IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Sergeant (E-5)
Todd D. Sewell,
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 20130460

USCA Dkt. No. 16-0360/AR

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, Appellee, v. Sergeant (E-5) **Todd D. Sewell,** United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20130460 USCA Dkt. No. 16-0360/AR

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

Issue Presented

I.

WHETHER THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY MAKING IMPROPER ARGUMENT ON THE FINDINGS.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On May 16, 2013, an enlisted panel sitting as a general court-martial convicted Sergeant (SGT) Todd D. Sewell, contrary to his pleas, of indecent conduct (six specifications) and assault with intent to commit rape, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934 (2012) [hereinafter UCMJ], respectively. The panel found SGT Sewell not guilty of seven specifications of indecent conduct and one specification of assault consummated by battery. The panel sentenced SGT Sewell to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for one year, and to be discharged from the service with a dishonorable discharge. (R. 1025). The convening authority approved the adjudged sentence and credited SGT Sewell seventeen days of confinement against his sentence. On January 29, 2016, the Army Court affirmed the findings and only so much of the sentence as provides for a dishonorable discharge, confinement for eleven months, forfeiture of all pay and allowances, and reduction to the grade of E-1. On April 12, 2016, this Court granted review of the above specified issue.

Statement of Facts

Lieutenant Colonel Matthew McDonald served as the government's Special Victim Prosecutor (SVP) throughout SGT Sewell's trial. Lieutenant Colonel McDonald had extensive knowledge and experience in military justice both as a military judge and as a litigator. *See, e.g., United States v. Pelletier*, 2013 CCA LEXIS 611 (Army Ct. Crim. App. 14 Aug. 2013)(LTC McDonald, military judge). Lieutenant Colonel McDonald was of equal or greater rank than everyone involved in the court-martial except the president of the panel.

Months prior to trial, SGT Sewell's trial defense counsel (TDC) filed several motions in limine. First, the defense requested that the government be precluded from using conclusory terms such as "rape" while questioning witnesses. (JA at 181). The TDC argued this would allow the prosecutor or the witness to improperly vouch for the credibility of evidence by using legally conclusory terms. (JA at 181-84). The SVP guaranteed he would not employ this tactic. (JA at 35-36). Nevertheless, during the trial, the SVP asked one witness whether she personally believed PFC NM was "making it up." (JA at 86). The military judge instructed the panel to disregard the question and lengthy answer. (JA at 86).

Further, in a pretrial motion, the government stated it "does not intend to state during trial what the government personally believes." (JA at 194). However, during argument on findings, the SVP used the term "I" or "we" to over 75 times.[1] For example, the SVP stated, "I made some mistakes when I charged this . . . He's guilty of everything, however, the wording's not accurate. . . ." (JA

[1] The SVP appears to vacillate between using we to include himself with the government and we to include himself with the panel.

at 133). With regard to the alleged exposure to Ms. ST, the SVP later stated, "*we* know this was not the actions of an innocent man . . . ." (JA at 140)(emphasis added).

The SVP also injected his personal opinions about witness veracity. In discussing the assault with intent to commit rape, the SVP stated that "[e]ither this happened to PFC [MN], he was on top of her as she claims, or she made it up. It's one or the other, and *we all know* she didn't make this up. . . ." (JA at 146)(emphasis added). The SVP also gave a personal opinion regarding the taped interview of SGT Sewell, stating that "we all know he lied on the video." (JA at 138).

The defense also filed pretrial motions to sever the charges to prevent impermissible spillover and the use of improper evidence under Military Rule of Evidence [hereinafter M.R.E.] 404(b). (JA at 185-190; 199-205). The military judge denied the motion to sever. But the military judge ultimately found that M.R.E. 404(b) evidence could be used among the indecent exposure and indecent conduct charges 1) to show a plan to target soldiers in the rank of E-4 and below 2) to negate a defense of accident or mistake, and 3) to show a plan to isolate females individually to commit the alleged misconduct. (JA at 106). But the military judge found the MRE 404(b) evidence could not be used to show an intent to satisfy sexual desires, modus operandi, or to show “testing” of potential victims to determine whether they were receptive to sexual advances. (JA at 106).

The military judge admonished the SVP, “you can’t argue that as propensity, right?” and “there’s great temptation on the part of the government to argue to the members we know he did it, because he did it on all these other occasions, which you agree that would be an impermissible argument.” (JA 30-31). Finally, before argument, the military judge stated “caution[ed] the government not to encourage through argument the inadmissible or inappropriate uses of that evidence for purposes of character or propensity.” (JA at 129).

But during findings argument, the SVP stated “what kind of man has 118 photos of [his penis] on his phone? . . . Is that normal? . . . Is that the type of guy that would do this to people? You all know the answer.” (JA at 148). The SVP continued, “If he won’t take no for an answer when they tell him to stop sending pictures, he’s not going to take no for an answer of PFC [MN] when she’s telling him to get off . . . He’s trying to excite his sexual desires, because he has something wrong with him.” (JA at 148).

In response to a defense objection and motion for mistrial, the military judge found these comments improper but denied the defense motion. (JA at 158). Instead, the military judge instructed the panel to disregard those two arguments (but only those two arguments) and re-read the instructions on M.R.E. 404(b) evidence and spillover. (JA at 159).

However, the military judge did not address other improper M.R.E. 404(b) arguments made by the SVP. For example, the SVP argued "Six of these females were E-4 and below, and we all know how it works. Young females in the military are preyed upon." (JA at 148-49). The SVP also stated,

> "[i]f it was just [Ms. ST], would we all give him the benefit of the doubt? We would. . . but we know it wasn't accidental, because of all the other females that he's exposing himself to, that he's sending pictures to, that he's masturbating in front of, and *that he sexually assaulted in his room*."

(JA at 139-40)(emphasis added).

The military judge also did not admonish the SVP or instruct the panel to ignore the following:

> Some of you are probably thinking as we're going through this evidence about the old stereotype or the old movie stories about the old dirty man in the trench coat down the street who's going around exposing himself. Unfortunately, that's Sergeant Sewell, and he's wearing our uniform, and unfortunately, it's more than just the old man in the trench coat exposing himself. This is an NCO in *our* Army.

(JA 140-41)(emphasis added). The SVP further stated, "[a]nother term comes to mind when you think of SGT Sewell is sexual predator . . . Something's wrong with him. We can't say what it is, but he's got issues and his issues are dangerous and they're criminal." (JA at 141). The SVP also stated, "[w]ho would believe her? He said, she said. PFC [MN], nobody would believe me, and *we can all understand why she felt that way.*" (JA at 149)(emphasis added).

The military judge did not provide a curative instruction regarding the SVP's other improper arguments and statements earlier in the proceedings. The SVP also "aggressive[ly]" approached SGT Durga outside the courtroom, demanding to know what she told the defense counsel. (JA at 93). The SVP belligerently questioned SGT Durga on the stand about this confrontation, requiring the military judge to intervene and limit the scope of his inquiry. (JA at 93). Further, the SVP had to be instructed by the military judge to allow another defense witness, SGT Lefferts, to fully answer his rapid-fire questions. (JA at 95). The SVP also read inconsistent statements by SGT Lefferts into the record instead of appropriately refreshing memory or impeaching. (JA at 96-97). The SVP also attempted to elicit over objection why PFC MN "wants to come here and make sure [SGT Sewell is] held accountable." (JA at 235).

During rebuttal argument, when referencing Ms. ST, the SVP stated "she's sitting right next to him, right next to him doing her homework and she looks over and sees his stuff hanging out . . . That was *once again* him testing . . . *Just like the other females he did this to*." (JA at 168)(emphasis added). The TDC objected to this use citing the military judge's ruling prohibiting the use of M.R.E. 404(b) for "testing." (JA at 178-79). However, the military judge again denied the motion and provided no curative instruction. (JA at 179).

Summary of Argument

The Special Victim Prosecutor's (SVP) findings argument was improper and prejudiced the accused because it is not certain that the panel did not rely on the improper arguments in convicting appellant. The SVP's argument included arguments prohibited by the military judge's ruling on M.R.E. 404(b), personal opinions and beliefs, arguments specifically designed to inflame the passions of the panel, arguments placing the panel in the position of the victim, and arguments based on facts not in evidence. Further, the military judge's curative instructions were insufficient and did not adequately address the improper argument, failing to address some improper arguments at all. The evidence for the charges were based solely on the credibility of the appellant and victim's testimony. Thus, it is not certain that the panel's verdict was based on evidence alone and the not prosecutor's improper arguments and statements.

Argument

I.

WHETHER THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY MAKING IMPROPER ARGUMENT ON THE FINDINGS.

Standard of Review

When preserved by objection at trial, allegations of prosecutorial misconduct are reviewed for prejudicial error. *United States v. Hornback*, 73 M.J. 155 (C.A.A.F. 2014)(citing *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). In the absence of an objection, this Court reviews for plain error. *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004). Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused. *Id.* at 88-89.

Law

A trial counsel commits prosecutorial misconduct when he or she "'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Hornback*, 73 M.J. at 159-60; *Fletcher*, 62 M.J. at 178 (quoting *Berger v. United States*, 295 U.S. 78, 84, (1935)). "Prosecutorial misconduct can be 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) (citing *Berger*, 295 U.S. at 88).

"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." *Id.* at 6. To determine whether prejudice resulted from prosecutorial misconduct, this Court "look[s] at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Hornback*, 73 M.J. at 160, *Fletcher*, 62 M.J. at 184 (internal citations omitted. Prejudice is assessed by balancing three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* "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 we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id.*

Argument

The findings argument by the SVP was improper and prejudiced the appellant. First, the SVP made multiple improper arguments in violation of court rulings and legal standards. Second, the arguments were prejudicial because the misconduct throughout the trial was severe, the curative instructions by the military judge were insufficient, and many of the specifications were not strongly supported by the weight of the evidence.

A. The SVP made improper arguments in violation of the military judge's M.R.E. 404(b) rulings.

The SVP made several statements during findings argument prohibited by the military judge's ruling and by case law. Closing argument encouraging a panel to focus on similarities between charges to show propensity not otherwise permissible under M.R.E. 404, is improper argument. *United States v. Burton*, 67 M.J. 150, 152-53 (C.A.A.F. 2009). Accordingly, the military judge cautioned the SVP multiple times not to argue inappropriate uses of M.R.E. 404(b) evidence for "purposes of character or propensity." (JA at 101, 129; 236-38).

But in spite of these multiple admonitions, the SVP continued to make impermissible propensity arguments. The military judge found the SVP improperly invited the members to consider "what kind of man has 118 images of his penis on his cell phone" as character of being a "pervert." (JA at 157-58). The SVP further improperly argued propensity by inviting the panel to convict SGT Sewell of assaulting PFC MN, an unrelated offense, because he "didn't take no for an answer" by sending unwanted photos to different victims under completely different circumstances. (JA 157). Additionally, the SVP argued, "He's trying to excite his sexual desires, because he has something wrong with him." (JA at 148, 155). This violated the military judge's rule against using evidence of other offenses to prove the intent to gratify sexual desires and also improperly invited the panel to find guilt based on a general character of being a "pervert." (*See* JA at 157-58).

Inexplicably, the SVP continued to violate the military judge's ruling on rebuttal when arguing "that was *once again* him testing . . . *Just like the other females he did this to*." (JA at 168)(emphasis added). This argument invited the panel to use evidence of other alleged crimes to find that SGT Sewell was "testing" the sexual receptiveness of Ms. ST, which was specifically prohibited by the military judge. (JA at 106). Although the military judge did not sustain the defense's objection to this argument, the argument was still improper.[2]

Further the SVP's improper propensity and character arguments on findings were plain and obvious error. The SVP argued, "[a]nother term comes to mind when you think of SGT Sewell is sexual predator . . . Something's wrong with him. We can't say what it is, but he's got issues and his issues are dangerous and they're criminal." (JA at 141). The SVP again improperly invited the panel to use general propensity and character of being a "sexual predator" to find SGT Sewell generally

[2] The military judge found that the SVP's reference to "testing" was only in relation to Ms. ST. (JA 179). However, the transcript shows this finding was clearly erroneous because it was clear the SVP was arguing that SGT Sewell was "testing" all the alleged victims. (JA 168); *see Burton*, 67 M.J. at 152.

guilty of criminal acts. *See Burton*, 67 M.J. at 152; *see, e.g.*, *State v. Campbell*, 133 N.C. App. 531, 538-39 (N.C. Ct. App. 1999) (finding prosecutor's closing argument labelling accused a sexual predator improper).

Further, the SVP argued, "Some of you are probably thinking as we're going through this evidence about the old stereotype or the old movie stories about the old dirty man in the trench coat down the street who's going around exposing himself. Unfortunately, that's Sergeant Sewell." (JA 140-41). This impermissibly invited the panel to convict appellant of crimes based on a general criminal disposition. *See Burton*, 67 M.J. at 152. Immediately after that inappropriate invitation, the SVP argued "we have higher standards and expectations that we expect from him *for ten people in that eight to nine month period*." (JA at 141). This linked general criminality of being "the old dirty man" to all ten offenses for which SGT Sewell was charged, inviting the panel to draw an impermissible inference. *See Burton*, 67 M.J. at 152.

The SVP improperly argued over and over that "we would not be here" if there was just one victim. (JA at 138-139). The SVP argued "if it was one person, if it was just SGT W or it was SPC F or it was SPC C individually, we wouldn't be here, we all know that." (JA at 138-139). This argument signaled to the panel that although the merit of the individual specifications was relatively weak and could be handled "at the lowest level," these specifications should be considered in the aggregate and warrant more severe punishment at court-martial.

These arguments were plain and obvious error in light of the substantial pretrial litigation, the military judge's explicit ruling on propensity arguments, and the fact that the military judge specifically reviewed the findings argument for other improper M.R.E. 404(b) arguments. Thus, these additional errors were improper.

B. The SVP made improper arguments by expressing personal beliefs and opinions through improper vouching and unsolicited personal views of the evidence

While not objected to at trial, the SVP improperly vouched for the government witnesses and evidence during his closing argument. In *Fletcher*, this Court found that use of personal pronouns in connection with assertions regarding credibility of witnesses or evidence was plain error. *Fletcher*, 62 M.J. at 180 (finding use of "we know" in connection with evidence was improper). This Court also found that making unsolicited personal comments regarding the guilt of the defendant is also error. *Id.* at 181.

The SVP in this case exceeded the improper conduct of the trial counsel in *Fletcher*. The SVP here inserted himself into the proceedings by using "we" or "I" over 75 times. Unlike the inexperienced trial counsel in *Fletcher*, during pretrial motions the very experienced SVP in this case stated he would not "personally vouch for any witness." *Fletcher*, 62 M.J. at 180; (JA at 35). However, when referencing the testimony of Ms. KP, the SVP argued "That's how *we* know it's true," (JA at 169), and "Is it hard to believe [SGT Sewell ejaculated on KP's foot] based off of the evidence *we* heard? *No*." (JA at 148)(emphasis added).

Further, when discussing the alleged assault of PFC MN, the SVP vouched for PFC MN's testimony by arguing "[e]ither this happened to PFC [MN], he was on top of her as she claims, or she made it up. It's one or the other, and *we all know* she didn't make this up. . . ." (JA at 146)(emphasis added). The SVP also gave a personal opinion on SGT Sewell's statements to CID stating that "we all know he lied on the video." (JA at 138).

The SVP also provided unsolicited opinions on SGT Sewell's guilt. When discussing what the SVP claimed were his personal mistakes in drafting the charges, the SVP stated, "He's guilty of everything." (JA at 133). With regard to SGT Sewell's alleged exposure to Ms. ST, the SVP later stated, "*we* know this was not the actions [sic] of an innocent man . . . ." (JA at 140)(emphasis added).

Finally, the SVP argued "the defense, they have a good poker face, but *we* all know there's not reasonable doubt." (JA at 165)(emphasis added).[3]

C. The SVP made improper arguments based on facts not in evidence and designed to inflame the passions of the panel.

The SVP also made improper arguments based on facts not in evidence. The general rule is that trial counsel may not argue facts which are not in evidence because it violates longstanding principles that a court-martial must reach a decision based on only the facts in evidence, and arguments by counsel are not evidence. *Fletcher*, 62 M.J. at 183 (internal citations omitted). However, a trial counsel may comment on "contemporary history or matters of common knowledge within the community." *Id.* (internal citations omitted).

The SVP argued facts not in the evidence when he stated "Six of these females were E-4 and below, and we all know how it works. *Young females in the military are preyed upon*" (JA at 148-49)(emphasis added). This categorical statement was not a matter of common knowledge and was an invitation to convict SGT Sewell on facts not in the record. Even if it was a matter of common knowledge, its usage is still problematic as it appears to inject command influence

[3] These comments are also disparaging to the defense. The SVP is essentially arguing that the defense counsel are aware their client is guilty, but are trying to "bluff" or perpetrate a subterfuge, hence donning a "good poker face." These comments are also improper. *See Fletcher*, 62 M.J. at 181 (finding error when trial counsel characterizes a defense as fabricated).

into the proceedings by invoking current concerns of sexual assault in the military.[4] *See United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003).

The SVP also argued facts not in the record by stating, "something's wrong with him. *We can't say what it is*, but he's got issues and his issues are dangerous and they're criminal." (JA at 141)(emphasis added). This comment was in reference to the psychiatric diagnosis of frotteurism that was never presented to the panel, that indeed the military judge deemed inadmissible without calling an expert. (JA at 47). Thus, the panel was left with the impression that the SVP knew of a condition or diagnosis that made SGT Sewell dangerous to the general public, but, for unknown reasons, precluded from informing the panel.

The SVP also impermissibly argued the "golden rule" by asking the panel members to place themselves in the position of the victim. *See United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). When discussing the alleged assault with intent to commit rape, the SVP argued, "[w]ho would believe her? He said, she said. PFC [MN], nobody would believe me, and *we can all understand why she felt that way.*" (JA at 149)(emphasis added). The SVP's argument impermissibly

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[4] The SVP's arguments regarding handling things at the lowest level and that "we wouldn't be here" for only one charge also appeal to notions of unlawful command influence. Namely, the SVP invites the panel to presume that the sheer number of charges warranted the convening authority to refer the charges to court-martial. Finally, multiple members noted during *voir dire* that they were familiar with the current emphasis on the importance of prevention of sexual assault. R. at 196-297.

invited the panel to put themselves in the shoes of PFC NM and understand why she did not immediately report the alleged assault.

While malicious intent is not required to find prosecutorial misconduct, LTC McDonald's rank and military justice experience cannot be ignored. *See Fletcher*, 73 M.J. 155 at 160. By his own admission, LTC McDonald is "very careful" about what he says in argument. (JA at 31). However, the egregiousness of his tactics and repeated disregard for the military judge's rulings calls into question whether LTC McDonald was merely negligent.

D. SGT Sewell was prejudiced by the prosecutorial misconduct because the SVP's misconduct was severe.

The SVP's misconduct throughout trial was severe, a factor that weighs heavily in favor of the appellant. Factors to be considered to determine severity of misconduct in the first prong of the *Fletcher* test are: "(1) the raw numbers -- the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread 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. (internal citations omitted).

First, the raw numbers are staggering. The SVP made at least twenty impermissible arguments on only twenty-seven pages of findings and rebuttal argument. Further, the SVP used the pronouns "I" or "we" approximately 75 times on those same twenty-seven pages of text.

Second, the misconduct was not restricted to argument, extending throughout the trial. Other misconduct included impermissibly eliciting SPC JF's personal opinion of whether PFC NM was "making it up" (JA at 86). The SVP was also aggressive and intimidating to SGT Durga both inside and out of the courtroom. (JA at 87-88)(asking "is it normal in the medical units when a Lieutenant Colonel talks to a Sergeant and they just say I don't have to talk?" after SGT Durga invoked her right to counsel). Further, the SVP also read inconsistent statements by SGT Lefferts into the record instead of properly refreshing recollection or impeaching. (JA at 96-97). The SVP also attempted to impermissibly elicit why PFC MN "wants to come here and make sure [SGT Sewell is] held accountable." (JA at 235). Finally the SVP also interrupted the defense argument, stating that the defense has equal access to witnesses and cannot comment on the government's failure to call a witness. (R. at 838).

The other factors also weigh in favor of SGT Sewell. *See Fletcher*, 62 M.J. at 184-85. The trial lasted three days. The panel members deliberated for three hours before arriving at a sentence. *See id.* (finding conduct severe where trial was three days and members deliberated for four hours). Finally, the SVP clearly did not abide by the military judge's M.R.E. 404(b) rulings, arguing multiple instances of general bad character, propensity, and other uses specifically prohibited by the military judge.

E. SGT Sewell was prejudiced by the prosecutorial misconduct because the remedial measures by the military judge were insufficient.

In light of such severe misconduct, the military judge's curative instructions were insufficient. The military judge instructed the panel to disregard only two arguments by the SVP: "what kind of man has 118 pictures" and if he doesn't take no for an answer with photos, he didn't with PFC MN. (JA at 160-61). However, the defense counsel raised at least three more impermissible arguments that the military judge did not instruct upon. (JA at 154-58, 178-79).

The military judge's simple repetition of the M.R.E. 404(b) and spillover instructions were similarly insufficient. (JA at 160-64). Unlike in *Burton*, the defense put both the military judge and the SVP on alert to the defense's concerns, requested severance, and objected to the SVP's egregious misconduct. *See Burton*, 67 M.J. at 152. Here, the military judge's instruction did not specifically identify the myriad of ways the SVP's argument ran afoul of M.R.E. 404(b), thus it was woefully insufficient. (*See* JA at 160-64).

Further, this case is more egregious than *Hornback* because, the military judge in this case did not "leave no stone unturned" nor effectively protecting the panel from impermissible arguments. *Hornback*, 73 M.J. at 161. In this case, the military judge did not *sua sponte* address or correct the significant, egregious, and numerous impermissible arguments regarding facts not in evidence, personal opinions, or inflammatory arguments. Nor in sustaining objections or addressing improper arguments did the military judge express "a sufficient sense of judicial disapproval of both content and circumstance needed to dispel the harm in the core of the prosecutor's statement." *United States v. Simton*, 901 F.2d 799 (9th Cir. 1990).

Finally, the flagrant and pervasive misconduct by the SVP, a former judge and high ranking prosecutor, simply could not be corrected by curative instructions. "When improper inquiries and innuendos permeate a trial to such a degree as occurred in this case, [I] do not believe that instructions from the bench are sufficient to offset the prejudicial effect suffered by the accused." *Hornback*, 73 M.J. at 165 (Ohlson, J., dissenting)(quoting *United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994)). Here, no instruction by the military judge could sufficiently remove the taint of prosecutorial misconduct from the proceedings.

F. SGT Sewell was prejudiced by the prosecutorial misconduct because the evidence of the convictions were not strong.

The SVP's misconduct likely affected the findings related to PFC MN because the weight of the evidence for multiple specifications were based heavily on the credibility of the witnesses. First, the charges relating to PFC MN were not supported by any physical evidence or injury. Further, her testimony conflicted with SPC JF regarding whether PFC MN had the option of sleeping in a different room and whether SGT Sewell was naked when he opened the door. (JA 233). In the taped, seven-hour CID interrogation, SGT Sewell's statements regarding the events on the evening in questions evolved, but he never admitted to trying or wanting to have sex. (JA at 80). His evolving statement and subsequent texts could have been due to a desire to avoid that a female was in his barracks room. Finally, the multiple defense witnesses stated that PFC MN had a reputation for being untruthful. Thus, the credibility of the appellant and PFC MN were vital questions to be decided by the panel.

The SVP's misconduct was heavily focused on the charges involving PFC MN. The SVP vouched for PFC MN's testimony that "we all know she didn't make it up." (JA at 146). Further, he argued that not "taking no for an answer" in sending pictures proved that SGT Sewell did not "take no for an answer" in assaulting PFC MN. (JA at 148). The SVP invited the panel to put themselves in

PFC MN's position by stating "*we can all understand why she felt that way.*" (JA at 149)(emphasis added). The SVP also attempted to elicit over objection why PFC MN "wants to come here and make sure [SGT Sewell is] held accountable." (JA at 235). Finally, the SVP also expressed an opinion on SGT Sewell's credibility stating that "we all know he lied on the video." (JA at 138). Thus, in a close case, this misconduct by a senior military prosecutor likely impacted the panel's decision on the allegation.

The SVP's misconduct likely impacted the panel's consideration of indecent conduct on Ms. EB's couch because the specification was based mainly on Ms. EB's and the appellant's credibility. There was no third party corroborating testimony that SGT Sewell was naked or had placed his hand on his exposed penis. While SGT Sewell stated he was naked on the couch, he did not admit to intentionally exposing his penis to Ms. EB. Thus, the SVP's arguments regarding general propensity, bad character, and SVP's personal opinion of SGT Sewell's credibility likely had a particularly significant impact on the jury's determination.

The SVP's misconduct likely impacted the remaining charges relating to sending or showing pictures of his penis because they were supported by M.R.E. 404(b) evidence. While that evidence was more substantial than for the other specifications, the allegations were mainly supported by the testimony of the victims and corroborated by the pictures discovered on SGT Sewell's phone.

However, as recognized by the military judge prior to trial, the numerous specifications presented a significant risk of being used as evidence to prove each other by the panel inappropriately. Thus, the SVP's blatant disregard for the judge's 404(b) rulings, the SVP's argument that "there's something wrong with him," and the SVP's argument that SGT Sewell was a dangerous sexual predator, likely impacted the panel's findings.

Finally, the fact that SGT Sewell was acquitted of multiple specifications shows the panel found many of the charges weak. *See Hornback*, 73 M.J. at 164 (Baker, J., dissenting). Thus, it is more likely that the misconduct involving misuse of character evidence by a senior SVP was improperly relied upon in an otherwise close case. Therefore, this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184.

Conclusion

WHEREFORE, Sergeant Sewell respectfully requests that this Honorable Court set aside the findings and the sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Sergeant Todd D. Sewell, Crim. App. Dkt. No. 20130460, Dkt. No. 16-0360/AR, was delivered to the Court and Government Appellate Division on **June 1, 2016**.

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