IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Index of Brief

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TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Case Law

Supreme Court of the United States

United States Supreme Court

United States Court of Appeals for the Armed Forces

Statutes

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

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

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (2012).

Statement of the Case

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of six specifications of indecent conduct and one specification of assault with intent to commit rape, in violation of Articles 120 and

134, UCMJ, 10 U.S.C. §§ 920 and 934 (2012). (JA 1). The panel sentenced appellant to forfeit all pay and allowances, confinement for one year, reduction to the grade of E-1, and to be discharged from the service with a dishonorable discharge. (JA 1). The convening authority approved the adjudged sentence and credited appellant with seventeen days of confinement credit. (JA 1).

On 29 January 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. (JA 2). This Court granted appellant's petition for grant of review of the Army Court's decision on 12 April 2016.

Statement of Facts

During pretrial motions session, the military judge addressed the defense's motion for severance and explained to the government that there was "a danger" to make "an argument that he's the kind of person that just does this." (JA 31). The government agreed that an argument that alleges "we know he did it because he did it on all these other occasions" would be impermissible. (JA 31). During the findings argument, the trial counsel asked "what kind of man would have 118 photos on his phone?" (JA 148). The trial counsel's argument also included statements such as "he won't take no for an answer. 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, when she's trying to push him off," and "he's trying to excite his sexual desires because he has something wrong with him." (JA 148). The trial counsel addressed the defense of mistake or accident by arguing:

> If it was just ST, would we all give him the benefit of the doubt? We would. We would all give him the benefit of the doubt if it was only ST, because that was probably accidental, but we know it wasn't accidental, because of all the other females that he's exposing himself to, that he's sending the pictures to, that he's masturbating in front of, and that he sexually assaulted in his room. So we know this was not the actions of an innocent man accidentally, mistakenly exposing himself, for example, to ST.

(JA 140).

In addition, to highlight that appellant targeted these individuals based upon their rank and inexperience, the trial counsel 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 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. We have higher standards and expectations that we expect from him for ten people in that eight to nine month time period here at Fort Hood that they found.

(JA 140-141).

The trial counsel further argued "we ask you not to blame PFC MN for trusting that an NCO wouldn't take advantage of her." (JA 146). At the conclusion of the government's argument, an Article 39(a), UCMJ, session was held and the defense counsel made an improper argument objection for the trial counsel's statements regarding the number of images appellant possessed and the impermissible use of Mil. R. Evid. 404(b) evidence. (JA 151-155). In response to the argument about the number of images, the trial counsel's reasoning for the statement was that "somebody that has these is more likely to keep sending them after he's told no." (JA 154).

After a thirty minute recess, the military judge provided the following curative instruction:

> Members, two portions of LTC [McD's] argument to you were improper and I'm going to ask you to disregard them. One of them was at a point in his closing argument he stated what kind of a man---words to the effect of what kind of a man has 118 images of his penis on his cell phone, to the extent that that was an invitation for you basically to use that evidence that was introduced that he had 118 images of his penis on his cell phone as somehow character that's showing that he's some kind of a deviant. I'm going to ask you to disregard it for that purpose. Likewise, LTC McD made some argument that the fact that the accused sent photographs of his penis, or is at least alleged to have, to women after they'd said I don't want to see that any more as standing for a general proposition that he doesn't take no for an answer, and therefore, that could be used for purposes of other offenses including the alleged assault on PFC N. Once again that's an improper invitation for you to consider

> that act for a propensity purpose that I've not instructed you on.

(JA 160-161).

After the military judge reread the spillover instruction, he stated the following:

> Here, for instance members, you could take evidence of the fact that the accused had photographs of what appeared to be his penis on his cell phone. If you believe that in fact, was true, you could use that evidence for the purpose of determining whether it's possible that he may have increased the likelihood that at least he had access to such photos he sent to other individuals if they received them. Again, this is just part of the evidence that's out there, that the mere fact that he had pictures of his penis on the cell phone itself, shouldn't be evidence of anything else other than he had access to such photos if you believe the pre-requisites that it was his cell phone and these photos were put on there by him.

(JA 162).

Then, the military judge restated the Mil. R. Evid. 404(b) instruction that allowed the consideration of: (1) the evidence that the accused committed the alleged conduct upon PFC N, KP, Specialist KS, JF, Sergeant EW, and CC, may be considered to show that the accused selected these Soldiers as victims based upon their rank, inexperience, and unlikelihood that they would report his misconduct; (2) the evidence that the accused exposed his penis to his alleged victims or sent pictures of his penis to the alleged victims named in the Specifications of Charge II, and the additional Specification and the additional

Charge and it's Specification to show that the exposure of his penis to his alleged victims under Charge II and under the additional Charge and its Specification, wasn't done by accident or mistake; and (3) evidence that the accused isolated females when he committed the alleged misconduct to show a plan or design of the accused to isolate females individually to commit the alleged misconduct, so there would likely be no other witnesses. (JA 163-164). Like his initial instruction, the military judge ended his Mil. R. Evid. 404(b) instruction with "you may not consider any of this evidence for any other purpose, and you may not conclude or infer from this evidence the accused is a bad person or has criminal tendencies and therefore, he committed the offenses." (JA 164).

During rebuttal, the trial counsel began his argument by stating "reasonable doubt as to each offense? Really? Were they listening to all the evidence here that we all heard? When we get to the defense, they have a good poker face, but we all know there's not reasonable doubt." (JA 165). The defense counsel did not object to this comment. At the conclusion of the rebuttal argument, the defense counsel objected to the trial counsel's statement of:

> She's sitting right next to him, right next to him doing her homework and she looks over and sees his stuff hanging out of his pajamas. That was not an accident. That was once again him testing. She's isolated. She's by herself. Just like the other females he did this to.

(JA 168-169, 178).

The military judge did not find error and stated:

> Basically what LTC [McD] was doing is saying he was sending it to her to test her. The 404(b) ruling I made the other day concerned using evidence of one charged offense for general propensity to be used with other individuals. In this case, I think it was fair argument for the government to argue that the reason he was exposing his penis to ST, one explanation for that would have been testing her. In other words, another way of saying that it was for the intent of gratifying his sexual desires. I'm ruling it's a fair argument based on the evidence. I don't find the argument improper and to what the--- even in the most liberal interpretation as invited to take part of the defense, I don't find that it's a significant error, nor do I think it would mislead the panel members or lead them to make leaps of logic with regard to the admitted evidence, that would invite them to use the evidence in a way that I have not instructed them. I have provided them repeated instructions that defense counsel has emphasized, and I'll provide them to the members in writing under the circumstances and pursuant to the rules concerning mistrial. I'm denying the defense motion for a mistrial.

(JA 179-180). The panel deliberated for three hours and came back with mixed findings. (JA 1).

Issue Presented

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

Summary of Argument

The military judge found two of the trial counsel's comments during the findings argument were improper and provided a curative instruction. As such,

this court should affirm the decision of the Army Court and grant appellant no relief. In light of the detailed curative instruction, the trial counsel's comments, taken as a whole, did not prejudice appellant and were not so damaging this Court cannot be confident that the members convicted appellant on the basis of the evidence.

Standard of Review

Improper argument is a question of law that is reviewed de novo. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011). When no objection is made at trial, prosecutorial misconduct is reviewed for plain error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). "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.* (citing *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004)). When an objection is made at trial, prosecutorial misconduct is reviewed for prejudicial error. *Id.*

Law and Analysis

"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 v. United States*, 295 U.S. 78, 88 (1935)). "The legal test for improper argument is whether

the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). "The argument by a trial counsel must be viewed within the context of the entire court-martial." *Id.* Trial counsel, in his role as advocate for the government, may "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Id.* "The prosecutorial misconduct inquiry is an objective one, requiring no showing of malicious intent on behalf of the prosecutor."[1] *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014).

The trial counsel's argument in this case was largely proper and any error did not rise to plain error that prejudiced appellant. Appellant's brief alleges that it was error for the trial counsel to violate the military judge's ruling on Military Rules of Evidence (hereinafter Mil. R. Evid.) 404(b) when he argued that appellant "won't take no for an answer. 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, when she's trying to push him off." (JA 148, 151-155). The defense's objection at trial alleged that the trial counsel was arguing that an allegation of sexual assault can rebut the defense of accident for the indecent conduct specifications. (JA 151). The military judge found his comments were

[1] Appellant's brief references the trial counsel as someone who is "very experienced," and a high ranking prosecutor." (Appellant's Br. 14, 21). The government is not aware of any legal authority that requires a heightened scrutiny of a trial counsel's argument because of their respective rank or years in service.

improper and provided the appropriate curative instruction. (JA 160-161). The military judge also provided an appropriate curative instruction after he found the trial counsel argued impermissible character evidence by asking "what kind of man would have 118 photos on his phone?" (JA 160).

Appellant now alleges the following comments were also improper: "the old dirty man," "we have higher standards," and "young females in the military are preyed upon." (JA 148-149). These comments are subject to the plain error analysis because there was no objection at trial. In these instances, the statements are not error because they were a fair comment upon the evidence. The government was permitted to argue that appellant preyed upon junior enlisted soldiers and these comments were directly related to the fact that he abused his position of seniority and trust to take advantage of them.

Additionally, appellant alleges the statement, "something's wrong with him" was error. This comment, also subject to the plain error analysis, was not error because it was a fair comment upon the evidence because there were multiple specifications regarding indecent conduct over a period of nine months. Contrary to appellant's argument, it did not leave the panel with the impression that appellant had a medical diagnosis that made him dangerous to the public.

Finally, appellant alleges the comments, "we know it wasn't accidental," was error because the trial counsel engaged in improper vouching of government

witnesses. Appellant also alleges the trial counsel made disparaging comments about the defense counsel. In these instances, the defense counsel did not object, so this court reviews for plain error. "Improper vouching can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed." *Fletcher*, 62 M.J. at 180. In addition, it is improper "for a trial counsel to attempt to win favor with the members by maligning defense counsel." *Id.* at 181. The trial counsel's use of "we know" was error because it is similar to the comments that this Court held were impermissible in *Fletcher*. *Id.* In addition, the reference to defense counsel's "poker face" was also error because the trial counsel attacked the defense counsel's integrity, a practice this Court has also found is impermissible. *Id.* at 182.

None of the errors listed above rise to plain error that materially affected appellant's rights as discussed below.

C. Analyzing Prejudice.

In spite of the errors above, they did not materially prejudice a substantial right of the accused because they were harmless. *Id.* at 179. "In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Id.* at 184. When reviewing a case for prosecutorial misconduct this Court analyzes the following 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.* Indicators of severity include: "(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." *Id.*

1. Severity of misconduct

The objections that were sustained were limited to the initial findings argument and not the rebuttal. In addition, the plain and obvious errors listed above were limited to the findings argument. The errors in this case are not as severe as the errors in *Fletcher*, where the government described the evidence as "'unassailable, fabulous'" and described the defense as "'nonsense, fiction, unbelievable, ridiculous, and phony.'" *Id.* at 181. The length of the findings argument was nineteen pages and the rebuttal was eight pages. The length of trial was three days and the panel deliberated for three hours.

2. The measures adopted to cure the misconduct

Unlike this case, the military judge in *Fletcher* provided no instruction to the panel other than the standard admonition that argument of counsel is not evidence. *Id.* at 185. The instruction provided by the military judge in appellant's case is

much more detailed and was designed to directly address any perceived implications in trial counsel's argument that the panel should convict appellant because he has the character of a sexual deviant. (JA 160-162). Contrary to appellant's argument, the military judge did not simply restate the Mil. R. Evid. 404(b) instruction but instead explained how they could analyze the fact that appellant had photographs of his penis on his phone. (JA 162). He also stated that the trial counsel's "general proposition that he doesn't take no for an answer" was an "improper invitation" to consider that act for a propensity purpose that they were not instructed upon. (JA 161). "Court members are presumed to follow the military judge's instructions." *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000). Therefore, any error from improper argument was cured by the military judge's instruction. *Id.*

3. The weight of the evidence supporting the conviction

The evidence proving appellant's misconduct with PFC MN was strong. Her immediate reaction to appellant's conduct was explained to the panel through JF, who testified that PFC MN came to her room after the incident and "was borderline hysterical." (JA 50). The most damaging evidence was appellant's interview with law enforcement. At first, appellant denied that PFC MN was in his room and denied making any physical contact with her. (JA 66). By the end of the interview, appellant admitted that PFC MN was in his bed wearing only her

underwear and he went over to give her a hug. (JA 67, 82). Appellant explained that he was rubbing lotion in his groin area, had an erection, and then he went to give PFC MN a hug. (JA 84). In addition, appellant admitted that he sent a text message to PFC MN and told her not to say anything about what happened. (JA 77). Finally, the fact that appellant was acquitted of several specifications demonstrates that the panel followed the military judge's instructions and did not engage in spillover.

Therefore, the trial counsel's comments, taken as a whole, were not so damaging that his Court cannot be confident that the members convicted appellant on the basis of the evidence. *Fletcher*, 62 M.J. at 185.

Conclusion

Wherefore, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

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June 28, 2016

CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on June 29, 2016.

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