IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39711
	)	
Technical Sergeant (E-6)	)	USCA Dkt. No. 23-0163/AF
MATTHEW P. LEIPART	)	
United States Air Force	)	20 September 2023
Appellant.	)	

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INDEX OF BRIEF

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

AIR FORCE COURT OF CRIMINAL APPEALS

OTHER COURTS

STATUTES & OTHER AUTHORITIES

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v.	)	Crim. App. Dkt. No. 39711
Technical Sergeant (E-6) **MATTHEW P. LEIPART** United States Air Force *Appellant.*	)	USCA Dkt. No. 23-0163/AF

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR, INTER ALIA, ALLOWING THE MILITARY JUDGE TO CONSIDER APPELLANT'S GUILTY PLEA WHEN DETERMINING WHETHER APPELLANT WAS GUILTY OF THE LITIGATED OFFENSES.

II.

WHETHER THE TRIAL COUNSEL'S "CLEAR ERROR" IN FINDINGS ARGUMENT—LEVERAGING APPELLANT'S GUILTY PLEA TO PROVE HIS GUILT OF THE LITIGATED OFFENSES—WAS HARMLESS BEYOND A REASONABLE DOUBT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.[1]

STATEMENT OF THE CASE

At a general court-martial convened at Whiteman Air Force Base, Missouri, Appellant elected trial by military judge alone and entered mixed pleas.[2] (JA at 49, 68, 69.) Pursuant to his pleas, the military judge found Appellant guilty of one charge and two specifications of communicating a threat, in violation of Article 134, UCMJ; one charge and two specifications of assault consummated by battery, in violation of Article 128, UCMJ; and one specification of aggravated assault, in violation of Article 128, UCMJ. (JA at 396.)

Following a litigated trial, the military judge also convicted Appellant, contrary to his pleas, of two specifications of sexual assault, in violation of Article 120, UCMJ. (JA at 396.) The military judge acquitted Appellant of one specification of communicating a threat, two specifications of sexual assault, and one specification of the lesser included offense of attempted sexual assault. (Id.)

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[1] Unless otherwise indicated, all references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and Rules for Courts-Martial (R.C.M.) are to the Manual for Courts-Martial, United States (2016 ed.).

[2] Appellant's court-martial convened on 2 July 2018 for motions and arraignment and re-convened from 27-29 November 2018 for trial.

The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, total forfeiture of all pay and allowances, 21 years confinement, and a dishonorable discharge. (JA at 397.)

STATEMENT OF THE FACTS

The Relationship Between KC and Appellant

In January 2016, Appellant and KC met on an online dating site. (JA at 150-51.) At the time, Appellant was stationed at Whiteman AFB, Missouri, and KC lived in Perth, Australia. (JA at 149-153.) In March 2016, KC flew to the United States to visit Appellant, during which time she became pregnant with his child. (JA at 152-53.) After approximately two weeks, KC returned to Australia. (JA at 152.)

In May 2016, KC visited Appellant a second time in Missouri and stayed until July 2016. (JA at 154.) In August 2016, KC returned to Missouri a third time. (JA at 157.) In November 2016, KC experienced a preterm rupture and gave birth to her and Appellant's son in the 31st week of her pregnancy. (JA at 170.) In December 2016, Appellant, KC, and their son flew to Australia together. (JA 171-72.) Appellant returned to the United States in January 2017, while KC and their son remained in Australia. (JA at 171.)

In May 2017, Appellant visited KC in Australia. (Id.) While in Australia, Appellant physically assaulted KC by grabbing and choking her with his hand and

arm, holding a screwdriver at her neck, and striking her on the head with his hand. (JA at 163-179.) Appellant also threatened to injure KC approximately 20 times. (JA at 82-95.) In June 2017, Appellant returned to the United States. (JA at 175).

In early August 2017, KC reported the physical assaults to the Australian police after receiving threatening text messages from Appellant. (JA at 196-97.) Later that month, Whiteman AFB's Security Forces Investigations (S2I) unit called KC regarding Appellant, and she again reported the physical assaults that had occurred in Australia. (JA at 202, 205.) Several weeks later, in September 2017, the Office of Special Investigations (OSI) contacted KC. (JA at 224.) During this interview, KC disclosed that Appellant had sexually assaulted her several times over the course of their relationship. (JA at 224-28.)

The Guilty Plea

At trial, Appellant faced five specifications of sexual assault; two specifications of assault consummated by a battery; one specification of aggravated assault; and three specifications of communicating a threat. (JA at 53-58.) Appellant pled not guilty to the three specifications of sexual assault and two specifications of communicating a threat. (JA at 102.) Appellant pled guilty to grabbing and choking KC with his hand and arm; holding a screwdriver to her

neck; striking her on the head with his hand; and threatening to injure her.[3] (JA at 102.) All the offenses to which Appellant pled guilty occurred in 2017 in Australia. (JA at 55, 58, 70, 102.) After the providence inquiry, the military judge accepted Appellant's pleas. (JA at 133.)

The Opening Statements

After the guilty plea, the parties began the litigated proceedings and gave opening statements. The prosecution's opening statement did not mention the conduct to which Appellant had pled guilty, nor did it make any reference to Appellant's guilty plea itself. (JA at 134-136.)

Appellant was represented by Mr. Daniel Conway, Mr. James Culp, and Capt Charles Berry. Mr. Conway, who opened for the defense, framed KC as "a manipulator who knows how to use the criminal justice system" and implied that KC had fabricated the allegations. (JA at 137.) He pointed first to a police intake form documenting KC's initial report to Australian police, which did not include any reports of sexual assault. (JA at 142.) He then moved on to describe an "affidavit" written by KC, in which she alleged Appellant had physically assaulted her but did not mention a sexual assault. (JA at 142.) Mr. Conway explicitly

[3] The prosecution's evidence on these offenses included audio recordings of various threats by Appellant, as well as a recording that captured the sound of KC choking and gagging as Appellant strangled her, which were played during the sentencing phase. (Suppl. JA at 827.)

acknowledged that the affidavit mentioned conduct that was the basis of Appellant's guilty plea but emphasized the absence of any reports of sexual assault. (JA at 142.)

> [S]he's then going to write a written affidavit. Okay. And, in that particular affidavit you won't find any—any reference to any sexual assaults. You will find some reference to some of the conduct that was the subject of the mixed plea—the guilty plea. But you won't find any reference in this second piece of documentary evidence to sexual assaults. No mention of rapes.

(Id.)

Mr. Conway then recounted KC's interview with S2I, noting that she reported conduct that "essentially covered the charges subject to the mixed guilty plea," but nothing about sexual assault. (Id.) Finally, he described KC's interview with OSI, which he characterized as "the first time that sexual assault allegations are going to appear." (Id.)

After the defense opening statement, the military judge noted he was "putting back on [his] judge hat," and engaged in the following discussion with trial defense counsel about the reference to Appellant's mixed pleas:

> MJ2: But you had mentioned in your opening statement about the mixed pleas, the guilty pleas, and one of the questions I was going to ask you, regardless of that, is your position – from the defense team – on consideration, or the fact-finder being aware that there has been previous guilty pleas? I think your opening statement probably answered the question, because now you've alerted to me in your

opening statement. But, I still want to give you the opportunity to bring that up.

CivDC1: Yeah, I think in a mixed plea in front of a panel type fact-finder, sometimes we would have the optionality [sic] of certainly disclosing to the members the existence of the plea. I thought that it was appropriate in the opening statement here, because you're going to hear prior inconsistent statements in impeachment, based on the 15 August statement to [KC]. And in that particular statement, the reference in opening statement was, she talks about the content of the mixed plea, but not these additional charges and specifications. So to the extent, I wasn't necessarily asking you to, as the fact-finder, to necessarily consider that mixed plea. But, I was alerting you to the fact of what you're going to hear on the cross-examination, if she made statements that are similar to that. I hope that answers your question, sir.

MJ2: It does.

…

MJ2: So we're operating in a world where I'm aware of the previous guilty plea?

CivDC1: Of course, sir; yes.

MJ2: I mean, obviously I am as the judge but even as the fact-finder now –

CivDC1: Yes, sir.

MJ2: -- I'm aware of it.

CivDC1: Then obviously, I certainly appreciate your thoroughness in compartmentalizing your various functions here, but I agree that we're in that universe now.

(JA at 145-46).

Immediately after this colloquy with Mr. Conway, the military judge explained his dual-hatted role as judge and factfinder to Appellant:

> MJ2: And Sergeant Leipart, I do this with accuseds in all cases where there's this situation. I'm sure your defense team has explained this to you, but I want to do it as well. I wear many hats in this particular role. So there are a lot of things where we've had discussions or I've seen motions filed, that's all wearing my judge hat. Now, I'm the fact-finder and so as you heard Mr. Conway say, *I compartmentalize those types of things and I try to keep things separate*.
>
> ACC: Yes, sir.
>
> MJ2: Not only do I try, but *I do*. So I just want to make sure that you are understanding of the fact that there might be some objections as we go through this trial where I'll put my judge hat back on. If I overrule an objection, then I consider all the evidence. If I sustain an objection – all that back and forth is sort of put back on the judge's side, then I put my fact-finder hat back on, and I pretend like I never heard that stuff.

(JA at 147) (emphasis added).

The Findings Case

The Government's findings case regarding the sexual assaults consisted of testimony from KC and the S2I investigator, as well as two clips from a recorded conversation between KC and Appellant. (JA at 148-175, 814-822.) On direct examination, KC described four sexual assaults that occurred in Missouri and one attempted sexual assault that occurred in Australia. (JA at 148-175.) The

prosecution did not elicit any testimony related to the physical assaults to which Appellant had pled guilty. (Id.)

KC testified that the first time Appellant sexually assaulted her was sometime in 2016 in Missouri after she became pregnant with his child. (JA at 154). After KC got out of the shower, Appellant "forced himself on [her]." (Id.) Though she described the experience as "humiliating," KC explained that she "thought maybe it's just like a once off thing," and that she "desperately just wanted this to work, because [she] was pregnant." (JA at 156-57.)

The second sexual assault occurred later the same year in Missouri, while KC was still pregnant. (JA at 158.) Appellant pushed KC face down onto the bed while she said "no, no, no," which made Appellant angry. (JA at 159.) Appellant pushed KC's legs up, "enough so he could get into [her]," pulled her pants down, and penetrated her with his penis. (JA at 161.) KC recalled that "it hurt so badly that it was awful" and that she "kept saying please, no." (Id.) She testified that Appellant told her, "[Y]ou're my wife, bitch, like this is my right, something like that." (Id.)

KC alleged that the third sexual assault happened sometime after the second, and described an incident in Missouri where Appellant came up to her while she was in the kitchen and "just shoved his fingers right—right up into [her]." (JA at 164-65.) KC stated she felt "[i]t wasn't like a sexual thing." (JA at 166.) She then

clarified that "[i]t was a sexual thing in that he … penetrated [her] vagina with his fingers, but the act itself felt like an act of aggression or ownership, that's what it felt like to [her]." (Id.)

The fourth sexual assault occurred in October 2016 after KC returned home to Appellant's house in Missouri from a women's health appointment. (JA at 167.) When Appellant pushed KC on the bed, she asked Appellant what he was doing and said "no," at which point Appellant told her that "he was entitled to have sex with [her], just because … [she] was his wife." (JA at 168.) Appellant "said something to the effect of, but he owned [KC] and it was his right" before he pushed KC's legs up and penetrated her. (Id.) KC told Appellant he was hurting her and asked him to stop. (Id.) After the incident, KC experienced bleeding. (JA at 169). Shortly thereafter, KC had a preterm rupture during the 31st week of her pregnancy—as a result, her son, who was due in December, was born the first week of November 2016. (JA at 170.)

Finally, KC described an attempted sexual assault that occurred in Australia in May 2017. (JA at 171). KC recalled that while she and Appellant were in the bedroom, he unsuccessfully tried to pull her pants down and penetrate her. (JA at 171-73).

Near the end of her direct examination, KC laid the foundation for two clips from a recorded conversation between KC and Appellant. (JA at 173-174.) KC

testified that she confronted Appellant and recorded the entire interaction using her phone. (JA at 174.) She confirmed the two audio clips were excerpts from that conversation and described them as Appellant "talking about sexually assaulting [her]" and suggesting that "he should be able to have sex with me whenever he wants." (JA at 173-174.) The first recording contained the following audio clip: "You should want to do it. You're right…you should always…you should never, you should never not want to do this. You should never not want to do it." (Suppl. JA at 823). The second recording contained the following audio clip: "I tried. I even grabbed you and forced myself on you, and you act like you're a rape victim. You're a fucking bitter bitch. Look at you --." (Id.) After the prosecution offered both recordings as Prosecution Exhibit 1 and the defense did not object, the military judge admitted them into evidence. (JA at 175).

On cross examination, trial defense counsel—Mr. Culp—focused on undermining KC's credibility. (JA at 176-287.) Just as his co-counsel telegraphed in opening statement, Mr. Culp stepped through each of KC's interactions with law enforcement agencies. (JA at 198-269). He first confronted KC about her 1 August 2017 report to the Australian police and the fact that she did not report anything about sexual assault, despite going to the police because she was scared of Appellant. (R. at 299.) KC explained that the officer taking her report told her to tell him "the worst things that [Appellant] has done to [her] *in Australia*," and

did not ask about sexual assault. (Id.) (emphasis added). Mr. Culp then attempted to impeach her using a police document about the report. (Id.) After reviewing the document, KC testified that she had never seen the document before and that it "isn't something that [she] produced." (JA at 199.) She further testified that the police did not ask any of the questions that Mr. Culp was saying they had. (Id.) The military judge then requested, "as the fact-finder," that the document be admitted into evidence. (JA at 201.) The document was admitted without objection as Defense Exhibit Alpha and contained the following summary of KC's initial report to Australian police:

> Victim states when partner last came to Australia to visit he became paranoid that the victim was cheating on him and has become both physically and verbally abusive towards the victim. On the 18th and 19 May the suspect has grabbed the victim by the throat and choked her, on the last occasion she has briefly passed out.
>
> The suspect returned to America a few days later.
>
> Since returning to America the suspect has sent numerous text messages to the victim threatening to hurt her and messages saying "dead," the victim has also received phone calls from the suspect where he has threatened to return and kill her and that the Police [can't] stop him.

(JA at 410.)

Mr. Culp next questioned KC about her 15 August 2017 interview with Investigator JM from S2I, during which she did not report any sexual assaults. (JA

at 205.) In emphasizing KC's "omission," Mr. Culp drew attention to the physical assaults that she did report:

> Q. Yes, ma'am. So what you did tell [Investigator JM] is that he held a screwdriver to your neck.
>
> A. Yes, I did.
>
> Q. You told [Investigator JM] that he grabbed you by the throat not once, but twice, correct?
>
> A. That's correct.

(JA at 206-207.)

Mr. Culp then moved on to discuss KC's 15 September 2017 interview with OSI, which he emphasized as the first time KC reported sexual assault. (JA at 224.) KC explained that no one had approached her about the issue previously and reiterated that it was "too embarrassing to talk about." (JA at 226.)

The defense then moved to admit a portion of KC's recorded interview with OSI as impeachment evidence. (JA at 267-287.) During the ensuing discussion with the military judge about the admission of the exhibit, Mr. Culp articulated the defense's theory of the case:

> Our point was … you had every reason in the world to fear based upon the things that he actually did, so why didn't you tell—if they really happened, why didn't you tell the police the stuff that was the most serious things that you're alleging now? *So we're never alleging that the original report to the police was falsely motivated. I mean, quite the opposite.* We would be crazy to do that.

(JA at 273) (emphasis added).

The prosecution asked the military judge to admit the entire interview. (JA at 268.) The interview included KC's accounts of the physical assaults and threats by Appellant: how he "held a screwdriver to [her] throat;"[4] "chok[ed] [her] from behind;"[5] "whack[ed] [her] in the back of the head;"[6] and threatened to "kill her."[7] (JA at 417.) After the defense did not object to "the entire video coming in as substantive evidence," the military judge admitted it as Defense Exhibit Charlie and noted that he would "consider it substantively." (JA at 268.)

After calling the S2I investigator to explain that they would not have questioned KC about sexual assault because it did not fall within S2I's purview, the prosecution rested its case. (JA at 822.) The defense did not present a case-in-chief.

The Closing Arguments

The first half of the prosecution's closing argument stepped through each of the contested offenses and the facts that supported the elements. (JA at 342-354.) It contained no reference to any of the conduct to which Appellant pled guilty. (Id.) The second half of trial counsel's argument focused on rehabilitating KC's

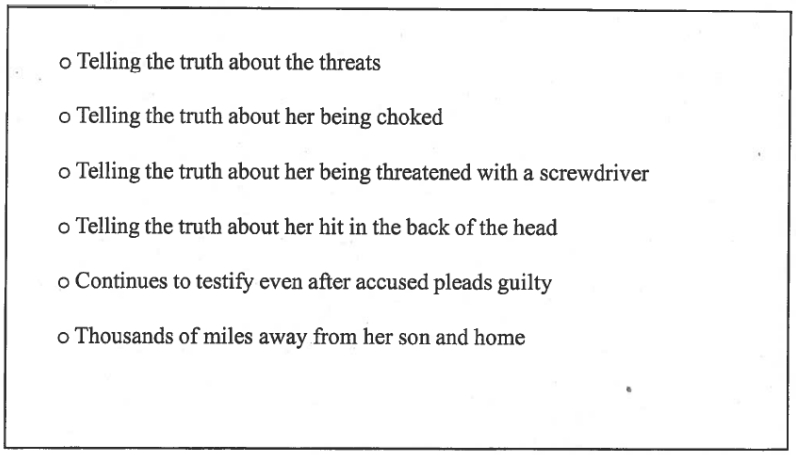
[4] Timestamp 28:32.
[5] Timestamp 32:17-32:36.
[6] Timestamp 1:47:28.
[7] Timestamps 45:01, 1:01:41.

credibility and dispelling the notion that she might have anything to gain from fabricating her allegations. (JA 354-364). During this portion of his argument, trial counsel invoked the military judge's awareness of Appellant's guilty pleas:

> The defense counsel asked you to operate in this world where you know that he pled guilty to a number of offenses. So right now, I want to talk about how that goes towards the victim's credibility, because as you're standing here operating in this world where he has admitted to crimes against [KC], the government believes you can use that in assessing her credibility on the stand. Whether or not she's telling the truth for the 120 offenses.
>
> So you know that she's telling the truth when she says the accused threatened her. You know that, Your Honor. Undeniable. You know that she's telling the truth about her being choked by the accused. Undeniable. You know that she's telling the truth about her being threatened with a screwdriver. That is undeniable. You know she's telling the truth about being hit in the back of the head by the accused. You can't deny it.

(JA at 354.)

Trial counsel's presentation included the following PowerPoint slide:



(JA at 420.)

Emphasizing the "stress and destruction of life" and humiliation that comes with being a victim, trial counsel posited that the delayed timing of KC's report indicated she was credible: "If she's a master-mind, why doesn't she sit down and plan all these assaults foolproof from A to Z? Because she's not lying." (JA at 357.) Trial counsel then spent the remainder of his argument contextualizing the timing of KC's report. (JA 357-364.) Trial defense counsel did not object to any of the argument. (JA at 342-364.)

Appellant's trial defense counsel gave a closing argument that painted KC as a liar with ulterior motives. (JA at 366-386.) Opening with the line: "Your Honor, false sexual assault cases are particularly difficult" (JA at 366), trial defense counsel proceeded to describe the sexual assault allegations as a "lie tree." (JA at 366-386). Near the end of his argument, trial defense counsel directly mentioned the conduct to which Appellant had pled guilty: "And [Appellant] loses his temper. And he *does some things*, but you know what he doesn't do? ... He doesn't have sexual intercourse with her." (JA at 383-84.) Trial defense counsel wrapped up his argument by juxtaposing Appellant and KC as truthful and untruthful, respectively. (JA at 386.) In so doing, trial defense counsel again commented on Appellant's mixed pleas:

> "I'll finish with this. This situation -- *this situation resulted in some ugliness by my client*. The worst. The

> worst. But there's two people that took the stand that were involved in that relationship -- I'm going to take back -- scratch that. *Two people testified under oath to you*, about the things that they've heard that occurred in that relationship. *One of those people were forthright*, were candid, was honest, and told the truth, *and accepted what he did*.

(Id.) (emphasis added).

After the defense closing, trial counsel gave a rebuttal argument that included the following response to the suggestion that KC was lying and Appellant was not:

> Let's start with those building blocks, with those roots as defense counsel talked about. The fact that she's told the truth about being threatened, that's a root. The fact that she's telling the truth about being assaulted, that's a root. While in defense counsel's own admissions, during their closing argument, the fact that she's telling the truth about everything up to this point, that she testified in court and that she testified in interviewed with sexual assault report. And that tree is a hundred foot tall and 50 feet wide, because she apparently has told the truth, Your Honor, for everything except for the one thing, the most important thing and the worst thing for their client, the accused.

(JA at 392).

The Result

At the end of the litigated findings case, the military judge found Appellant guilty of two specifications of sexual assault and one specification of communicating a threat. (JA at 396). All three contested offenses of which Appellant was found guilty occurred in Missouri. (JA at 56, 58, 396).

The Appeal

On appeal, Appellant asserted, *inter alia*, that his trial defense counsel had been ineffective for allowing the military judge to be aware of his guilty pleas during the findings portion of trial, and that trial counsel's comments during closing were improper. (JA at 17, 33). The ineffective assistance of counsel (IAC) claim was raised under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). (JA at 2-3.) In an affidavit attached to his brief, Appellant alleged that he had not wanted to plead guilty but did so at the insistence of his trial defense counsel. (Suppl JA at 824.) His affidavit was silent about whether he had ever expressed any disagreement to his trial defense counsel about their strategy. (Id.)

In response to a court order, two of Appellant's three trial defense counsel provided declarations addressing the IAC claims. (JA 592-94). Capt Berry asserted that it was the defense strategy that "once [Appellant] plead [sic] generally use his honesty and apology to his benefit to show that the threats and aggravated assault was [sic] an isolated incident." (JA at 592). Similarly, Mr. Conway asserted that the mixed pleas was designed to "obtain credibility with the military judge." (JA at 594). Mr. Culp did not provide an affidavit because he did not see the court order in time due to various personal circumstances. (JA at 614-619).

At a subsequent Dubay hearing, all three trial defense counsel testified regarding the decision to have the military judge be "aware" of Appellant's guilty

pleas during the litigated findings case. (JA at 600-779). Mr. Culp recalled discussing—at an unspecified time—whether or not to allow the military judge to consider Appellant's guilty pleas. (JA at 646). He explained the strategy as follows: "[T]hat which [Appellant] was guilty of, [Appellant] was willing to accept responsibility for… That which he had not committed[,] he was not going to take responsibility for." (JA at 645). Capt Berry did not recall being part of any such discussion, but acknowledged that Mr. Conway and Mr. Culp had many strategic discussions without him. (JA at 699, 701). Capt Berry further clarified:

> The words that came out [Mr. Conway's] mouth, that wasn't a group decision, but *generally our strategy was absolutely once he pled guilty we were going to use his honesty*. And so, you know … the Court can't see the way this comes out in the record, but Mr. Conway kind of said that, oh yes, Your Honor. Kind of very softly, you know? And so, you know, I think a little bit of that was trying to was—trying to show how honest Sergeant Leipart was going to be in saying that yes, these other things happened, but the sexual assaults did not occur.

(JA at 707) (emphasis added).

Mr. Conway acknowledged that he answered the question about whether the defense wanted the military judge to be aware of the guilty plea without further discussing it with his co-counsel. (JA at 747). He explained the decision as being about "maintaining some credibility and goodwill with [the military judge] and trusting him not to use it inappropriately." (JA at 743.) When asked what defense theory that would have advanced, Mr. Conway opined that "[t]here's a certain

level of credibility that comes along with personal responsibility." (JA at 746.) Although Mr. Conway said that looking back, he might not make the same decision or would stop to discuss it, he asserted that he thought it was a "strategically" good idea at the time and emphasized his confidence in the military judge. (JA at 742, 747.)

The Lower Court's Opinion

In an opinion dated 26 January 2023, the Air Force Court of Criminal Appeals (AFCCA) declined to decide whether trial defense counsel's performance was deficient and held instead that Appellant's IAC claim failed because he had not demonstrated prejudice, because there was no evidence the military judge misused his providence inquiry. (JA at 19.)

Regarding trial counsel's comments in closing, AFCCA opined that trial counsel "committed clear error" because his comments "in effect, compelled Appellant to incriminate himself." (JA 36-37). Nevertheless, AFCCA found the error harmless beyond a reasonable doubt because Appellant had been tried by a military judge alone, and "the law presumes trial counsel's improper argument did not influence the trial judge's verdict." (JA at 37.)

SUMMARY OF THE ARGUMENT

Appellant's assignments of error are without merit, and he is not entitled to relief. Trial defense counsel's performance was not deficient because it was based on their best available strategy, and Appellant has failed to show that there would have been a reasonable probability of an acquittal in the absence such performance. Strickland v. Washington, 466 U.S. 668, 698 (1984). Further, trial counsel did not commit plain error—even if there was error, it was invited by the trial defense. Moreover, even if this Court finds it was constitutional error, it was harmless beyond a reasonable doubt. United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019).

Issue I – Ineffective Assistance of Counsel

During their opening statement, Appellant's trial defense counsel agreed that the military judge should be "aware" of the guilty pleas because they expected evidence about the underlying conduct to come up during KC's cross examination.

The decision was reasonable because it directly served the defense strategy, which consisted of two prongs. The first prong was portraying Appellant as willing to accept responsibility for what he had done and unwilling to take the fall for what he had not—a strategy that has been sanctioned by this Court in United States v. Rivera, 23 M.J. 89, 95-96 (C.M.A. 1986). The second prong focused on undermining the credibility of KC's sexual assault allegations by emphasizing the

delayed reporting. The defense could not accomplish either of these things without alerting the factfinder to the physical assaults and threats to which Appellant had pled guilty. Thus, trial defense counsel needed—and was authorized—to let the factfinder operate with knowledge of those things. But in so doing, the defense had to accept that the factfinder could draw the opposite inference: that because Appellant had pled guilty to exactly the same assaults and threats that KC initially reported, KC was a credible person. Appellant could not ask the military judge to use the fact that he had pled guilty to bolster his own case, while denying the prosecution the ability to argue how the same fact supported theirs.

Trial defense counsel did *not*, however, ask the military judge to consider Appellant's providence inquiry as evidence of an essential element of the contested offenses, which is why the military judge did not discuss it with Appellant separately. Trial defense counsel's performance did not fall below the standard of fallible attorneys because absent their chosen line of attack, the cross examination of KC—and by extension, the defense case—would have been far less effective. Thus, their performance was not constitutionally deficient.

Further, Appellant has failed to establish a reasonable probability that he might have been acquitted but for his counsel's performance. It was the defense's cross examination that elicited evidence favorable to the defense strategy, absent which KC would have come off as more credible. Appellant has not articulated a

viable alternative strategy under which he might have prevailed. Moreover, Appellant has not demonstrated how he might have been acquitted despite the other evidence against him—namely, a damning recording of Appellant expressing his belief that KC should always want to have sex with him and admitting to forcing himself upon her. Because Appellant has not shown a reasonable probability of a better result, he has failed to establish prejudice and his claim necessarily fails.

Issue II – Trial Counsel's Closing Argument

Trial counsel did not commit error in closing argument, much less one of constitutional dimensions. Trial counsel's argument neither referred to Appellant's protected statements from the providence inquiry nor urged the factfinder to rely on such statements as evidence of an essential element of the contested offenses; thus they did not compel Appellant to testify against himself. Rather, they were a "fair response" to the defense theory that KC was a liar and Appellant, who had taken responsibility already for the crimes he did commit, was not. United States v. Gilley, 56 M.J. 113, 121 (C.A.A.F. 2001). Thus, even if this Court finds trial counsel's comments to be improper, they do not constitute error or a basis for relief because they were invited by the defense. United States v. Raya, 45 M.J. 251, 254 (C.A.A.F. 1996).

Further, trial counsel's comments comprised a negligible fraction of his argument. More importantly, there was *zero* factual overlap between Appellant's guilty pleas and contested offenses. The conduct to which Appellant pled guilty occurred in Australia in 2017, whereas the sexual assaults of which he was convicted occurred in the United States in 2016. Thus, none of Appellant's statements from the providence inquiry could have possibly served as evidence of an essential element of the contested sexual assaults. Appellant was tried by a military judge alone, who is presumed capable of filtering inadmissible evidence and improper argument. United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). Unless this Court assumes the military judge abdicated his responsibilities as the presiding officer of the court-martial, there is "no *reasonable* possibility" that trial counsel's allusions to Appellant's guilty pleas contributed to the conviction. United States v. Upshaw, 81 M.J. 71, 74 (C.A.A.F. 2021). Accordingly, trial counsel's comments, if they were error, were harmless beyond a reasonable doubt.

This Court should affirm the findings and sentence.

ARGUMENT

I.

TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE BECAUSE THE DECISION TO ALLOW THE MILITARY JUDGE TO CONSIDER APPELLANT'S GUILTY PLEA WAS A REASONABLE STRATEGIC CHOICE UNDER THE CIRCUMSTANCES.

Standard of Review

Allegations of ineffective assistance are reviewed de novo. United States v. Palacios-Cueto, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law & Analysis

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; Strickland, 466 U.S. at 686. "In order to prevail on a claim of ineffective assistance of counsel (IAC), an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). "Appellate courts do not lightly vacate a conviction in the absence of a serious incompetency which falls measurably below the performance . . . of fallible lawyers." United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986) (quotations omitted) (citing United States v. DeCoster, 624 F.2d 196, 208 (D.C.Cir.1979)). If an appellant has made

an "insufficient showing" on even one of the elements, this Court need not address the other. Strickland, 466 U.S. at 697.

In assessing the effectiveness of counsel, courts "*must* indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 671 (emphasis added); *see also* Harrington v. Richter, 562 U.S. 86, 105 (2011) ("Even under de novo review, the standard for judging counsel's representation is a most deferential one."). Counsel's performance is not deficient "when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Military courts use a three-part test to determine whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there a reasonable probability that, absent the errors, there would have been a different result. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011)

(citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)) (quotations omitted).

1. Trial defense counsel's performance was not deficient.

a. Mr. Conway's decision to allow the military judge to be "aware" of the guilty plea has a reasonable explanation.

Appellant alleges that Mr. Conway made a "unilateral decision to permit the military judge to consider the horrific conduct discussed in the guilty plea," and that such a decision could was not "strategic, tactical, or objectively reasonable." (App. Br. at 30.)

But Appellant's claim fails because there was a "reasonable explanation for counsel's actions." *See* Gooch, 69 M.J. at 362. Allowing the military judge to be "aware" of Appellant's guilty plea served the trial defense's strategy, which was best summarized by Mr. Culp: "[T]hat which [Appellant] was guilty of, [he] was willing to accept responsibility for… That which he had not committed[,] he was not going to take responsibility for." (JA at 645.) This Court has recognized such a strategy as legitimate:

> Conceivably, an accused may himself desire to bring before the court members the fact that he has pleaded guilty to charges unrelated to those which they are trying. Perhaps his defense counsel wishes to argue that the accused was perfectly willing to plead guilty to the crimes of which he, in fact, was guilty, but that he has pleaded not guilty to the remaining charges because he is innocent thereof.

Rivera, 23 M.J. at 95-96. And the R.C.M. 913(a) Discussion (2016 ed.) provides that "[e]xceptions to the rule requiring the military judge to defer informing the members of an accused's prior pleas of guilty include cases in which the accused has specifically requested, on the record, that the military judge instruct the members of the prior pleas of guilty . . ." In Rivera, this Court contrasted this permissible use of an accused's plea to what was not allowed: using "admissions implicit in a plea of guilty to one offense . . as evidence to support the findings of guilty of an essential element of a separate and different offense." Id. at 95. (internal citations omitted.)

However, this strategy necessarily required Appellant's trial defense to credit KC's various reports of physical assault and threats—without doing so, they could neither portray Appellant as taking responsibility for the physical assaults and threats nor highlight KC's delayed report of sexual assault. This is the context in which Mr. Conway agreed the military judge could "operat[e] in a world where [he was] aware of the guilty plea." (JA at 146.) What Mr. Conway did not do, however, was ask the military judge to "use" or "consider" the conduct underlying the guilty plea as evidence of an essential element of the sexual assault offenses.

This is further supported by the absence of any indication that the military judge interpreted Mr. Conway's response to mean Appellant's guilty pleas could be used as evidence of an element of the contested offenses. The record reflects the military judge was cognizant of his dual-hatted role. From the outset, it is

evident the military judge was conscious of his duty to compartmentalize. Not only did the military judge explain it to Appellant immediately after the discussion with Mr. Conway about the guilty plea, but he also prefaced—at various times throughout the proceedings—his switching between roles by saying "putting on my judge hat," or words to that effect. (*See* e.g., JA at 145-46, 212, 326, 344, 372.) Thus, the fact that the military judge did not further engage with Appellant about the use of his providence inquiry supports an inference that the military judge understood the limited purpose for which trial defense counsel was drawing his attention to the conduct underlying the guilty pleas. The military judge knew he should not use the guilty plea to conclude that Appellant was a violent person and therefore committed the contested sexual assault offenses.

Considering the above, Appellant's characterization of Mr. Conway's decision as a usurpation of his Fifth Amendment right against self-incrimination lacks merit. Appellant's contention that Mr. Conway's decision compelled Appellant to incriminate himself conflates the actual purpose articulated by Mr. Conway with the lower court's opinion regarding the perceived effect of trial counsel's closing argument, which is addressed further in Issue II. There was a reasonable explanation for why trial defense counsel pursued their chosen strategy – it had been sanctioned both by this Court in Rivera and within the Manual for

Courts-Martial. Given the state of the law, trial defense counsel's strategic choice could not have been ineffective.

b. Trial defense counsel's performance did not fall measurably below the standard expected of fallible lawyers.

Appellant next contends that trial defense counsel's performance "fell measurably below the standard expected of even fallible counsel" and cites his trial defense counsel's Dubay testimony: "Mr. Conway himself admitted he would not do it again … while Capt Berry…found the decision confusing and 'bizarre.'" (App. Br. at 32.) As a preliminary matter, it should be noted that "[a]fter a losing effort, hindsight usually suggests other ways that might have worked better; but that is not the measure of ineffective assistance of counsel." United States v. Sanders, 37 M.J. 116, 118 (C.M.A. 1993). Such is the case with Appellant's trial defense counsel—they are not immune to the "distorting effects of hindsight," Strickland, 466 U.S. at 689, and their Dubay testimony should be viewed with this in mind.

Moreover, their testimony makes it clear that bolstering Appellant's credibility through his guilty pleas was an overarching defense strategy—not just a "unilateral decision" by Mr. Conway. As evidenced by his summary of their strategy, Mr. Culp clearly understood their angle. Similarly, Capt Berry recalled that the defense strategy was to use Appellant's "honesty" to his benefit. (JA at 592.) Mr. Conway explained his decision by asserting "[t]here's a certain amount

of credibility that comes with taking responsibility," and believed his decision was a strategically good idea at the time. (JA at 746.) Thus, Appellant is incorrect when he now suggests on appeal that Mr. Conway's decision was made without any forethought or consultation with his co-counsel.

Appellant's argument that his trial defense team could not choose to employ their chosen strategy without his consent also proves unpersuasive. (App. Br. at 31-32.) First, despite submitting a declaration to AFCCA and having the opportunity to testify at the Dubay hearing, Appellant never claimed that he was unaware of this defense strategy or that his counsel did not have his consent to pursue it. Given that it is Appellant's burden to prove ineffective assistance of counsel, his silence in this regard weighs against him. Second, according to Rivera, "a military judge certainly should not presume that an accused is willing to have this potentially damaging information as to a guilty plea brought to the members' attention unless, in fact, the accused *or his counsel* has given some specific indication to this effect." 23 M.J. at 96. (emphasis added). Based on this guidance, the military judge here was authorized to accept trial defense counsel's representations regarding the use of the guilty plea, without conducting a specific inquiry with Appellant himself.

Turning to the substance of trial defense counsel's decision, their chosen strategy was not unreasonable, considering the cards they had been dealt. Here,

the victim's testimony was accompanied by a damning recording of Appellant professing his belief that the victim, KC, should always want to have sex with him, and that he had once forced himself on her. Accordingly, it is unsurprising that Appellant's trial defense team desired to cultivate, on Appellant's behalf, whatever "goodwill" they could with the factfinder. (JA at 743.) Moreover, undermining KC's report of sexual assault was key to Appellant's defense. The best way to do so was to emphasize the late timing of her sexual assault allegation, compared to her other allegations of threats and physical assault. As discussed previously, this meant trial defense counsel needed KC's testimony about the physical assaults she reported previously. They recognized this and planned accordingly.

Although Appellant contends that Mr. Conway "could not identify a specific rule or legal theory that would have allowed the military judge to limit his consideration of the guilty plea and Care inquiry to just 'appropriate' matters," (App. Br. at 33), this argument neglects one obvious legal concept. Specifically, that military judges are "presumed to know the law and to follow it absent clear evidence to the contrary." Erickson, 65 M.J. at 225. Even though Mr. Conway did not explicitly name the presumption, it is clear he relied on it, as evidenced by his testimony that he trusted the military judge "not to use it inappropriately." (JA at 743.) Mr. Conway no doubt trusted that the judge would not use Appellant's guilty pleas as evidence of an essential element of the contested offenses or as

improper propensity evidence. The fact that the *defense* elicited testimony about the physical assaults and threats further indicates that Mr. Conway and his co-counsel understood the facts underlying the guilty pleas were not evidence. Trial defense counsel's failure to object to trial counsel's slides and argument is similarly mitigated by the fact that Appellant's factfinder was a military judge who is presumed capable of filtering such things.

In sum, Appellant has failed to establish that his trial defense counsel were deficient. The trial defense team's decision to make the military judge "aware" of the existence of the guilty plea was (1) a strategic acceptance of risk, that (2) was calculated to serve the defense theory, and (3) has been recognized as legitimate by this Court and in the Manual For Courts-Martial. Thus, their performance did not fall "measurably below the performance expected … of fallible lawyers." DiCupe, 21 M.J. at 442. Tempting though it may be to condemn what was—in hindsight—an unsuccessful strategy, this is precisely the kind of "second-guessing [of] tactical decisions, which [this Court] dismiss[es] as mere Monday-morning quarterbacking." United States v. Sanders, 37 M.J. 116, 118 (C.M.A. 1993).

2. Appellant has not demonstrated a reasonable probability that he would have been acquitted but for trial defense counsel's performance.

To establish prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 698; Loving v.

United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is one sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Here, Appellant alleges that the "most glaring prejudice" is trial counsel's closing argument, which invoked the military judge's awareness of the guilty plea. (App. Br. at 36.) Appellant asserts that but for trial defense counsel's decision, "it is highly unlikely trial counsel would have utilized the same tactic." (App. Br. at 37). However, whether trial counsel would have argued differently is distinct from whether the *result* of the proceeding would have been different—this nation's jurisprudence tests for the latter. *See* Strickland, 466 U.S. at 698.

The question then, is whether Appellant has established a "reasonable probability" that he would have been acquitted, absent his trial defense counsel's decision to let the military judge be aware of the guilty plea. *See* id. For the reasons discussed below, Appellant has failed to establish that probability.

a. Appellant's trial defense counsel had no other viable strategy.

Appellant asserts that his defense counsel's performance enabled the prosecution to "repair KC's otherwise irreparably damaged credibility and thus tipped the balance against [him]." (App. Br. at 37.) However, Appellant fails to recognize that it was his counsels' strategy that "damaged" KC's credibility in the first place, and that they could not have done so without making the factfinder aware of the conduct to which Appellant had pled guilty.

The prosecution's initial direct examination of KC did not elicit any testimony about either the physical assaults to which Appellant had pled guilty or KC's initial reports about the same. (JA at 147-175.) It was the cross examination which produced evidence that KC talked to three different law enforcement agencies about physical assault but did not report sexual assault until her interview with the third. (JA at 176-269.) While Appellant may ultimately contend that this also constitutes ineffective assistance, this Court should find any such assertion without merit. Had the trial defense team cross examined KC only on the details of the sexual assaults she reported to OSI, her cross examination would have been far less effective. Absent the testimony elicited by the defense, KC would have appeared—to the factfinder—to be a victim who reported sexual assault in her one and only interaction with law enforcement, rather than someone who remained silent over multiple such interactions. In other words, but for the trial defense team's performance, KC may have come off as *more* credible. This certainly would not have been to Appellant's advantage.

Further, without the military judge's awareness of the guilty pleas and KC's testimony about the underlying conduct, trial defense counsel would have been unable to advocate as he did in closing argument. The defense closing argument portrayed Appellant as someone who was willing to take responsibility for what he had done while attacking the reliability of the allegations to which he pled not

guilty. Appellant reaped the benefit of this approach, which allowed him to effectively deny the sexual assault allegations without taking the stand.

Ultimately, Appellant's assertion that his trial defense counsel's performance "tipped the balance against [him]" (App. Br. at 37) fails because he has not established a reasonable probability that the balance would have tipped the other way absent that performance. If Appellant's trial defense counsel did not use this strategy, they would have had no strategy at all—much less a prevailing one. Appellant had the burden of demonstrating otherwise and has failed to do so. If Appellant is implying that no strategy would still have produced a better result, this Court should find such a suggestion patently unreasonable, given the prosecution's evidence.

b. The Government's case included damning evidence that supported Appellant's convictions.

Although Appellant suggests he would have been acquitted absent his counsel's performance because of what he characterizes as the "overwhelming weakness" of the prosecution's case, this is uncompelling. (App. Br. at 37). Appellant avows that KC's credibility was "irreparably damaged," and that but for his counsel's performance, "there is a reasonable probability that the military judge would have harbored sufficient doubts about the credibility of KC's otherwise uncorroborated sexual assault allegations." (App. Br. at 37-38.) Appellate courts are not required to accept an appellant's view of the record of trial or the inferences

which might be reasonably drawn therefrom. United States v. Rounds, 30 M.J. 76, 80 (C.M.A. 1990). This Court should not adopt Appellant's view of the record, which skews in his favor.

First, KC's credibility did not suffer as much damage as Appellant would like to think. Despite Appellant's characterization of KC as the subject of "professional misconduct bearing on her veracity as a witness" (App. Br. at 38), the factfinder never received evidence that suggested KC's character for truthfulness should be questioned. (*See generally* JA at 179-181). Similarly, Appellant's suggestion that KC affirmatively "claimed she was not a victim of sexual violence" (App. Br. at 39) ignores the reality that KC denied this in her testimony and explained that no one except OSI asked her about sexual assault. Appellant also makes much ado about KC's failure to report sooner and the fact that she stayed with him and named their child after him. (App. Br. at 38-39.) But the military justice system is no stranger to such counterintuitive behavior. *See* United States v. Flesher, 73 M.J. 303, 313 (C.A.A.F. 2014) (citing United States v. Houser, 36 M.J. 392 (C.A.A.F. 1993)).[8] KC repeatedly explained that she did not disclose the sexual assaults until someone explicitly asked her about it because she

[8] "In the past we have made it clear that expert testimony about the sometimes counterintuitive behaviors of sexual assault or sexual abuse victims is allowed because it 'assists jurors in disabusing themselves of widely held misconceptions.'" Flesher, 73 M.J. at 313.

was embarrassed and humiliated. She also testified that she wanted the relationship to work *because* she was pregnant with Appellant's child. While Appellant may not like KC's explanation, it changes neither the fact that she provided one nor that it could be consistent with victim behavior. *See* United States v. Stevens, 1999 CCA LEXIS 198, *15 (A.F.C.C.A. 1999) ("Sexual assault cases involving both children and adults frequently involve delayed reporting.").

Second, Appellant overlooks a key piece of evidence—his own voice—that corroborated KC's testimony at trial: Prosecution Exhibit 1. In Prosecution Exhibit 1, Appellant can be heard telling KC that she should "never not want to do it" and admitting that he "grabbed [her] and forced [himself] on [her]," and then derisively telling her she acted like she thought she was a "rape victim." (Suppl. JA at 823.) Both sexual assaults of which Appellant was convicted were supported by testimony that he expressed similarly vile sentiments to KC. Thus, Prosecution Exhibit 1 offered strong corroborating evidence of Appellant's motive to sexually assault KC – he believed that, as his wife, she should always submit to sex and that even if he forced himself on her, it was not sexual assault. It is not unreasonable to infer that the military judge found that the recordings evinced the same kind of controlling, entitled motive that KC testified about, and convicted Appellant of those offenses as a result. The idea that "[i]t was Appellant's admissions, under oath, that made KC credible, when she otherwise was not," is fundamentally

flawed for the same reason—it ignores, perhaps wishfully, the existence of Prosecution Exhibit 1. (App. Br. at 41.) While the prosecution's case was not perfect—few are—neither was it untenable.

3. Conclusion.

In sum, Appellant's IAC claim fails all three prongs of the Gooch test. 69 M.J. at 362. First, trial defense counsel's decision to allow the military judge to be "aware" of the guilty plea is reasonably explained by the defense's need to highlight impeachment testimony that served their theory of the case. Second, trial defense counsel's performance did not fall below the standard of fallible attorneys because they had a coherent strategy based on undermining KC's credibility, and reasonably believed it was a good idea at the time. Finally, because Appellant has not articulated a viable alternative strategy that would have overcome the prosecution's evidence, he has failed to establish reasonable probability that the result of his proceeding would have been different. Accordingly, Appellant is not entitled to relief.

II.

TRIAL COUNSEL'S ARGUMENT DID NOT CONSTITUTE PLAIN ERROR; EVEN IF IT DID, THE ERROR WAS INVITED BY APPELLANT'S TRIAL DEFENSE AND THEREFORE CANNOT BE A BASIS FOR RELIEF.

Standard of Review

Claims of prosecutorial misconduct and improper argument are reviewed de novo and where no objection is made, this Court reviews for plain error. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citations omitted). Under plain error review, appellant bears the burden of showing that (1) there is error, (2) the error is clear or obvious, and (3) said error resulted in material prejudice to a substantial right of the appellant. Id. "[W]here a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard." Tovarchavez, 78 M.J. at 460; *but see* Greer v. United States, 141 S. Ct. 2090, 2097 (2021) (Even for constitutional errors "[t]he defendant has the burden of establishing entitlement to relief for plain error."). This standard is met "where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." Upshaw, 81 M.J. at 74.

Law and Analysis

"Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard." United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996). "Improper argument is one facet of prosecutorial misconduct." United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017). "When determining whether prosecutorial comment was improper, the statement must be examined in light of its context within the entire court-martial." United States v. Lewis, 69 M.J. 379, 384 (C.A.A.F. 2011) (quotations omitted).

1. Trial counsel did not commit plain error; to the extent there was error, it was invited by the defense.[9]

a. Trial counsel's comments were not plain error because they were a fair response to the defense and therefore did not compel Appellant to testify against himself.

Appellant contends that trial counsel's remarks during closing argument and rebuttal were "clear" error. (App. Br. at 50). This Court should be unpersuaded, as trial counsel's remarks were simply a "fair response" to the defense's theory. Gilley, 56 M.J. at 120.

[9] Appellant does not appear to contest that the question of whether trial counsel committed plain and obvious error is encompassed within the granted issue. (App. Br. at 50-52.) *See also* United States v. Steen, 81 M.J. 261, 269 (Maggs, J. dissenting) (explaining that the "cross-appeal doctrine" permits the government to defend the decision of a CCA on any ground if the government prevailed below and is merely seeking affirmance of the CCA's judgment).

There is no doubt that trial counsel understood the defense strategy of crediting KC's earlier reports to police in order to question the delayed report of sexual assault. As early as in opening statement, trial defense counsel told the military judge that he would see a police report about some of conduct that was the subject of the guilty plea, but that the report would contain no reference to sexual assault. (JA at 142.) Trial defense counsel also articulated as much on the record during KC's cross examination:

> Our point was … you had every reason in the world to fear based upon the things that he actually did, so why didn't you tell—if they really happened, why didn't you tell the police the stuff that was the most serious things that you're alleging now? *So we're never alleging that the original report to the police was falsely motivated. I mean, quite the opposite.* We would be crazy to do that.

(JA at 273) (emphasis added).

During his closing argument, trial counsel stated his understanding on the record, noting that Appellant's trial defense counsel had "made no qualms about their theory" before beginning his discussion of KC's credibility. (JA at 354.) Similarly telling is the fact that trial counsel began by reminding the military judge that "defense counsel asked you to operate in this world where you know [Appellant] has admitted to crimes against [KC]." (JA at 355.) Trial counsel's prefatory comments reinforce that the argument which followed was narrowly tailored to respond to the defense's theory that KC was not a credible witness.

This Court has recognized that "the Government is permitted to make a fair response to claims made by the defense, *even when a Fifth Amendment right is at stake*." Gilley, 56 M.J. at 120 (emphasis added) (quotations omitted). Such is the case here. Trial defense counsel elicited testimony or video evidence about every instance of conduct to which Appellant had pled guilty, which they subsequently used to call her delayed report of sexual assault into question. Trial counsel then alluded to these incidents on his slide about KC's credibility, which said KC was "telling the truth about the threats;" "being choked;" "being threatened with a screwdriver;" and "being hit in the back of the head." (JA at 417.) Although Appellant asserts that these incidents did not come from "substantive evidence offered during the litigated findings proceeding," this is inaccurate. (App. Br. at 50.) Evidence about every single incident came out during the case on the merits through KC's cross examination and the defense's own exhibits. (JA at 206-207, 410, 417.)

In response to trial defense counsel's questioning on cross examination, KC testified about reporting that Appellant "held a screwdriver to [her] neck" and "grabbed [her] by the throat not once, but twice." (JA at 206-207.) Defense Exhibit Alpha contained a summary of KC's initial report that Appellant "grabbed [KC] by the throat and choked her;" "sent numerous text messages to [KC] threatening to hurt her;" and "threatened to return and kill her and that the police

[can't] stop him." (JA at 410.) Similarly, Defense Exhibit Charlie—KC's recorded interview with OSI—contained KC's account of how Appellant "held a screwdriver to [her] throat," "chok[ed] [her] from behind," "whack[ed] [her] in the back of the head," and threatened to "kill her." (JA at 417.) It was not error for trial counsel to allude to evidence that the defense had itself elicited.

Considering this, trial counsel's argument and PowerPoint slides—when examined in context—were a "fair response" to the defense's line of effort regarding KC's lack of credibility. Gilley, 56 M.J. at 120. Here, the defense confirmed that the military judge was operating in a world where he was aware of the guilty plea to the assaults and threats and then introduced KC's reports about the assaults and threats into evidence. They did so in order to try to show that Appellant had credibly accepted responsibility for only what he had actually done and that KC's belated sexual assault allegations were not credible.[10] But the defense also had to accept that the factfinder could draw the opposite inference: that because Appellant had pled guilty to exactly the same assaults and threats that KC initially reported, KC was a credible person. Appellant could not fairly ask the military judge to use the fact that he had pled guilty to bolster his own case, while

[10] As evidenced by trial defense counsels' Dubay testimony, it was always the defense strategy to leverage Appellant's guilty pleas to enhance the credibility of his pleas of not guilty.

denying the government the ability to argue how the fact of the guilty pleas supported theirs.

Further, the defense closing argument advanced two parallel theories: that KC's word deserved little weight because she was a liar, and that Appellant's deserved more because he took responsibility for what he had actually done:

> Two people testified under oath to you, about the things that they've heard that occurred in that relationship. One of those people were forthright, were candid, was honest, and told the truth, and accepted what he did.

(JA at 384).

Thus, trial counsel's remarks on rebuttal—about KC "telling the truth" regarding the physical assaults and threats—were also a fair comment on the defense's presentation. *See* Lewis, 69 M.J. at 385 ("[D]uring 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."). The defense's lack of objection to any of trial counsel's arguments also demonstrates their belief that trial counsel had not taken his argument "outside the scope of whatever it was the Defense intended," as Appellant now claims on appeal. (App. Br. at 52.) This provides yet another indicator that trial counsel did not commit plain and obvious error.

Because trial counsel's arguments about KC's credibility were a "fair response" to what he perceived as the trial defense's theory—that KC "lied about some things, but not lied about others" (JA at 357)—he did not commit plain error, and the analysis should end here.

Appellant, however, contends not only that the error was "clear" but also that it was constitutional, and leans on the lower court's conclusion that that trial counsel "in effect, compelled Appellant to incriminate himself." (JA at 36-37). To reach this conclusion, the lower court relied on United States v. Flores, 69 M.J. 366 (C.A.A.F. 2011). (JA at 37.) This Court should find that the lower court's—and by extension, Appellant's—reliance on Flores is misplaced, because this case is distinguishable.

In Flores, the accused, a detention facility guard, was charged with, *inter alia*, taking photos and a video of detainees, transferring the photos to another guard, and fraternizing and developing an unprofessional relationship with detainees. Id. at 368.[11] The accused pled guilty to taking photos and a video of detainee, as well as to transferring them to another guard, and admitted to this conduct during her providence inquiry. Id. at 369. She pled not guilty to the other offenses, including the one charging her with "wrongfully fraternizing or acting

[11] For additional context, *see* United States v. Flores, 69 M.J. 651 (A.F.C.C.A. 2010).

with undue familiarity toward" the detainee of whom she took a video.[12] Id. During the litigated findings case, the prosecution's evidence regarding this offense included, among other things, a video in which the accused asked the detainee to tell another guard that he loved her, as well as the other guard's testimony that the accused filmed the video in question. Id. at 371. During closing argument, trial counsel *directly* referenced the accused's providence inquiry—specifically, her statements admitting to taking a video of a detainee—to corroborate the other guard's testimony regarding the contested offense:

> Airman [AB] also testified to the video regarding [detainee] Siraj, how she had asked Flores to hold her camera that day and it comes back with a video on it of Siraj. Well that was corroborated by Sergeant Flores. She actually corroborated that in court, in front of you, Your Honor.

Id. at 370.

This Court found that trial counsel's comment was plain and obvious error "[g]iven the direct reference made by trial counsel to a statement made by [the accused] at the providence inquiry. Id.

Here, this Court should be unpersuaded by Appellant's attempt to portray trial counsel's comments as a violation of his right against self-incrimination, akin to those in Flores. First, unlike the counsel in Flores, trial counsel in this case did

[12] The accused was convicted of this offense and later challenged it on appeal. Flores, 69 M.J. at 366.

not make a direct reference to any of Appellant's statements from the providence inquiry, much less use those statements to prove up one of the contested sexual assaults. Although Appellant asserts that trial counsel "use[d] Appellant's own words from the guilty plea session against him as evidence of guilt for a separate offense" (App. Br. at 50), this is a legal impossibility. Appellant's argument ignores the fact that the offenses to which he pled guilty and the contested offenses of which he was convicted had no overlap in underlying facts. The offenses underlying the guilty pleas all occurred in Perth, Australia in 2017. (JA at 49-50). The sexual assaults of which the military judge convicted Appellant both occurred in Missouri in 2016. (JA at 49-50.) Accordingly, none of the information from Appellant's providence inquiry could possibly have served as evidence of an essential element of the litigated sexual assaults. *Cf.* United States v. Resch, 65 M.J. 233 (C.A.A.F. 2007) (finding error where a military judge considered providence inquiry statements about unauthorized absence as evidence of the greater included offense of desertion without conducting further inquiry with the accused). In other words, there should be no question that the military judge did not improperly rely on Appellant's guilty pleas on the question of guilt for the litigated sexual assaults. To find otherwise would be to assume that the military judge completely jettisoned not only his legal training as a judge, but also his common sense as a factfinder.

Further, as discussed below, this case is distinguishable from Flores because the defense in Flores did not invite the error of which they complained on appeal.

b. Even if trial counsel's argument was error, it cannot be a basis for relief because the error was invited by the defense.

Under the invited error doctrine, Appellant "cannot create error and then take advantage of a situation of his own making." Raya, 45 M.J. at 254. Invited error therefore does not provide a basis for relief. Id.; *see also* United States v. Martin, 75 M.J. 321, 325 (C.A.A.F. 2016) (finding no error from the introduction of inadmissible human lie detector testimony where the defense's questioning "foreseeably elicited" such testimony). Here, even if this Court finds trial counsel committed error, Appellant is not entitled to relief because the error was invited by the defense. The question of whether trial defense counsel invited an error at trial is a question of law, which this Court reviews de novo. Martin, 75 M.J. at 325.

According to Appellant, the invited error doctrine should not apply because the "error" was caused by ineffective counsel. (App. Br. at 51.) As discussed in Issue I, *supra*, the defense strategy of portraying Appellant as "willing to accept responsibility" for what he had done but not for "that which he had not committed" was not deficient performance. (JA at 645). Appellant had the burden of demonstrating otherwise, and he has failed to do so. Strickland, 466 U.S. at 698. Thus, this Court is not precluded from applying the invited error doctrine to trial counsel's comments during closing.

To bolster Appellant's credibility through his willingness to take responsibility, the trial defense team necessarily needed to credit KC's allegations of physical assault. Accordingly, the trial defense counsel allowed the military judge to "operate in a universe where [he is] aware of the guilty plea" (JA at 146) and elicited evidence about the conduct underlying the guilty plea. Because the trial defense set the stage, the invited error doctrine precludes Appellant from complaining of how the prosecution moved about it. *See* Martin, 75 M.J. at 327 ("Because trial defense counsel first elicited human lie detector evidence on cross-examination, the invited error doctrine precludes Appellant from complaining about the Government's elicitation of this type of evidence on redirect.").

Appellant's trial defense counsel leveraged the military judge's awareness of the mixed pleas to argue that Appellant—who enjoyed the uncommon advantage of, in effect, denying the allegations without having to testify—was more credible than KC. Trial counsel was simply reversing this argument. Trial counsel leveraged the military judge's awareness of the mixed pleas to argue that KC was credible. Trial counsel's use of the posture and evidence set up by Appellant's own trial defense cannot be deemed plain or obvious error, and therefore cannot form a basis for relief. Raya, 45 M.J. at 254.

This Court should find that the Air Force Court of Criminal Appeals erred in concluding trial counsel committed clear error and affirm the findings and sentence.

2. If this Court finds trial counsel committed constitutional error, this Court should overrule Tovarchavez and require Appellant to prove prejudice.

If this Court finds trial counsel erred, and that such error constitutional, this Court's decision in Tovarchavez dictates that the Government has the burden of showing that the error was harmless beyond a reasonable doubt. 78 M.J. at 460.

The continuing viability of Tovarchavez, however, is in question. *See* United States v. Long, 81 M.J. 362, 371 (C.A.A.F. 2021). In Long, this Court recognized that since Tovarchavez, the Supreme Court has held that the appellant—not the Government—bears the burden of providing prejudice in a plain error review of nonstructural constitutional error. Id. (citing Greer, 141 S. Ct. at 2100). Pursuant to Greer, to prove prejudice, the appellant must show "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." 141 S. Ct. at 2095. In conducting its plain error review, the appellate court can review the entire record. Id. at 2104.

In Long, this Court declined to decide the applicability of Greer to the military because the facts in that case would have necessitated a finding of prejudice regardless. 81 M.J. at 371. If this Court decides constitutional error

occurred here, the issue will become ripe, at which point this Court should overturn Tovarchavez, follow Greer, and require Appellant to prove prejudice.

3. Even if trial counsel committed constitutional error, the error was harmless beyond a reasonable doubt.

Regardless of whether this Court finds trial counsel's comments are constitutional error, there is still no prejudice, even under the Tovarchavez standard. The comments were harmless beyond a reasonable doubt because (a) they only formed a fraction of his argument; (b) Appellant was tried by a military judge alone, who is presumed capable of distinguishing between proper and improper argument; and (c) the weight of the evidence supports Appellant's conviction.

In assessing prejudice from improper argument, this Court considers 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. United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). The lack of defense objection is "relevant to a determination of prejudice" because it is "some measure of the minimal impact of a prosecutor's improper comment." Gilley, 56 M.J. at 123 (C.A.A.F. 2001) (quotations omitted); Here, as discussed below, the Fletcher factors favor the Government. 62 M.J. at 175.

a. Trial counsel's comments were not severe given that they comprised only a fraction of his argument.

This Court considers the following indicators in assessing severity: (1) the raw numbers -- the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the deliberations, and (5) whether the trial counsel abided by any rulings from the military judge. Fletcher, 62 M.J. at 184.

First, the "raw numbers" overwhelmingly support a finding that trial counsel's conduct was not severe. The assertion that trial counsel "made the guilty plea the argument's focus," is simply not true. (App. Br. at 50.) During closing argument, trial counsel's allusions to the guilty plea covered approximately 19 lines (JA at 355, 357, 364) in an argument that ultimately spanned 19 pages—totaling 482 lines—of the record.[13] (JA at 342-365). Similarly, trial counsel's comments in rebuttal covered only six lines in an argument that spanned 120 lines. (JA at 390-395.) Any prejudicial impact that trial counsel's comments may have had is "dampened by the minor part they played in the midst of a nineteen-page argument." United States v. Moran, 65 M.J. 178, 185 (C.A.A.F. 2007); *cf.*

[13] This calculation excludes the break in argument where the military judge and counsel discussed fatal variance. (JA at 344-348).

Fletcher, 62 M.J. at 185 (deeming trial counsel's conduct "pervasive and severe" since there were several dozen examples of improper argument across 21 pages).

This leads into the second indicator—whether the alleged misconduct was spread throughout the "case as a whole." Fletcher, 62 M.J. at 184. Here, the prosecution took great care not to elicit any testimony about the offenses to which Appellant had pled guilty during KC's direct examination. It was only in response to the trial defense team's questioning—which elicited such testimony—and the defense-introduced evidence that the prosecution alluded to the guilty pleas in argument. Further, although trial counsel's comments occurred both in findings and rebuttal argument, they were not pervasive—trial counsel's challenged comments only comprised three percent of his closing argument and five percent of his rebuttal.

The remaining indicators also favor the Government. Over a three-day trial, trial counsel took care to both understand and abide by the military judge's rulings. (*See* e.g., JA at 217, 296, 298.) At the conclusion of findings, the military judge deliberated for approximately two and a half hours, after which he returned mixed findings. (JA at 396.) Taken in conjunction, the indicators warrant the conclusion that trial counsel's comments were of minimal severity.

b. Curative measures were not required because Appellant was tried by a military judge alone, who is presumed to be capable of distinguishing proper and improper argument.

Admittedly, there were no curative measures with respect to trial counsel's argument—however, this is not dispositive because Appellant elected to be tried by a military judge alone. Absent clear evidence to the contrary, military judges are presumed to know the law and apply it correctly. Erickson, 65 M.J. at 225.

Appellant contends that the presumption regarding military judges "goes to error, not prejudice" (App. Br. at 56), and cites United States v. Hukill, 76 M.J. 219, 223 (C.A.A.F. 2017), as being dispositive on this point. In Hukill, this Court reviewed a military judge's admission of propensity evidence and found that even though the military judge correctly applied the law as it existed at the time, his ruling was nevertheless error because the law had since changed. Id. It is in this context that this Court noted that "[t]he presumption cannot somehow rectify the [military judge's] error or render it harmless." Id. Thus, contrary to Appellant's assertions, Hukill does not stand for the proposition that the presumption regarding military judges is never relevant to *any* prejudice analysis. Id. Where, as here, the effect of an alleged error—the swaying power of trial counsel's argument—is dependent on how the military judge might have perceived it, the presumption regarding military judges is absolutely relevant.

Appellant's suggestion that the military judge's "repeated and comparative silence" during trial counsel's argument is proof that he impermissibly considered Appellant's providence inquiry is uncompelling. (App. Br. at 57.) A military judge is presumed to be capable of distinguishing between proper and improper argument, even where he does not specifically note on the record that argument is improper or that he will not consider it. Erickson, 65 M.J. at 225. Here, there is no evidence that trial counsel's reference to Appellant's guilty pleas caused the military judge to use the guilty pleas for plainly improper purposes, such as propensity evidence or as substantive evidence of an element of the sexual assault offenses. And if trial counsel's use of the guilty pleas to argue for KC's credibility was plain and obvious error, then this Court should presume that the military judge recognized it as such and disregarded it.

That the military judge returned mixed findings further supports an inference that he was not unduly swayed by trial counsel's comments. *See* Sewell, 76 M.J. at 19 ("The panel's mixed findings further reassure us that the members weighed the evidence at trial and independently assessed Appellant's guilt without regard to trial counsel's arguments."); *see also* United States v. Pabelona, 76 M.J. 9, 12 (C.A.A.F. 2017) (finding no material prejudice from trial counsel's alleged improper argument because mixed findings indicated the members were able to weigh the evidence and make an independent assessment of appellant's guilt).

After all, if KC's veracity was "the only difference between a conviction and an acquittal" (App. Br at 55) and the military judge was, in fact, influenced by trial counsel's argument that KC was credible, he might have been compelled to convict Appellant of *all* the contested sexual assaults.

Nothing in the record supports that this military judge was not entitled to the presumption that he knew and was capable of applying the law. Thus, assuming trial counsel plainly erred, even in the absence of a curative measure, this factor weighs in favor of the Government.

c. The weight of the evidence supports Appellant's conviction.

Finally, as discussed in Issue I, *supra*, the Government's evidence—even without trial counsel's argument—strongly supported Appellant's convictions for sexual assault. What Appellant characterizes as KC's "refus[al] to take personal responsibility for anything that tended to call her claims into question" (App. Br. at 38) could also be described as an ability to withstand the crucible of cross examination. KC refused to bow under the pressure of the trial defense team's bombardment; she testified with consistency and clarity about what she did and did not know, and the military judge observed her testimony first-hand. "With regard to judging the credibility of witnesses, [this Court] well recognize[s] the advantage of the factfinder." Sanders, 37 M.J. at 117. Accordingly, "[c]redibility

determinations are entitled to great deference on appeal." United States v. Hernandez, 81 M.J. 432, 442 (C.A.A.F. 2021) (quotations omitted).

More importantly, KC's testimony did not stand alone at trial. The prosecution buttressed it with Prosecution Exhibit 1, a recording of Appellant that can only be described as damning. The significance of Appellant's statements on Prosecution Exhibit 1 cannot be understated. There should be little doubt that Appellant's telling KC that she should "never not want to do it" and admitting that he "grabbed [her] and forced [himself] on [her]" (Suppl. JA at 823) weighed towards finding Appellant guilty of the two sexual assaults where he expressed the same despicable motivations.

Finally, the complete absence of *any* temporal overlap between the offenses to which Appellant pled guilty and the sexual assaults of which the military judge convicted him all but guarantees that, logically, none of the information Appellant provided in his providence inquiry could have served as substantive evidence of any element of guilt for the sexual assaults—no matter how trial counsel framed it. Therefore, this factor also supports the Government.

Ultimately, Appellant was tried by a military judge alone, who is presumed capable of not only disregarding improper argument, but also filtering and weighing evidence appropriately. The military judge did not *need* Appellant's guilty pleas or trial counsel's argument to infer that KC was "telling the truth"

about the physical assaults and threats to infer, because trial defense counsel never challenged those allegations—in fact, trial defense counsel explicitly noted that they were doing "quite the opposite." (JA at 273.) In some ways, trial counsel's comments simply echoed what the trial defense counsel acknowledged on the record. Thus, this court should rest assured there was "no reasonable possibility" that trial counsel's comments—which formed a negligible part of his overall argument—contributed to Appellant's conviction. Trial counsel's argument was "unimportant in relation to everything else the [factfinder] considered on the issue in question," and was therefore harmless beyond a reasonable doubt. United States v. Prasad, 80 M.J. 23, 35-36 (C.A.A.F. 2020). Appellant is not entitled to relief.

CONCLUSION

Appellant is not entitled to relief because trial defense counsel's decision to allow the military judge be "aware" of Appellant's guilty plea was necessitated by the defense strategy, and Appellant has not demonstrated that he would have been acquitted despite the prosecution's other evidence. Trial counsel's argument was not plain and obvious error because it did not reference Appellant's statements made during his guilty pleas and was a fair response to the defense theory. To the extent it was error, it was invited by the defense. Further, even if it was constitutional error, it was harmless beyond a reasonable doubt because Appellant

was tried by a military judge, who is presumed capable of filtering improper argument.

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

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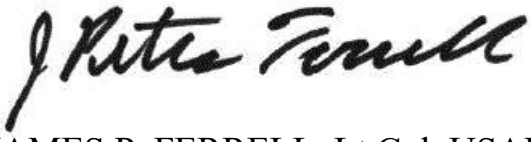

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Appellate Defense Division by electronic means on 20 September 2023.

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