer and paid him $5,000.00 to work on his wife's immigration status, but later admitted that he did not. (J.A. 61.) Appellant claimed that the only means of support he ever provided to his wife was car insurance. (J.A. 62.) His wife did not have a driver's license. (J.A. 62.) His wife said the only means of support Appellant provided her was to pay for her cell phone. (J.A. 89.) Appellant listed his mother-in-law's address as the address of his friend and co-worker. (J.A. 63-64.) None of these statements were true, and all of these lies and inconsistencies were evidence presented by the United States in order to prove the charged offenses.

Appellant references comments by Trial Counsel out of context and without reference to the nature of the case. Appellant alleges instances of unobjected-to

misconduct by Trial Counsel: (1) giving his personal opinion (2) vouching for the evidence (3) disparaging Appellant (4) disparaging Appellant's Trial Defense Counsel (5) arguing facts not in evidence. (Appellant's Br. at 10-17.) Appellant is mistaken. Each complained-of statement is addressed below.

a. "That's a ridiculous story."

Trial Counsel said this in response to Appellant's suggestion that nobody came to the courthouse for his wedding ceremony, but a celebration occurred with people who Appellant and his wife did not invite to the wedding. (Appellant's Br. at 3; J.A. 100.) Trial Counsel was not opining. Rather, he was "highlighting inconsistencies" in Appellant's story and "forcefully assert[ing] reasonable inferences from the evidence." *Cristini*, 526 F.3d at 901; ABA Standard 3-5.8. (J.A. 217.)

b. "Common sense tells you that's ridiculous."

This was the continuation of the comment above. Appellant attempts to make Trial Counsel's comments appear more numerous by separating a single comment into two. (Appellant's Br. at 3.) The actual transcript indicates that Trial Counsel stated, "[t]hat's a ridiculous story. Common sense tells you that's ridiculous." (J.A. 100.) This statement was similarly a comment on how Appellant's story is inconsistent with common sense, not Trial Counsel's opinion.

c. "That is hogwash."

Trial Counsel said this regarding Appellant's theory that the reason none of Appellant's friends or colleagues knew about his wife was because he is a private person, especially when some indicated that Appellant told them he was single. (Appellant's Br. at 3; J.A. 103.) This comment is similar to the "bogus" comments in *Newman*, because it was supported by the evidence in the Record—including testimony that showed Appellant was not "private" and freely told others he was single. *Newman*, 1993 U.S. App. LEXIS 32082, at *29.

d. "[S]he's full of it."

Trial Counsel said this in response to Yadira Nohemi's NCIS statement in which she claimed the reason she had not communicated with Appellant in years was because her cell phone was broken. (Appellant's Br. at 3; J.A. 104.) As the Ninth Circuit held and as specifically permitted in the ABA's Standards, "[p]rosecutors may . . . argue reasonable inferences based on the evidence, including that one of the two sides is lying." *Wilkes*, 662 F.3d at 540.

e. "She tells ridiculous stories."

Again, this was part of the same comment above, only split into two separate comments by Appellant. (Appellant's Br. at 3; J.A. 104.) The actual passage reads: "because she's full of it. She tells ridiculous stories." (J.A. 104.) Trial counsel was explaining that if Appellant and Ms. Nohemi truly intended to have a life together, a cell phone would not have been the only means of communication,

and certainly other forms, like use of email would have been used. (J.A. 104.) It is not improper to argue that a witness is lying based on the evidence. *Wilkes*, 662 F.3d at 540.

f. "[T]his is a ridiculous story."

This was the conclusion of the same paragraph referenced in the preceding comments and was Trial Counsel's continuation of his argument that a married couple would have communicated with each other if they intended a valid, non-fraudulent marriage. (Appellant's Br. at 3; J.A. 104.) It is similarly acceptable, as explained in *Wilkes*.

g. "It's—it's—it's hogwash, members."

This was Trial Counsel's comment on Appellant's statement that he provided support to his "wife" in the form of car insurance when it was shown that she did not possess a driver's license. (Appellant's Br. at 3; J.A. 105.) Again, this comment is similar to the "bogus" comments in *Newman*, because it was supported by the evidence in the Record and common sense inferences. *Newman*, 1993 U.S. App. LEXIS 32082, at *29.

h. "He lies and clumsily at that."

Trial Counsel was commenting about statements Appellant had made about his "mother-in-law" and the nature of their relationship. (Appellant's Br. at 4; J.A. 109.) It is not error to assert that an accused is lying. *Wilkes*, 662 F.3d at 540.

This comment was particularly not problematic given that Appellant's crimes of dishonesty—that is, whether Appellant lied and whether he lied knowingly—were elements of the charged crimes. Arguing that Appellant "lied" is, in a case where lying is an element of the crime, not unlike arguing that "the accused murdered the victim."

i. "That's rubbish."

Trial Counsel said this regarding the obstruction of justice charge, in response to Appellant's claim that he flew from Naples to Sigonella simply to tell the primary Government witness to tell the truth, when he knew the witness had previously explained to NCIS that Appellant told him he got married to obtain BAH. (Appellant's Br. at 4; J.A. 111.) Again, this was a colloquial comment on the evidence, and supported by common sense inferences. *Newman*, 1993 U.S. App. LEXIS 32082, at *29. It was not improper.

j. "He tells ridiculous stories about his mother's fortune, ridiculous stories about his own personal fortune."

Trial Counsel made this comment referring to the fact that Appellant told his friends and co-workers that his mother was extremely wealthy and left him a lot of money. (Appellant's Br. at 4; J.A. 112.) A comment on the plausibility of Appellant's argument does not become improper simply because it is accompanied by the word "ridiculous." *See United States v. White*, 486 F.2d 204, 1973 U.S. App. LEXIS 7562 (2d Cir. 1973) ("[W]e do not intend to formulate per se rules or

declare that certain words will automatically trigger mistrials or reversals of convictions.").

k. "[P]athetic excuses" and "That's absurd."

Trial Counsel made both of these comments to characterize Appellant's claims of being a "private person." (Appellant's Br. at 4; J.A. 113.) Trial Counsel went on to cite the testimony of HMC Anglin to suggest that Appellant is actually "guarded" and then he cited the fact that Appellant was willing to talk about past marriages, but unwilling to talk about his current "wife." (J.A. 113.) This was a fair characterization of an incredible argument based on the evidence admitted at trial.

l. "That love seems to have sprung out of the middle of nowhere."

Trial Counsel made this comment in response to the fact that Appellant had never told anyone how much he loved his wife until after the investigation started. (Appellant's Br. at 4; J.A. 114.) Again, this was a comment on the plausibility of Appellant's defense theory based on the evidence presented at trial. It is not improper to rebut an argument by Appellant.

m. "Just doesn't make sense," "These stories are not believable," and "They're not reasonable."

Trial Counsel said this regarding how Appellant purported to love his wife so much that he was crying in his Master Chief's office for fear that the person

with whom he had no communication with for a year, provided no support to, and did not care about, was going to get deported. (Appellant's Br. at 4; J.A. 114-115.) Trial Counsel also argued that Appellant's crying was due to the fact that he had been caught and that since she was married to an American citizen, his "wife" would only be in danger of being deported if they were "exposed." (J.A. 114.) Furthermore, the comment "they're not reasonable" was a continuation of Trial Counsel's arguments about Appellant's incredible stories. (J.A. 115.) Appellant again splits these comments up to attempt to give the appearance these comments were more numerous. It is not improper to assert that a witness is not telling the truth or that an accused's story does not make sense. *Wilkes*, 662 F.3d at 540.

n. "[T]hat doesn't sound cooperative to me."

Trial Counsel made this comment in response to Trial Defense Counsel's argument that Appellant cooperated with investigators. (Appellant's Br. at 4; J.A. 112, 139.) Trial Counsel was pointing out that Appellant's "wife" refused to provide a sworn statement and cut off the interview process. (J.A. 139.) This occurred during his rebuttal argument to respond to Trial Defense Counsel's claim that Appellant's "wife" had been "extremely forthcoming" during the investigation. (J.A. 126.) Thus, it was not improper when considered in context. *See United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (noting that "[u]nder 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") (*citing United States v. Gilley*, 56 M.J. 113, 120-21 (C.A.A.F. 2001)).

o. "I mean the defense seems to be at odds with itself" and "[I]t's ridiculous to think that."

Trial Counsel made these comments in response to Appellant's position that he loved his wife all along. (Appellant's Br. at 4; J.A. 140.) Again, Appellant is dividing what is essentially one comment into two, in order to exaggerate their importance and number. (Appellant's Br. at 4.) Once again, Trial Counsel was responding to the fact that Appellant was claiming to have loved his "wife" all along, despite the evidence to the contrary. (J.A. 139); *Carter*, 61 M.J. at 33.

p. "[T]hese ridiculous statements."

Trial Counsel said this to characterize Appellant's claims that he had met with an immigration lawyer for his "wife," paid the lawyer $5,000, and then later reversed his position and claimed he had taken no steps towards solidifying her legal status, which his "wife" then confirmed. (Appellant's Br. at 4; J.A. 141.) The characterization of Appellant's story as "ridiculous" was based on the fact that he admitted his initial story was not true. (J.A. 61.) This was not merely the opinion of Trial Counsel.

q. "I heard a lot of fanciful suggestions," "I heard a lot of conjecture," and "I didn't hear any reasonable doubts."

Trial Counsel made all three of these comments consecutively, which

Appellant again attempts to separate in order to exaggerate the number of perceived "improper" comments. (Appellant's Br. at 4; J.A. 143.) Trial Counsel was merely arguing how the Members should view Appellant's suggested theories and this was a specific response to Trial Defense Counsel's argument. It was not improper.

r. "It's remarkable, but it's absurd."

Trial Counsel said this in response to Trial Defense Counsel's closing argument suggesting that if Appellant were in fact guilty, there would actually be evidence of his marriage as he would have attempted to cover up his guilt. (Appellant's Br. at 4; J.A. 144.) This was a fair response to an implausible defense argument and even if it were not, it was proper under the "invited reply" doctrine. *Carter*, 61 M.J. at 33.

s. "[I]t's obvious that he didn't help her at all."

Trial Counsel made this comment about the evidence indicating that Appellant did not provide any support for his "wife" during the marriage. (Appellant's Br. at 5; J.A. 107.) This was not vouching. Trial Counsel was not claiming this was "obvious" because he said so or because he was a representative of the Government. (Appellant's Br. at 5.) Rather, this was a comment on the extensive evidence that Appellant did not provide any support to his wife. (J.A. 62, 89.)

t. "[I]t's obvious that he doesn't intend to give these funds back" and "[T]his makes sense."

Trial Counsel made this comment before explaining why it was "obvious" he would not return the money, so as to demonstrate Appellant's intent to permanently deprive the United States of the money. (J.A. 107.) Trial Counsel immediately followed this comment by saying "[Appellant's] burning [these funds] up much too quickly, and why is that, members? Well, you saw his maxed out credit cards. You saw his consumer debt." (J.A. 107.) Once again, this was not vouching, but was an argument based on the evidence and common sense.

u. "He made it very clear."

Trial Counsel said this twice to indicate that HM1 Partida-Jacobo showed while testifying that he "did not want to be there" because Appellant was his friend. (Appellant's Br. at 5; J.A. 110.) Trial Counsel was not vouching for anything. Rather, he was referring to the demeanor and testimony of a witness to emphasize that witness' believability.

v. "That makes it inescapably clear."

Trial Counsel said this when characterizing a conversation Appellant had with HM1 Partida-Jacobo, during which HM1 Partida-Jacobo admitted to Appellant that he had told the truth about Appellant's BAH fraud. (J.A. 112.) Trial Counsel further argued that Appellant's angry response that HM1 Partida-Jacobo had "screwed him over" made it clear that Appellant's intention was to

obstruct justice by influencing HM1 Partida-Jacobo's testimony. (J.A. 112.) This was not vouching as Appellant now claims, but an argument based on the evidence presented to the Members. (Appellant's Br. at 5.) The word "clear" is not improper *per se*. Even *Fletcher* did not go this far. Rather, the phrase "I think it is clear" was identified by this Court as improper. *Fletcher*, 62 M.J. at 180. Nevertheless, a specific word should not render a characterization of the evidence as improper. *White*, 486 F.2d at 204.

w. "It makes sense" and "[I]t's clear that's what he's up to."

Trial Counsel said this about the conspiracy charge after describing an e-mail that showed Sergio Newsome helped to set up the fraudulent marriage. (J.A. 117.) This was not vouching, but rather a conclusion to a section of an argument based on evidence admitted at trial.

x. "[U]navoidably clear," "[M]akes it very clear," and "[A]nd it is absolutely clear."

Trial Counsel made these comments about the evidence in its entirety and how it demonstrated Appellant never intended to enter into a true marriage with his "wife." (J.A. 117.) Simply using the word "clear" when drawing conclusions based on the evidence presented at trial is not vouching, as Appellant claims. (Appellant's Br. at 5); *White*, 486 F.2d at 204. There is no ethical rule that makes a specific word or phrase improper argument and Appellant points to none. Rather,

it is improper only to "express [a] personal belief or opinion as to the truth or falsity of any testimony or evidence. . ." (J.A. 217.)

Though *Fletcher* identified "I think it is clear" as prohibited language, this Court also stated that the use of personal pronouns in connection with assertions about whether a witness should be believed is vouching. *Fletcher*, 62 M.J. at 181. Trial Counsel never used a personal pronoun in conjunction with the word "clear" because he was not saying that he thought something was clear. Rather, he was arguing the evidence rendered a conclusion clear. Thus he was not "putting the weight of the Government" behind evidence, but was using the evidence to argue a conclusion. *Id.* at 181.

y. "It's clear what he's up to." and "[I]t's clear that that was intended to impede this investigation."

These two comments "bookended" a paragraph of argument based on the testimony of HM1 Partida-Jacobo. (Appellant's Br. at 5; J.A. 140.) What Appellant leaves out is, "This is an evasion. HM1 Partida-Jacobo who was there, who saw this transpire told you this was an obstruction of justice, told you that he was trying to influence his testimony. . ." (J.A. 140.) Yet again, these comments are arguments based on evidence and not vouching based on Trial Counsel's status as a representative of the Government.

z. "His intent is clear."

Trial Counsel said this after referring to the various documents admitted into evidence and the testimony presented at trial that demonstrated the marriage was fraudulent. (Appellant's Br. at 5; J.A. 141.) Characterizing evidence does not become vouching simply by uttering the word "clear."

aa. "I think this is important."

Trial Counsel said this before recounting for the Members Appellant's various incredible statements and emphasizing the fact that these statements constitute Appellant's consciousness of his own guilt. (Appellant's Br. at 5; J.A. 141-142.) Trial Counsel was not saying the Members should believe the statements are true or false because he represented the Government. Rather, he was emphasizing the importance of these statements, which were in evidence, as they related to the ultimate issue of the case.

ab. "I mean you know it's—the evidence is clear that the accused was trying to obstruct justice," and "He actually tells the truth, not the truth according to the accused, but the actual truth."

This was, again, the preface to an argument Trial Counsel made about the evidence. (Appellant's Br. at 5; J.A. 143.) Trial Counsel followed this statement by asking rhetorically "what makes it inescapably clear?" and then he answered himself by recounting evidence presented at trial. (J.A. 143.) Further, Trial Counsel juxtaposed the testimony of HM1 Partida-Jacobo with what he posited Appellant told HM1 Partida-Jacobo to say. (J.A. 143.) Trial Counsel was

therefore arguing that HM1 Partida-Jacobo was telling the truth and Appellant was not. "Prosecutors may, however, argue reasonable inferences based on the evidence, including that one of the two sides is lying." *Wilkes*, 662 F.3d at 540. "Furthermore, prosecutors are permitted to respond to defense counsel's attempts to impeach the credibility of government witnesses." *Id.* This was an argument based on the evidence and testimony given during rebuttal to respond to challenges made by the Defense. It was not vouching.

ac. "He doesn't appear to care."

Trial Counsel said this to comment on Trial Defense Counsel's theory that Appellant was actually innocent, because if he were guilty, he would have actually taken efforts to appear innocent. (J.A. 144.) Saying "he doesn't appear to care" was a summation of the evidence or lack of evidence that Appellant had any real connection to his "wife." This was not vouching, but a fair response to an argument set forth by Appellant. *Carter*, 61 M.J. at 33.

ad. "There'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."

Trial Counsel made this comment during sentencing argument in an effort to predict the kind of argument Appellant would make given the fact that he would have no rebuttal. (J.A. 171.) Trial Counsel said this before explaining that the United States had an interest in punishing Appellant and that punishments, such as

confinement, are not "inhuman." (J.A. 923.) It is unclear how this could be considered "vouching" or "personally advocating the Government's arguments" as Appellant contends. (Appellant's Br. at 5, 12.) Claiming one is "not a monster" is not the same as putting the force of the Government behind one's arguments. Here, it is apparent that Trial Counsel was attempting to proactively defeat an argument that confinement would be unduly harsh, which is appropriate during sentencing.

ae. "[H]e's a deadbeat." and "[P]athetic excuse for a husband that he was."

Appellant contends these comments were a personal attack. (Appellant's Br. at 6.) But Trial Counsel was actually saying this to illustrate the implausibility of Appellant's theory. (J.A. 112, 114.) Trial Counsel was saying that both Appellant and his "wife" agreed that Appellant provided very minimal support; incidentally, the types of which were inconsistent. The full comment was: "[t]hey both agree he's a deadbeat." (J.A. 102.)

And Trial Counsel's "pathetic" comment responded to Appellant's suggestion that he loved his wife so much that he openly cried for fear of her deportation, as juxtaposed to his complete lack of support for and communication with her. (J.A. 114.) Trial Counsel was not arguing that Appellant was a "deadbeat" or a "pathetic excuse for a husband." Rather, he was illustrating the

opposite; that Appellant actually was not a deadbeat in that only a deadbeat would provide barely any support to his actual wife.

Appellant was in a sham marriage with his "wife" and therefore this explained his lack of financial support. Thus, Trial Counsel was not suggesting that the Members should convict Appellant because he is "a deadbeat." Rather, he was suggesting that the lack of financial support indicated the marriage was a sham and thus, he had committed the offense of which he was charged.

af. "He's a liar" and "He sleeps in a bed of lies."

This was the portion of his argument when Trial Counsel illustrated a number of misrepresentations by Appellant. The misrepresentations included that Appellant paid a lawyer $5,000.00 to help prevent his "wife" from being deported, that his mother was extremely wealthy, that he did not know about his "wife's" undocumented status, and that he told co-workers different stories about his marital status, including that he was single. (J.A. 112-113.) Trial Counsel specifically said "he's a liar" in response to Appellant's statements that that he did not know that his "wife" was undocumented at the time of their wedding and claimed he only later found that out to be true. (J.A. 113.) Trial Counsel questioned whether his "wife" was required to show some identification at the time of their ceremony. (J.A. 113.)

Though the Court cautioned prosecutors away from calling an accused a "liar" in *Fletcher*, the Court also held that the trial counsel's use of the term in that case "did not rise to the level of plain error." *Fletcher*, 62 M.J. at 183. The Court also focused on the particular context of that case, where the appellant's defense to a cocaine charge was based largely on his good character defense and testimony. *Id.*

Here, the context is quite different. Appellant was tried for crimes of falsity and did not present a good character defense, nor did he testify. (J.A. 93.) This case is not *Fletcher*.

ag. "He's a second rate con artist."

Trial Counsel said this about Appellant's numerous inconsistent statements, arguing they were circumstantial evidence of his guilt, especially of his intent to deprive the United States of the money permanently. (J.A. 115.) Trial Counsel argued that a criminal mastermind may have been savvy enough to get his falsehoods straight, but because Appellant was not competent at his thievery he altered his deceptions to cover up his crime throughout the investigation and kept contradicting himself. (J.A. 115-116.) Trial counsel was not insulting Appellant. Rather, he was explaining how Appellant's clumsy actions constituted evidence and demonstrated his guilt.

ah. "This man is a manipulator and a user."

This statement was made in reference to the obstruction of justice charge. (J.A. 143.) Appellant tried to convince his friend, co-worker, and roommate to not truthfully testify against him by telling his friend such things as "[y]ou screwed me over. Now you're going be a witness at my court-martial." (J.A. 143.) Trial Counsel was once again characterizing Appellant's actions as they related to the obstruction of justice charge; demonstrating the influence Appellant attempted to exert on HM1 Partida-Jacobo.

ai. "I think he's an idiot and he's also a con artist . . ."

Trial Counsel actually stated: "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." (J.A. 144.) He prefaced this by stating that he was responding to the argument of Trial Defense Counsel both in opening statements and closing argument. (J.A. 144.) Trial Counsel concluded closing argument by immediately stating that "[e]nough is enough, members. Find him guilty of all Charges and Specifications." (R. 711.) This was the entire summation of the case by the United States.

It was fair comment about the evidence elicited. Trial Defense Counsel elicited some evidence and argued that if Appellant was such a savvy thief he would have been more careful to cover his tracks and taken steps to avoid detection. (J.A. 124.) Trial Counsel, in a case about false statement, stealing from

the United States, conspiracy to commit fraud, and obstruction of justice, countered with the argument that it need not prove Appellant was a clever criminal. (J.A. 144.) Further, Trial Counsel was asserting that the United States did not need to prove that Appellant would take actions to conceal his criminal intent, especially in a case where Appellant incompetently tried to lie his way out of criminal responsibility. (J.A. 144.) Even if this was not proper argument, it was certainly acceptable in light of the invited reply doctrine. *See United States v. Lewis*, 69 M.J. 379, 385 (C.A.A.F. 2011) ("Likewise, during rebuttal of closing argument, the prosecution could rely on the defense counsel's closing argument, which highlighted the earlier defense presentation, as providing the basis for the comments offered by the prosecution in rebuttal.").

Because the entire trial was about the veracity of Appellant's previous statements, as in *Pimienta*, Trial Counsel's arguments were fair comments upon the evidence. To prohibit the United States from depicting Appellant as a liar and his statements as beyond credibility would result in preventing the United States from pursuing these charges.

3. Trial Counsel did not mislead the Members.

Appellant also asserts that Trial Counsel misled the Members by arguing facts not in the record during findings. (Appellant's Br. at 6-7.) Specifically he asserts that the comment "[t]hat's something you generally see when people intend

to establish a life together," (J.A. 102), and references to "these $500 trips to a strip club," (J.A. 107), are facts not in evidence. (Appellant's Br. at 6.) Appellant ignores the instruction from the Military Judge, and even the request from his own Trial Defense Counsel for the Members to use their common sense and make sense of the facts when weighing the evidence. (J.A. 94-95, 107.) The assertion of Trial Counsel regarding what one "generally sees" in a married couple was an appeal to the Members' common sense, their knowledge of human nature, and the ways of the world regarding how a married couple typically would act over a period of time. *See* ABA Standard 3-5.9 (J.A. 217) ("unless such facts are matters of common public knowledge based on ordinary human experience. . ."); *see also Jones*, 2 C.M.A. at 87 (1952) (A counsel may comment on any matter "upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all.").

Additionally, evidence was admitted that on April 11, 2011, a $508.00 bank withdrawal from an automated teller machine was made from "The Venetian 1" in Anaheim, California. (J.A. 212.)[2] Trial Counsel's argument was a fair comment based upon the evidence and the reasonable inferences that may be drawn from it.

[2] While the United States did not introduce evidence about the club, the fact that it is a strip club is readily within the Members' common sense and understanding of the ways of the world based upon name, location, and the amount withdrawn). *See also* Venetian Gentlemen's Club, http://venetiangc.com (last visited July 13, 2016).

Appellant also points out statements made by Trial Counsel during sentencing argument about schizophrenia, con men, and the effects of Appellant's actions on his supposed "wife." (Appellant's Br. at 6-7.) Trial Counsel's comments about schizophrenia were not intended as a "diagnosis," as Appellant claims. (Appellant's Br. at 15.) Indeed, Trial Counsel never said Appellant had schizophrenia, but merely argued how some criminals—like Appellant now was due to his conviction—can have admirable qualities like friendliness, charisma, and leadership skills. (J.A. 155-156.) No reasonable person would take Trial Counsel's arguments as a diagnosis of schizophrenia.

Regarding the impact of Appellant's crimes on his "wife," Trial Counsel argued the fact that Appellant was acquitted of conspiracy suggested that some Members felt his "wife" had been duped by him. (J.A. 168.) As such, he asked the Members to consider the implications of that and how his actions harmed her as well. (J.A. 168, 173.) This was certainly within the Members' common sense and knowledge of the ways of the world.

Finally, Appellant complains about Trial Counsel's comment that he did not have PTSD and that, due to his being treated by a psychologist, he would have been diagnosed by the time of trial if he did have PTSD. (Appellant's Br. at 4, 7, 16.) However, there was no evidence in the Record that Appellant did have PTSD and there is certainly no evidence that Appellant has ever been diagnosed with

PTSD to this day. Appellant argues he was somehow "precluded from diagnosis" by "the long process of making appointments and follow-up appointments." (Appellant's Br. at 16.) There is no evidence to support this and Trial Counsel's argument that Appellant did not have PTSD was supported by the evidence.

4. Trial Counsel did not attack Defense Counsel.

A prosecutor should maintain a professional attitude toward opposing counsel. ABA Standard 3-5.2(a) (J.A. 217.) In *Fletcher*, this Court found the trial counsel's numerous comments about the defense counsel's style, demeanor and honesty to be plain error. *Fletcher*, 62 M.J. at 181-82. The comment Appellant complains about nowhere near approaches the kind of personal attack this Court dealt with in *Fletcher*.

Appellant complains that Trial Counsel "disparaged" Trial Defense Counsel by "likening him to a clown in a circus act." (Appellant's Br. at 14.) Specifically, Appellant cites Trial Counsel's statement: "If the defense counsel gets up here and lights his hair on fire, juggles on a unicycle or does and says any number of things that have nothing to do with this. . ." (Appellant's Br. at 14; J.A. 118.)

However, Appellant did not provide the entire quote or explain when Trial Counsel made this argument. Trial Counsel finished this statement by saying, ". . .remember you have the facts that support the evidence of the charges." (J.A. 118.) Trial Counsel did not disparage Trial Defense Counsel, but rather

encouraged the Members to remember the evidence regardless of any distractions Trial Defense Counsel might bring up. Trial Defense Counsel had not even argued at this point, so there was no argument to disparage. Trial Counsel's comment did not demonstrate an unprofessional attitude toward Trial Defense Counsel, therefore there is nothing improper about the argument. Yet again, Appellant presents a comment out of context in order to suggest prosecutorial misconduct.

In choosing to commit larceny by fraudulent marriage, and then making multiple statements to investigators, Appellant placed his honesty directly at issue. While the specific words used by Trial Counsel in commenting upon the evidence presented may not always have been consistent with polite discourse, they did not amount to him inserting his personal opinions or commenting upon evidence that was not presented. Trial Counsel made a "hard" argument, but not a "foul" one. *See United States v. Akbar*, 74 M.J. 364, 394 (C.A.A.F. 2015) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). Accordingly, there was no error.

C. Even if Trial Counsel's comments were erroneous, Appellant fails to demonstrate the errors are "plain or obvious." Appellant points to no binding precedent that characterizing an accused as a liar, in a prosecution for crimes of dishonesty, is error.

"Error is 'plain' when it is 'obvious' or 'clear under current law.'" *United States v. Harcrow*, 66 M.J. 154, 162 (C.A.A.F. 2008) (Stucky, J., with whom Effron, C.J., joined, concurring in the result) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)).

Here, Appellant relies almost exclusively on *Fletcher* to support his argument for plain error. Under the specific facts of *Fletcher,* this Court found plain and obvious error where the trial counsel offered her personal commentary on the truth or falsity of the evidence, made disparaging comments about the appellant and his counsel, and drew parallels between the case and the legal problems of various entertainers and public religious figures. *Fletcher*, 62 M.J. at 181. There, use of the words "nonsense," "fiction," "unbelievable," "ridiculous," and "phony" in describing the appellant's defense, rose to the level of plain error. *Id.* at 180.

But *Fletcher* was a prosecution for cocaine use, not crimes of fraud or dishonesty. *Id.* at 178. The violations in *Fletcher* are not *per se* errors, but rather contextual errors. Use of "I" or "we," or calling an assertion by defense counsel "ridiculous," is not automatically prosecutorial misconduct. Rather, allegations of prosecutorial misconduct have to be analyzed within the context of the cases in which they occur. *See United States v. Argo,* 46 M.J. 454 (C.A.A.F. 1997) (contextually analyzing each action for whether it crossed an ethical line).

Though this Court has not considered allegations of improper argument within the context of crimes of dishonesty, a published opinion of the lower court is instructive:

> [i]n order to establish a prima facie case on this [false official statement] charge, the trial counsel had to prove that the statement the

> appellant made . . . was in fact false, that is, that the appellant had lied in his statement. One would, therefore, expect the trial counsel to address the falsity of the statement during closing argument.

United States v. Pimienta, 66 M.J. 610, 618 (N-M. Ct. Crim. App. 2008), *review denied*, 67 M.J. 194 (C.A.A.F. 2008). In holding that no plain error existed in *Pimienta,* the lower court concluded that the "trial counsel's comments were based on a fair reading of the record and the evidence adduced at trial, particularly as it related to proof of a false official statement." *Id*. The facts of this case are more like *Pimienta* than *Fletcher*.

When considering Trial Counsel's comments in context and in light of the evidence presented at trial, any error was not plain or obvious. Appellant's theory of the case was that the United States had no evidence that he had the requisite intent to enter a fraudulent marriage at the time of the marriage. Appellant's own counsel stated that "I'm going to tell you what actually happened based upon the facts we saw" and that he was "going to talk about what the government is alleging and how that really doesn't make sense with the facts." (J.A. 120.) The arguments of the United States were not Trial Counsel's personal opinions of Appellant, Appellant's counsel, or evidence presented favoring either side, but rather were observations and commentary regarding the evidence presented.

Here, the United States' entire case was built around presenting evidence of Appellant's falsehoods. The false official statements were the basis for proving the

larceny and conspiracy charges and the statements made by Appellant to a witness were essential to the obstruction of justice charge. Thus, *Fletcher* is inapposite because it was a prosecution for drug use, not crimes of dishonesty. *Fletcher*, 62 M.J. at 178. Furthermore, this Court did not even find that referring to the appellant as a "liar" constituted "plain error" in *Fletcher*. *Id*. at 183. Thus, Appellant cannot carry his burden to demonstrate plain or obvious error in this case.

D. Even if Trial Counsel's comments were erroneous, Appellant fails to meet his burden to demonstrate that error materially prejudiced a substantial right. He fails to establish severe misconduct, no specific curative measures were requested or needed, and the case against Appellant was strong.

"A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young*, 470 U.S. 1, 11 (1985).

"While prosecutorial misconduct does not automatically require a new trial or the dismissal of the charges against the accused, relief will be granted if the trial counsel's misconduct 'actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice).'" *Fletcher*, 62 M.J. at 178 (C.A.A.F. 2005) (*citing United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)); *see also Meek*, 44 M.J. at 5 ("The characterization of certain action as 'prosecutorial misconduct,' however, does not

in itself mandate dismissal of charges against an accused or ordering a rehearing in every case where it has occurred.") The harmlessness of an error is to be determined after a review of the entire record of trial. *See, e.g.*, *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

"It is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct." *Meek*, 44 M.J. at 6. In determining whether prejudice resulted from prosecutorial misconduct, this Court will "look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Fletcher*, 62 M.J. at 184 (quoting *Meek*, 44 M.J. at 5). In analyzing prosecutorial misconduct and testing for prejudice, this Court examines three factors: (1) the severity of the misconduct; (2) curative measures taken; and (3) the strength of the Government's case. *Fletcher*, 62 M.J. at 184. "In other words, prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that [the court] cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Hornback*, 73 M.J. at 159-60.

In analyzing the "severity of prosecutorial misconduct," this Court looks to five factors: (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. *Fletcher*, 62 M.J. at 184.

Here, a review of the entire Record reveals that Appellant fails to meet his burden under plain error review.

1. Appellant ignores the five-part test for analyzing the severity prong of the analysis and fails to demonstrate the requisite severity of conduct that may be the basis for determining substantial prejudice.

All five severity factors weigh against Appellant when placed into context.

a. The number of asserted instances of misconduct is low given the context of the case and as such did not spread throughout argument.

Including allegations relevant to sentencing only, Appellant complains of statements made by the prosecutor which are found in bits and pieces across approximately twenty-five pages of a 959-page Record. Even assuming that every alleged comment was somehow improper, these comments encompassed less than three percent of the transcribed Record. However, as previously noted, Appellant exaggerates the number of supposedly offending comments by dividing some into several parts, and as such, the actual percentage is much lower. As to the first two severity factors, the number of instances is not great and the comments do not spread throughout the argument when viewed in context.

b. The actual findings and length of trial do not make the

alleged errors severe.

Not counting the two days of pretrial sessions of court, the actual trial lasted four days, from February 11, 2014, until February 14, 2014. Four charges were presented to the Members. The Members deliberated for a total of three hours and fifty-three minutes. (J.A. 146-150.) Ultimately, the Members returned findings of guilty on two of the charges and findings of not guilty on the other two charges. (J.A. 151.) Several of the comments Appellant complains about related to the obstruction charge of which Appellant was acquitted. (Appellant's Br. at 3-6.)

Given the nature of the case, the number of contested charges, the volume of documentary and testimonial evidence received, and the actual results of the trial, the length of deliberations and trial weigh in favor of the United States.

c. Whether Trial Counsel abided by any rulings from the Military Judge.

Inasmuch as Trial Defense Counsel never objected to argument of the United States, there were no relevant rulings by which to abide. The Military Judge did provide standard instructions on argument of counsel such that the Members were well-aware of the purpose of argument.

2. No specific curative actions were necessary, and the Military Judge provided the general instructions regarding argument of counsel.

Absent evidence to the contrary, a military appellate court may presume that court-martial members followed a military judge's instructions. *United States v.*

Stewart, 71 M.J. 38, 42 (C.A.A.F. 2012).

Prior to argument of counsel, the Military Judge provided the standard instruction on counsel's arguments. He stated:

> Members, at this time you are going to hear the arguments of counsel. The arguments of counsel are an explanation of the facts by counsel for both parties as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence. You must base your determination of the issues in the case on the evidence as you remember it.

(J.A. 96-97.) Appellant neither objected to this instruction, nor asked for another one. Appellant thus argues that despite the fact he did not object, the Military Judge should have *sua sponte* recognized some error and provided a curative instruction. Against the backdrop of the facts and circumstances of this case, the Military Judge had no responsibility to provide additional instructions.

3. <u>The United States presented a strong case on the charges for which the Members convicted Appellant</u>.

The evidence against Appellant relevant to the larceny and false official statement offenses was strong. Numerous exhibits were introduced that showed that Appellant submitted documents to the Navy to receive additional allowances based upon his marriage. (J.A. 179-212, Pros. Ex. 5.) The evidence demonstrated facts and circumstances that were almost entirely incompatible with a real marriage, including the fact that after Appellant was married and living in the same vicinity of his "wife," he never cohabitated with her. (J.A. 36, 40, 42-43, 58, 62-

63, 67.) Additionally, Appellant barely provided her any financial support and had ceased all forms of communication with her.

4. Appellant received his constitutionally mandated fair trial, even assuming some form of prosecutorial misconduct.

In *Smith v. Phillips*, 455 U.S. 209, 219 (1982), the Supreme Court noted that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Accordingly, courts should gauge the overall effect of counsel's conduct on the trial itself and not counsel's personal blameworthiness. *Id*. at 220. The ultimate question is whether the alleged improper comments "cast serious doubt on the correctness of the jury's verdict." *United States v. Andrews*, 22 F.3d 1328, 1341 (5th Cir. 1994) (quotation omitted).

Here, the mixed verdicts demonstrate that these unobjected-to-comments did not infect the trial or deprive Appellant of due process. *See United States v. Phillips*, 200 Fed. Appx. 609, 612 (7th Cir. 2006) (affirming District Court's decision that acquittal on one robbery charge demonstrated there had been no prejudice to the appellant necessitating a mistrial on the other robbery convictions despite an admittedly improper comment by the prosecutor during closing argument). The fact that the Members acquitted on half of the offenses charged stands as ample testament to the degree to which the Members listened to and applied the instructions of the Military Judge and to the degree that it counters

Appellant's post-trial assertions, disregarded any possible improper arguments of counsel. (J.A. 151.)

As Appellant fails to demonstrate any prejudice, no plain error exists.

Conclusion

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

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36051

JAMES M. BELFORTI
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678
Bar no. 36443

BRIAN K. KELLER

Acting Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374

SUZANNE M. DEMPSEY
Major, U.S. Marine Corps
Acting Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374

(202) 685-7430
Bar no. 31714

(202) 685-7059
Bar no. 36266

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 10,215 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2010 with 14 point, Times New Roman font.

Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy was served on opposing counsel on July 18, 2016.

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36051