IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,	)	REPLY BRIEF ON BEHALF OF
	)	APPELLANT
Appellant	)	
v.	)	
	)	
Sergeant (E-5)	)	Crim. App. Dkt. No. 20150320
Brian G. Short,	)	
United States Army,	)	USCA Dkt. No. 17-0187/AR
Appellee	)	

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INDEX OF FINAL BRIEF ON BEHALF OF APPELLEE

Page

Issue Presented

WHETHER GOVERNMENT COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN THEY MADE IMPROPER ARGUMENT AFTER REPEATEDLY ELICITING INADMISSIBLE TESTIMONY. 1

Statement of the Case 1

Argument 1

Conclusion 9

Certificate of Filing and Service 10

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Page

Case Law

Supreme Court

Berger v. United States, 295 U.S. 78 (1935) 2

Court of Appeals for the Armed Forces / Court of Military Appeals

United States v. Fletcher, 62 M.J. 175 (C.A.A.F. 2005) 8

United States v. Hornback, 73 M.J. 155 (C.A.A.F. 2014)............................. 2, 3, 5

United States v. Rushatz, 31 M.J. 450 (C.M.A. 1990).. 3

United States v. Sewell, 76 M.J. 14 (C.A.A.F. 2017) 3

United States v. Thompkins; 58 M.J. 43, 47-48 (C.A.A.F. 2003).................. 3, 5, 6

Federal Courts

United States v. Crutchfield, 26 F.3d 1098 (11th Cir. 1994)..............................2-5

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

Issue Presented

WHETHER GOVERNMENT COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN THEY MADE IMPROPER ARGUMENT AFTER REPEATEDLY ELICITING INADMISSIBLE TESTIMONY.

Statement of the Case

On March 21, 2017, this Honorable Court granted appellant's petition for review. On April 27, 2017, appellant filed his final brief with this Court. The government responded on May 24, 2017. This is appellant's reply.

Argument

A. Contrary to precedent, the government argues that this Court reviews the military judge's rulings rather than the trial counsel's repeated acts of prosecutorial misconduct.

The government argues that "[t]his Court should give deference to the military judge's ruling for mistrial," thus asking this Court to ignore prior prosecutorial

misconduct case law.[1] (Appellant Br. at 14); s*ee United States v. Hornback*, 73 M.J. 155 (C.A.A.F. 2014). However, the government has provided no legal support for such a departure nor has the government certified such issue before this Court.[2]

Critically, the government, like the Army Court, provides no legal support for why previous rulings for mistrial by the military judge binds this Court from reviewing whether the cumulative impact of any violation of legal norms constituted prosecutorial misconduct. As this Court discussed in *Hornback*, both the Supreme Court and other federal courts recognize an independent basis for reviewing the cumulative impact of repeated and persistent violations of a judge's rulings, rules of evidence, and other legal norms may constitute prosecutorial misconduct. *Hornback*, 73 M.J. at 160; *see Berger v. United States*, 295 U.S. 78 (1935); *United States v. Crutchfield*, 26 F.3d 1098 (11th Cir. 1994) (finding prosecutorial misconduct in spite of denied motion for mistrial). Regardless of

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[1] The government echoes the Army Court's suspicion of the military judge's Mil. R. Evid. 404(b) rulings, yet that issue was not certified. Moreover, this suspicion again loses the forest for the trees: the misconduct is the repeated violation of this ruling in spite of numerous admonitions before and during trial.

[2] The government argues that because the individual rulings of the military judge were not certified, this Court should afford the judge's rulings deference. However, this is not the standard. Under *Hornback*, this Court reviews whether the prosecution's actions violated a legal norm for prejudicial error without regard to the underlying military judge's rulings. 73 M.J. at 159-60.

whether a motion for mistrial was made, both this Court and federal courts have reviewed prosecutorial misconduct without deference to the military judge's ruling.[3] *See United States v. Sewell*, 76 M.J. 14 (C.A.A.F. 2017); *Crutchfield*, 26 F.3d at 1098.

Thus, this Court should decline the government's request and review the totality of the proceedings for prejudicial error without deference to the military judge's earlier, narrow rulings.[4]

B. No amount of curative instructions could have cured all the instances of misconduct.

The government focuses on instructions but ignores the innuendo, improper testimony, and improper argument permeating the trial, which became too much for instructions to overcome alone. *See Hornback*, 73 M.J. at 162-63; *United States v. Thompkins*; 58 M.J. 43, 47-48 (C.A.A.F. 2003); *Crutchfield*, 26 F.3d at 1098. From the beginning, the prosecution's strategy in the case was clear: 1) make the panel believe appellant was a controlling husband and bad person and 2)

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[3] Giving deference to the military judge in this case is especially inappropriate because the mistrial motions did not encompass the entirety of the prosecution's misconduct in this case, as they focused primarily on the violations of the Mil. R. Evid. 404(b) ruling. Nor did the military judge's ruling consider the weight of the evidence in determining prejudice.

[4] Under any standard, the sheer breadth and depth of misconduct in this case constitutes clear evidence of an abuse of discretion in denying the motions for mistrial. *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990).

make the panel sympathize with Ms. NS and see her as more credible.[5] (JA 48, 56, 67, 75-76, 516-19, 536-37). Undeterred by the military judge's adverse rulings, the prosecution executed its plan.[6]

As in *Crutchfield*, the panel was continually left with innuendo based on these impermissible questions. Based solely on improperly elicited testimony, the panel was left with the picture that SGT Short was verbally abusive and violent numerous times (but they will not hear about them), that he actively sought to conceal this abuse, that he was dangerous, and that he threatened Ms. NS's life after she reported the incidents. (JA 103, 106, 107, 111, 123, 135, 148, 251, 279, 319, 341, 418). Moreover, the panel was left with the impression that Ms. NS told multiple people about the injuries, corroborating her story. (JA 261, 319, 349, 352).

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[5] Appellant does not argue intentional misconduct. Rather, as this Court noted in *Hornback*, "[i]t matters not that trial counsel seems to have been merely inexperienced, ill prepared, and unsupervised in this case. . . the prosecutorial misconduct inquiry is an objective one, requiring no showing of malicious intent." 73 M.J. at 160.

[6] The government argues much of the improperly elicited testimony was not intentional, but "the result of the victim testifying slightly different than anticipated." (Appellant Br. at 14). However, it is clear from the record the prosecution had only just interviewed the alleged victim the night before trial and only "spoke briefly" of the military judge's ruling. (JA 64, 104). Thus, the net effect is the same: improper testimony was placed before panel due to the actions of the prosecution. *See Hornback*, 73 M.J. at 106.

Thus, as stated by the court in *Crutchfield*, "[w]hen improper inquiries and innuendos permeate a trial to such a degree as occurred in this case, . . . instructions from the bench are [in]sufficient to offset the certain prejudicial effect suffered by the accused." 26 F.3d at 1098.

C. Contrary to the government's argument, the military judge left many "stones unturned."

The government analogizes the military judge's curative instructions with those conducted by the military judge in *Hornback*, but the government ignores key differences. First, the military judge in *Hornback* allowed the trial counsel to practice questions outside the presence of the panel, but the military judge in this case did not. 73 M.J. at 158-59. Second, the military judge in *Hornback* allowed multiple witnesses to be questioned outside the presence of the panel, but the military judge in this case did not. *Id*. at 157. Third, the military judge in *Hornback* even told the prosecutor "what questions she could ask," but the military judge in this case did not. *Id*. at 158. Had the military judge utilized these curative actions after the first motion for mistrial, the majority of improper testimony might not have been heard by the panel.

Additionally, the military judge failed to take corrective action similar to the military judge in *Thompkins*. In *Thompkins*, the prosecution elicited numerous instances of uncharged misconduct outside the military judge's ruling. 58 M.J. at 47. However, the military judge took the measure of denying the government a

chance to conduct a redirect examination of a key government witness. *Id*. Had the military judge in this case restricted the trial counsel's redirect or cross examination of defense witnesses, it would have prevented improper testimony reaching the panel. (JA 329, 342, 349, 350, 351, 357, 418). Finally, it also would have also prevented the prosecution's largely irrelevant and antagonistic questioning of SGT Short's stepmother, causing her to cry on the stand. (JA 422).

Thus, in addition to the instances where no instruction was given, the military judge in this case left many a stone unturned in curing the improper testimony and argument.

3. The government's brief fails to provide any insight into the rhyme or reason of the panel's findings.

The government fails to provide any basis in the evidence for why appellant was convicted of some specifications but not others. Namely, the government argues appellant was convicted of the three assaults because Ms. NS "testified in detail" regarding "times, locations, what occurred, and how she felt" and because Ms. KP observed bruises and arguments. (Appellant Br. at 17).

Juxtaposing two allegations reveals the fault in the government's argument. Specifically, Ms. NS testified in equal "detail" regarding the assaults in Specification 2 of Charge II (hair pulling) as Specification 3 of Charge II (shoving her head into the car hood). For Specification 3, while Ms. NS did not remember how it started, she was able to testify that after a barbeque in June, she remembered

going to the basement garage and having sex with appellant when he slammed her head into the hood of a car, giving her a black eye. (JA 98-99). Similarly, for Specification 2, Ms. NS was unable to remember whether she was injured, but was able to testify that in April the appellant pulled her hair and dragged her down the hallway in front of her son. (JA 93-94). Critically, both specifications could be corroborated by the neighbors: Ms. KP corroborated seeing bruising on Ms. NS during that time period and SGT Peoples recalled seeing Ms. NS with a black eye. (JA 258).

Inexplicably, SGT Short was acquitted of Specification 3 of Charge II but convicted of Specification 2 of Charge II. In fact, the car incident in Specification 3 had arguably stronger corroboration as Ms. NS stated that she initially told Ms. KP she received a black eye due to rough sex but later told her it was not. Ms. KP corroborated this during her testimony by acknowledging she later learned of many instances of physical abuse. (JA 590-91). In contrast, Ms. NS didn't even remember if she was visibly injured from the conduct in Specification 2, and therefore a panel could have found neither Ms. KP nor SGT Peoples corroborated such injury or argument. Accordingly, the government's argument that the acquittals "line up directly with the weakest charges" does not withstand scrutiny. (Appellant Br. at 18).

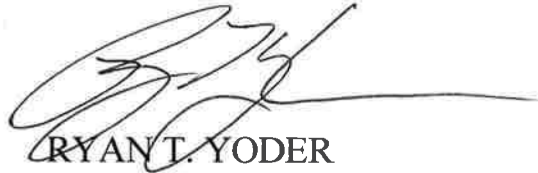
Accordingly, the record demonstrates the panel did not wholeheartedly believe Mrs. NS, and the case was a "close call" where the improper argument and testimony likely swayed the balance. *See Hornback*, 73 M.J. at 164 (Baker, C.J., dissenting). The improper testimony and argument would account for the inconsistent finding in Specification 2 of Charge II because the panel could have found that because SGT Short was a bad, controlling husband, he committed the domestic assaults. Along those same lines, the panel could have then found that while a bad and controlling husband commits domestic violence, he is not a rapist, and acquitted him of the sex related offenses.

Finally, the light sentence supports that the case was a close call, swayed by the improper testimony and argument. The bad conduct discharge in light of the testimony of the victim shows residual doubt by the panel. Critically, had the panel convicted appellant of only some of the offenses and then sentenced him to the maximum punishment, it would be telling of their confidence in the findings. However, in this case, the panel gave only the requested minimum by SGT Short. Thus, the panel could have given a light sentence as a result of residual, lingering doubt regarding the domestic assaults.

Thus, this Court cannot be confident that the panel convicted SGT Short on the basis of the permissible evidence alone. *See United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005).

Conclusion

WHEREFORE, appellant requests this Court set aside the findings and the sentence.



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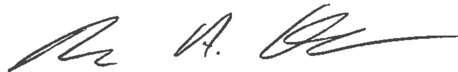

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Sergeant Brian G. Short, Crim. App. Dkt. No. 20150320, Dkt. No. 17-0187/AR, was delivered to the Court and Government Appellate Division on **June 5, 2017**.

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