IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

JOHN P. MATTI
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 25-0148/AF

Crim. App. Dkt. No. ACM 22072

BRIEF ON BEHALF OF APPELLANT

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ISSUE PRESENTED

Whether trial counsel committed prosecutorial misconduct through improper bolstering, improper vouching, improper use of facts not in evidence, and shifting the burden to defense in findings argument.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (hereinafter Air Force Court) reviewed this case pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A).[1] This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).[2]

RELEVANT AUTHORITIES

U.S. CONST. amend. V:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

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[1] The version of Article 66, UCMJ, as codified in the 2018 edition of United States Code and as amended by the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611 (2021), and the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022), applied in this case. Unless otherwise noted, all other references to the UCMJ and Rules for Courts-Martial (R.C.M.s) are to the version published in the *MCM* 2019 ed.

[2] The current version of Article 67, UCMJ, applies to this case. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539C(a), 135 Stat. at 1699.

STATEMENT OF THE CASE

Airman First Class (A1C) John P. Matti, was convicted, contrary to his pleas, of two specifications of assault consummated by a battery upon a spouse in violation of Article 128, UCMJ, 10 U.S.C. § 928, by a panel of officer and enlisted members. JA at 002, 254. A1C Matti was acquitted of the remaining two specifications for assault consummated by a battery upon a spouse. *Id.*

A1C Matti was sentenced by the military judge to a reprimand, reduction to the grade of E-1, forfeiture of $1,222.00 pay per month for two months, and seventy-five days confinement for specification 2 of the Charge and fourteen days confinement for specification 3 of the Charge, to run concurrently. JA at 255, 269-70. After notification of his right to submit a direct appeal, A1C Matti filed his notice of appeal with the Air Force Court and his case was docketed. JA at 273. On February 28, 2025, the Air Force Court issued a split decision, ultimately finding no error materially prejudiced A1C Matti's substantial rights and affirmed the findings and the sentence. JA at 001, 029.

STATEMENT OF FACTS

Court-Martial Overview: Voir Dire, Specifications, and Witnesses

The senior prosecutor (hereinafter, trial counsel) introduced himself in voir dire at A1C Matti's contested court-martial as someone "travel[ed] around to assist in *specific* cases." JA at 051. (emphasis added). Trial counsel asked the panel members if they agreed his duty as a prosecutor was to "zealously seek[]

justice, along with maintaining good order and discipline." JA at 051-52. The members agreed. JA at 52.

During the trial itself, A1C Matti did not testify in his defense. JA at 203. Who the members might hear from in the case was flagged for the members earlier during voir dire, where trial counsel posed that there are only two accounts of a crime, that of the victim and the accused. JA at 054. The members agreed. *Id.* As a follow-up question in the context of assessing witness credibility, trial counsel asked whether the panel could use a single witness's testimony as proof beyond a reasonable doubt. *Id*. They again agreed. *Id.*

Of the four specifications, A1C Matti was acquitted of the two specifications, JA at 269, where the only evidence of the crime was the testimony of the named victim, CC. *Compare* JA at 155-86, 195-202 (where no witnesses testified about the incidents alleged in specification 1 and 4), *with* JA at 058-154 (where CC was the only witness who testified about specifications 1 and 4). A1C Matti was convicted of biting CC's arm in January 2021 (specification 3) and of pressing his knee into CC's back on or about May 21, 2021 (specification 2). JA at 254.

Separate from after-the-fact evidence offered as corroboration, CC was the sole witness to testify about the specific events alleged in specifications 2 and 3, of which A1C Matti was convicted. Six witnesses testified that they observed CC during the charged timeframes of January 2021 and May 21, 2021—CayC, A1C

AA, CHW, RL, SM, and CS—albeit with limited recollections as to any bruising on CC. Specifically:

- Related to specification 2, CS was the only witness who testified she saw a bruise on CC's chin in May or June 2021, but CS was not shown the photographs entered into the record that were argued as evidence of that same bruise. *Compare* JA at 256-58 (picture of alleged chin bruise), *with* JA at 155-61 (where CS was never shown the exhibit or asked about the appearance of the bruise).
- Related to specification 3, four of the six witnesses (CayC, A1C AA, CHW, RL) did not see any bruising or bite marks, with two of these four witnesses (CayC, A1C AA) staying with CC and A1C Matti in their home in January 2021. (JA at 162-180, 195-202).
- Also related to specification 3, SM was the only witness who testified to seeing a bruise or bruises on CC in January 2021, but did not say which arm or where on the arm, and did not testify to seeing a bite mark. JA at 181-86.

Specification 2

Specification 2 alleged A1C Matti placed his knee on CC's back on or about May 21, 2021. *See generally*, JA at 206, 269. A1C Matti worked swing shift on May 21, 2021, from 3 p.m. to 11 p.m. JA at 191-92. Despite CC's testimony that the assault happened before she left for work that afternoon, at approximately 2

p.m., she also testified that A1C Matti would ordinarily sleep until around 2 p.m. and leave around 2:30 p.m. JA at 084, 087-88, 108-09. According to CC's testimony, May 21 was different, with A1C Matti using CC's phone to try to buy supplies for his car detailing business at 2 p.m., just prior to CC leaving for work and when A1C Matti should have been getting ready for his work shift that started at 3 p.m. *Id*. This led to the argument and alleged physical altercation. *Id.*

According to CC, A1C Matti had taken CC's phone, and CC tried to grab her phone back from him to prevent him from using an account of hers for online shopping. JA at 084-85. She was unsuccessful because A1C Matti ran to the garage with her phone. JA at 085. While A1C Matti was in the garage with her phone, CC took A1C Matti's phone and opened one of his social media applications, finding he had interacted with a profile showing a women dressed in lingerie. *Id*.

CC testified that when A1C Matti returned, they argued over this woman on his account and A1C Matti made the argument physical. *Id*. According to CC, A1C Matti grabbed her wrists, lifted them up and lifted her arms higher to raise her off the stool where she had been seated while going through his phone. *Id*. CC tried to kick A1C Matti, and when she did, she testified he lifted her arms to where she lost balance and fell onto her left knee and chin on the wood floor. JA at 085-86. There was no evidence that CC's arms were behind her back as she fell, nor that A1C Matti was still holding her hands as she fell. *See* JA at 085-87. After she

fell, CC testified A1C Matti pressed his knee to her back. *Id*. CC testified she immediately left for work after this incident. JA at 087.

The Government entered photographic evidence of what CC claimed was the bruise to her chin and knee following when she fell onto the wood floor. Prosecution Ex. 1; JA at 089. CC testified that she took the pictures around eight hours after the 2 p.m. assault on May 21, 2021. JA at 098, 110-11. But CC also admitted that time stamps reflected the pictures were actually taken at 10:58 am and 11:04 am, three hours before the incident at issue. JA at 110-11, 089.

This discrepancy surrounding when the pictures were taken was left unresolved following testimony by the one witness who is purported to have seen an injury on CC between April and June 2021. That witness, CS, who worked with CC between April and June 2021, testified she saw a bruise on CC's chin once during the time they worked together. JA at 155, 159. But CS was never shown the photographic evidence of the bruising to confirm it was the same or similar to what she bruise she saw in location, size, or appearance. JA at 155-61. Further, there is no evidence in the record to document whether the injury to CC's chin would have immediate bruising such that CS could or did observe the bruise CC testified was caused by A1C Matti on May 21, 2021.

Two witnesses who knew CC and A1C Matti and lived next to them at the time of the charged conduct never saw any altercations or any bruising on CC. JA

at 195-202. RL, a neighbor who knew both A1C Matti and CC, testified he never saw any arguments between CC and A1C Matti, and he never observed bruising on CC. JA at 199-202. Similarly, CHW, another neighbor who knew both A1C Matti and CC and spoke regularly with CC, never saw any bruising on CC or abuse of CC by A1C Matti, and never heard any fights or arguments. JA at 195-98.

Specification 3

Specification 3 involved testimony from CC that, in January 2021, A1C Matti bit her right forearm and left a bruise lasting two weeks. JA at 069, 072. The altercation started, according to CC, because A1C Matti commented on a woman's breasts on television and CC asked him, "[W]hy are you with me if you wanted somebody with large breasts[?]" or words to that effect. JA at 070. According to CC, A1C Matti leaned over and bit CC on the right forearm. *Id*. CC was confident this bite happened in January, because it was before her sister visited around January 17, 2021. JA at 073.

Five witnesses (A1C AA, CayC, SM, CHW, RL) saw CC during the charged timeframe for specification 3. JA at 162-186, 195-202. As described below, each was asked about whether they saw bruising. *Id*. Only one did. JA at 181-86.

As with specification 2, the two neighbors, RL and CHW, did not witness any arguments between CC and A1C Matti, nor did they observe any injury to CC during January 2021. JA at 195-202.

Unlike specification 2, there was a witness with regular exposure to the relationship between CC and A1C Matti as it related to specification 3. A1C AA lived with CC and A1C Matti from the end of September 2020 or early October 2020 until mid-to-late January 2021 or early February 2021. JA at 163, 166. A1C AA never saw a bite or any bruising on CC's arm. JA at 167.

Overlapping with A1C AA was CayC, who is CC's sister and who visited CC and A1C Matti for four days to celebrate a birthday in January 2021. JA at 172. CayC testified that A1C AA was living with CC and A1C Matti when she visited. JA at 174. Like A1C AA, CayC observed no bruises or bite marks on CC in January 2021. JA at 175.

The only witness to claim to observe bruising on CC that might correlate to specification 3 was SM, who started working with CC in a retail store in November 2020 and worked with CC into mid-January 2021. JA at 181-83. Working in the store's backroom, CC's professional obligations included moving boxes, packing boxes, and putting boxes on pallets. JA at 183. SM testified CC came in with "a few bruises." JA at 182. SM denied that the bruises appeared consistent with their work duties. JA at 184-85.

But SM's observations of the bruising were limited. SM testified she would see these bruises "throughout periodically," but could not be more specific about the timeframe. JA at 182, 184. SM also did not regularly see CC's arms at work

because CC was wearing long sleeves or a jacket during the time they worked together that winter. JA at 184. For the bruising she did claim to see, SM did not describe the location of the bruising, which arm it was, or whether it looked like it resembled a bite mark. JA at 182, 184. According to SM, CC specifically denied any abuse by A1C Matti. JA at 184.

Trial Counsel Argument

The same prosecutor who conducted voir dire also presented findings argument. JA at 051, 214. Trial counsel wove a theory of control through the initial portions of closing argument. JA at 214-17. He then directed the members to consider three things: (1) "this makes sense[,]" . . . "it rings true[,]" (2) the law and corroboration, and (3) "you have a credible witness." JA at 217.

In making his first point, trial counsel focused on the timeline and characterization of CC's and A1C Matti's marriage through the theme of control. JA at 217-225.

Trial counsel then looked at the elements, and told the members the elements, other than the charged acts, were all "legal matters" and are generally the same for each specification, asking the members to answer only "whether this actually happened." JA at 226-27.

Reaching the third point, trial counsel focused on CC's credibility and, more precisely for specifications 2 and 3, on the alleged corroborating evidence of bruising: the photographs, and the testimony of CS and SM. JA at 228-30.

With regard to credibility, trial counsel argued: "[Y]ou have a credible witness. You have a victim, CC, who came up here and took the stand and she was credible. She doesn't have a reason to lie. She doesn't have any reason to make this up." JA at 217. Trial counsel went on: "She's telling the truth. What does she have to gain by not telling the truth?" JA at 233. Trial counsel's argument about CC's credibility continued:

> Think about the benefits for [CC] of reporting a domestic violence claim. She has to do these investigative interviews, which you've heard briefly about from the Office of Special Investigations. Yeah, that's really fun to go and put your entire marital life – your failed marriage to these law enforcement officials. She's had to go through prosecutor interviews, defense interviews, her courtroom testimony in front of you, the direct and cross-examinations sitting up here for hours on the stand as we dig through any text messages she might have ever had and confront her on all those things. Members, it's not for the faint of heart to testify in court. It is a long, drawn-out, difficult experience for [CC]. What possible motivation does she have? . . . [Y]ou saw her and you saw her credibility, and you saw the credibility of the other witnesses. . . . The defense *needs* to get up here and say that all of these people are just lying to you; that it's all one giant conspiracy theory [in reference to the bruising]. None of it makes sense. Members, what they're going to do with that is trying to tell you that if there's any doubt at all, if there's any conspiracy theory they can sell then you need to find him not guilty. That is not true.

JA at 234-35 (emphasis added).

Beyond CC's credibility, trial counsel argued, "[Y]ou have two corroborating witnesses for the two exact bruises that the victim identified." JA at 230. Trial counsel tied this testimony to the actual charged conduct even though neither witness confirmed they saw the bruises described by CC or documented by photographs. *Compare* JA at 230 (where trial counsel argued the witnesses corroborated the two exact bruises), *with* JA at 182, 184, 156, 159 (where SM only described seeing "bruises" without a definite date; and where CS did not link CC's visit on May 21 to the observation of a bruise on CC's chin nor did CC link the bruise she saw to Prosecution Ex. 1).

Trial counsel also reenacted the alleged conduct that precipitated specification 2. JA at 274. Trial counsel demonstrated his interpretation of the sequence causing CC's chin injury by getting on his knees in front of the jury, holding his arms behind his back as if he was at parade rest, and stuck his chin out as he leaned forward. *Id.* Trial counsel argued the only way the bruising to the chin occurred was if CC's arms were held behind her back. JA at 251.

Defense Argument

Trial defense counsel's argument started with a focus on CC's motives to report. JA at 237-40. Defense counsel spoke to the members about CC's conservative background, the broken promises of fidelity in the marriage, and the eventual unraveling of her dream of being a wife and mother. *Id*. Defense

counsel's argument went on to evaluate the evidence for each specification, discussing the extent to which the evidence presented was inconsistent with other evidence. JA at 240-46. Defense counsel never offered an alternate explanation or theory for any alleged injury described by CC. *Id*. Defense counsel's argument did not call any witness a liar and did not ask the members to consider anything other than the bias of each witness as the members considered witness credibility. JA at 246-48.

Trial Counsel Rebuttal

Despite the nature of defense counsel's argument, trial counsel's rebuttal focused on whether the defense provided the members a reasonable explanation for the bruises: "What you have not been given is any reasonable explanation for where this came from, what these are about." JA at 250. He continued, "Defense hasn't given you any explanation but think about where an explanation might be of how someone might get" the purported injury to CC's chin on May 21, 2021. JA at 251.

Trial counsel's rebuttal also renewed the earlier line of argument after defense counsel argued CC's motive to fabricate based on her testimony that "[A1C Matti] took away my dream of being a wife now it's only fair that he loses his dream; that he doesn't get to be a pilot." JA at 240-41, 252. Specifically, trial counsel argued:

> For a woman who has been abused over the course of many months, how is she supposed to feel? How is a victim supposed to feel when

> she's asked by the Legal Office about what sort of outcome she might want from this? Is she supposed to say no accountability; nothing should happen to him? *Those are the words of a victim*. *Those are the words of someone who has been abused over the course of many months* and did lose her marriage because of this, and told countless people that that's why she lost her marriage, because of the abuse. . . . You know she's telling the truth. You know her sincerity and you have the evidence to back it up.

JA at 252 (emphasis added).

Defense counsel made no objections to any of these arguments. The military judge did not issue any curative instructions and offered the standard instructions, including the standard instructions on findings argument. JA at 204-214, *see Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1843-45 (Feb. 29, 2020).

SUMMARY OF ARGUMENT

Trial counsel wove four separate categories of improper argument throughout the Government's initial and rebuttal argument on findings, which, taken together, amount to prosecutorial misconduct. Trial counsel engaged in improper bolstering, improper vouching, improper use of facts not in evidence, and shifted the burden to the defense. The nature of the overlapping impropriety of the trial counsel arguments, taken as a whole, were so damaging that no court can be confident that the members convicted A1C Matti based on the evidence alone. *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005).

In forgoing an explanation and argument on the actual facts in evidence, trial counsel's argument instead reduced the defense theory to one of conspiracy predicated on asking the members to find all witnesses were liars. As a foil for this skewed reduction of the defense's case, trial counsel vouched for CC's credibility, asserting she was truthful, telling the truth, and that her words were those "of a victim." Trial counsel also improperly argued facts not in evidence related to the effect of the investigative process and testifying had on CC. Those facts inserted by trial counsel also served to improperly bolster CC's credibility. Next, trial counsel made arguments related to the bruising and the witness testimony about the bruising that was not supported by the evidence. The compounding effect of these arguments alongside the relative weakness of the Government's case is demonstrable evidence of plain error that resulted in prejudice. *See Fletcher*, 62 M.J. at 184.

But trial counsel's improper argument did not end with bolstering, vouching, and improper argument of facts not in evidence. Trial counsel's argument also shifted the burden to the defense and was not responsive to the defense argument when trial counsel made arguments such as the defense's failure to "provide [the members] with any reasonable explanation as to why . . . it's a lie, it's a lie, it's all lies." JA at 234. Trial counsel continued, "The defense needs to get up here and say that all these people are just lying to you; that it's all one giant conspiracy theory." JA at 235. Despite no argument by the defense as to alternate theories of injury that

would invite reply, trial counsel returned in rebuttal to his burden-shifting argument when he argued the defense gave no "reasonable explanation for where this came from, what these [bruises] are about." JA at 250-51. He continued, "Defense hasn't given you any explanation, but think about where an explanation might be of how someone might get that [bruise on CC's chin]." JA at 251. This impermissible argument of a constitutional dimension demands the Government prove these arguments were harmless beyond a reasonable doubt, which the Government cannot do given the prevalence of its impermissible arguments and otherwise weak evidence. *See United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004).

Accordingly, this Court should vacate the decision of the Air Force Court and set aside the findings and the sentence.

ARGUMENT

Trial Counsel committed prosecutorial misconduct through improper bolstering, improper vouching, improper use of facts not in evidence, and shifting the burden to defense in findings argument.

Standard of Review

Prosecutorial misconduct and improper arguments are reviewed de novo, and where no objection is made, they are reviewed for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019).

"Plain error occurs when (1) there is error, (2), the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused."

Id. at 401 (quoting *United States v. Andrews*, 77 M.J. 393, 401 (C.A.A.F. 2018)). "The burden of proof under plain error review is on the appellant." *Andrews*, 77 M.J. at 398 (citing *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017)).

If the error is of a constitutional dimension, such as shifting the burden of proof to the defense, the burden on prejudice shifts to the Government to show the error was harmless beyond a reasonable doubt. *Mason*, 59 M.J. at 424. This Court reviews the issue of whether a constitutional error was harmless beyond a reasonable doubt de novo. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005).

Law and Analysis

Trial Counsel's Improper Bolstering, Vouching, and Arguing Facts not in Evidence Constituted Prosecutorial Misconduct

Trial Counsel Improperly Bolstered the Government's Case

One avenue for argument to stray into improper bolstering is to malign the defense counsel. It is improper for trial counsel to attempt to win favor with the members by maligning defense counsel. *See Fletcher*, 62 M.J. at 181-82. In *Voorhees*, it was clear, obvious error to accuse defense counsel of misplaced lying and making the defense theory of the case seem fantastical. 79 M.J. at 5. At risk is that members could have been convinced to decide the case based on which lawyer they liked better. *Fletcher*, 62 M.J. at 181-82.

Trial counsel's argument here posed just that risk based on that very same error. In A1C Matti's case, trial counsel argued the defense case was a conspiracy

theory four times. JA at 231, 235. The common use of the term "conspiracy theory" is to imply that the subject of it is false, and that people who believe it are irrational. David Coady, *Conspiracy theory as heresy*, EDUCATIONAL PHILOSOPHY AND THEORY, 756–759 (2021), https://doi.org/10.1080/00131857.2021.1917364 (last accessed Jul. 31, 2025). To the extent that there was any question about the intended use of the term "conspiracy theory," it became clear with the characterization that the defense's only explanation is that "it's a lie, it's a lie, it's all lies." JA at 234. This echoes *Vorhees*, where accusing the defense counsel of lying or making the defense theory seem fantastical amounted to plain error. 79 M.J. at 5. While this argument does not amount to accusing the defense counsel of lying, it does equate the defense with a fantastical theory, one where the only answer could be that this was all a lie. Consistent with *Vorhees*, this amounted to plain error.

Trial Counsel Vouched for CC

Trial counsel's errant argument did not stop at improper bolstering, but added to it with vouching for CC. Improper vouching occurs when trial counsel places the prestige of the Government behind a witness with personal assurances of the witness's truthfulness. *Fletcher*, 62 M.J. at 180. Here, as in *Voorhees*, trial counsel bolstered and vouched for the credibility of CC and expressed his personal opinions. This is plain and obvious error.

In assessing the impropriety of arguments, the broader context of the court-martial also matters. *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005). This context can begin as early as voir dire, which is trial counsel's first interaction with the members. ROGER M. GOLDMAN ET AL., 3 Criminal Law Advocacy § 56.02 (Matthew Bender & Company, Inc. 2025). The member selection process is critical, in as much as it is for the information received from the members, but also in the attorney's ability to make a positive first impression. *Id.*

In setting up the Government's position and making his first impression, trial counsel explained he traveled to try "specific cases." JA at 051. The effect was to single out A1C Matti's case as one warranting the special attention of this select prosecutor. And then he reminded members that in domestic violence cases, there are often only two witnesses, the alleged victim and the accused. JA at 054. It is in this context, with the importance of CC's testimony heightened from the outset, that trial counsel's vouching should be viewed for impropriety.

Trial counsel put the prestige of the Government behind CC, giving personal assurances of her truthfulness. First, as outlined, trial counsel was the Government representative whose duty was to zealously seek justice, and who traveled only to try specific cases. JA 051-52. When coupled with trial counsel's characterization of the defense case as a conspiracy theory, these representations of the Government's obligations to justice and vouching for CC served as an attempt to place CC's

testimony on the side of justice with A1C Matti on the side of a conspiracy theory; and they were the only two witnesses to the crime. So, when trial counsel argued: "you have a credible witness," "she was credible," "she's telling the truth," and "you have not been provided with any reasonable explanation as to why the defense wants to get up here and say it's a lie, it's a lie, it's all lies," [3] this argument from trial counsel put the prestige of the Government behind CC and asserted his view of CC –that she was credible and telling the truth. JA at 234. These statements are not taken in isolation and continued, with characterization of CC's words as "those of a victim," which, in the context of this argument, attempted to garner favor for the prosecution's case simply because CC alleged domestic violence. JA at 252. Thus, these arguments, in the context trial counsel set up for the Government, show he attempted to influence the members with the prestige of the Government and his own view of CC—that she was credible because he said so as a representative for the Government, on the side of justice.

The error here is akin to the clear and obvious errors noted by this Court in *Voorhees*. There, it was error to argue that a witness was an outstanding airman, to state that the witness's perception was the truth, that the members could rely on the

[3] This last argument is discussed both here and in the section regarding the burden shift. It is not unintentionally duplicative. Rather, trial counsel committed two errors with one improper argument. The prevalence of these improprieties is pertinent to this Court's analysis. *See United States v. Norwood*, 81 M.J. 12, 20 (C.A.A.F. 2021).

credibility of one witness because "that airman is credible", to state "she testified credibly; she told you what happened to her," "[Senior Airman HB's] not lying. It's the truth. It's what happened." *Voorhees*, 79 M.J. at 9-10. Trial counsel's argument followed the same defective playbook as *Voorhees*, going so far as to couple the bolstering of CC by stating "she's telling the truth" with argument that the defense had not given the members evidence of innocence, after he had already told the members there were often only two sources of evidence for these obligations: the victim and the accused. This is plain, obvious error.

In the context of the entire trial, this Court should consider two things: that the members did not hear from A1C Matti, JA at 203, and that trial counsel's argument that the members were given no explanation by defense must be evaluated through the dichotomy trial counsel set out in voir dire. Trial counsel asked the members all to agree that in cases such as A1C Matti's there would often only be evidence from either the victim or the accused. JA at 054. Therefore, when he came back during argument and asserted the defense did not provide any explanation outside of "lies," and contrasted that with vouching for CC as credible and telling the truth, this argument closed the loop teed up from the outset and amounted to plain error.

Trial Counsel Argued Facts Not in Evidence

Trial counsel's arguments also injected facts not known to the members, which contravened the mandate that the court-martial "must reach a decision based only on the facts in evidence." *Fletcher*, 62 M.J. at 183 (citing *United States v. Bouie*, 9 C.M.A. 228, 233 (1958)). Trial counsel did this in two ways: (1) when he misrepresented the way the injury to CC's chin occurred, and held out that there was no other explanation possible by this demonstration, and (2) when he gave members additional evidence to consider for CC's truthfulness.

Trial counsel's errant demonstration of the allegation leading to injury with an assertion there is "no other explanation for these injuries" constituted plain error because it was not grounded in fact. *See* JA at 274 (where A1C Matti described the demonstration by trial counsel during closing argument). Trial counsel demonstrated the sequence causing CC's chin injury by getting on his knees, holding his arms behind his back as if he was at parade rest, and stuck his chin out as he leaned forward. *Id.* This demonstrated that A1C Matti held CC's arms behind her back as she fell, essentially that he took her down to the ground versus her losing her balance as she testified. *Id.*

This demonstration was not grounded in fact because CC did not testify that A1C Matti held her arms behind her back, nor that A1C Matti fell on top of her as she lost her balance and fell. No witness said that. Rather, the evidence showed that

A1C Matti raised CC's arms up to get her to stand up, but also that she lost her balance and fell when her arms were raised as she tried to kick A1C Matti. JA at 084-86. Though counsel may argue hypotheticals, those hypotheticals must be based in evidence, and it is error to argue hypotheticals without a factual basis. *Norwood*, 81 M.J. at 21. When trial counsel asserted his demonstration was the only way for the injury to occur to CC's chin, he ignored the evidence and sought to impose his personal views and interpretation of the evidence on the members in pursuit of a conviction. Given there was no factual basis for his demonstration within the record, this amounts to error. *Voorhees*, 70 M.J. at 14-15.

In addition to the demonstration, trial counsel sought to counter the defense's trial theory with evidence that was not admitted at trial. For example, in an effort to address CC's motive to fabricate, trial counsel added facts into his argument about the burden of the investigative process on CC. JA at 234. He argued that because she undertook the investigative process, she must be telling the truth: "It's not for the faint of heart to testify in court. It is a long, drawn-out, difficult experience for CC," "What possible motivation does she have?" and "You saw her and you saw her credibility." JA at 234.

The problem with this line of argument by trial counsel is that CC did not testify to the impact of the investigative process on her, only that she conducted an interview with the prosecution, with the defense, and with law enforcement. JA at

120-21, 104. No witness discussed the impact of that process on CC, let alone the argued proposition that CC had to disclose all the intimate details of her marriage or have attorneys "dig through any text messages she might have ever had and confront her on all those things." JA at 234. Perhaps trial counsel perceived something in CC but, if he did, it is nowhere in the record. *See* JA at 058-154 (where CC did not testify about the impact of the investigative process or testifying). Without any factual predicate, there was no basis for such arguments.

The structure of the argument and context of the court-martial continued to demonstrate the intended effect of this argument: that the Government was on the side of justice, selling the truth through CC, while the defense was on the side of conspiracy theories, selling lies. This supplantation of trial counsel's own views of CC's credibility based on facts not known to the members demonstrates the members were invited to reach a decision with evidence outside of the record, which is error. *Fletcher,* 62 M.J. at 183.

Trial Counsel's Plain Errors Were Prejudicial

Taken together, trial counsel improperly bolstered the Government's case, vouched for CC's testimony, injected his own personal credibility assessment onto the members, and disparaged defense's theory as fantastical—as a conspiracy theory. In light of *Voorhees* and *Fletcher*, this argument invited members to make a decision based on something other than the evidence, whether it was a decision

based on which counsel they may prefer, or based on counsel's interpretation of events. *Voorhees,* 79 M.J. at 9-10, and *Fletcher*, 62 M.J. at 183. This error is plain and obvious, and thus the next question is whether the errors were prejudicial. *Fletcher*, 62 M.J. at 179.

To determine prejudice, this Court must examine the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial. *Fletcher,* 62 M.J. at 184. The three factors are (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of evidence supporting the conviction. *Id.*

The first factor, the severity of the misconduct, is consistent with what this Court determined was severe in *Voorhees* and *Fletcher*. 79 M.J. at 10, 62 M.J. at 184-85. Here, like *Voorhees*, the misconduct was sustained throughout both findings and rebuttal argument, with multiple instances of error within approximately 40 minutes of argument. *See* JA at 037 (where the dissenting judge noted the one-day trial on the merits had only 40 minutes for closing argument and rebuttal argument by the Government). Moreover, the offending arguments were made with juxtaposition to the characterization of the defense theory as "lies" and "conspiracy theories." Similar to *Fletcher*, these improper comments permeated the entire argument, with evidence of improper bolstering, vouching, and argument on facts not in evidence. *Fletcher*, 62 M.J. at 185. This conduct is severe.

The second factor, the measures adopted to cure the misconduct, weighs in favor of A1C Matti even though defense counsel did not object. Here, as the dissenting judge below noted, the impropriety of the argument "so thoroughly saturated" the closing and rebuttal arguments that this Court should conclude the standard instructions were insufficient to overcome the trial counsel misconduct. JA at 047 (Gruen, J., dissenting). Like in *Fletcher*, no curative efforts were made by the military judge in this case and only the standard instructions were given, stating arguments by counsel were not evidence. JA at 204-14, *Fletcher*, 62 M.J. at 185. However, this Court in *Fletcher* noted that there should have been corrective instructions given earlier to overcome the misconduct because the misconduct in that case was so severe. *Id*. The severity of misconduct can be indicated with the raw numbers—the instances of misconduct as compared to the overall length of the argument, whether the misconduct was confined to the trial counsel's rebuttal or spread throughout findings or the case as a whole, and also in consideration of the length of the trial. *See Fletcher*, 62 M.J. at 184. The conduct in *Fletcher* was severe when the improper comments permeated the entire findings argument, with several dozen examples of improper arguments over twenty-one pages of text, the Court deemed them not to be isolated in the frequency of their appearance over less than a three-day trial with the members deliberating less than four hours. *Id.* at 185. Here, like *Fletcher* the arguments were numerous in both findings and rebuttal argument,

across several categories of impropriety—with improper bolstering, vouching, asserting facts not in evidence and burden-shifting arguments. The trial on the merits was one day, with the government's closing and rebuttal arguments taking approximately 40 minutes. JA at 037. Similarly, in terms of the sheer number of instances of impropriety, trial counsel called the defense case a conspiracy theory four times, JA at 231, 235, and repeatedly shifted the burden to defense, in both findings and rebuttal. JA at 232, 235, 250-51. These seven errors were littered among the other arguments where he served to vouch for CC and argue facts not in evidence. Based on the severity of the misconduct here, this Court should resolve this factor for A1C Matti because the minimal effort here in the form of giving the standard instructions was insufficient to overcome this severe, cumulatively errant argument.

The third factor, the weight of the evidence supporting the conviction, weighs in favor of A1C Matti. As outlined above, the difference between conviction and acquittal seemed to hang on the small threads of purported corroboration the trial counsel paired with his improper argument. *See also* JA at 048 (Gruen, J., dissenting) (discussing the limited corroborating evidence that was largely inconsistent with CC's testimony, and which was also the subject of the improper arguments). Stated differently, when the members were left with just the testimony of CC and were not asked to rely on the minimal evidence of corroboration weighted

down with improper argument, they acquitted. That is because the evidence corroborating the alleged bruising was not particularly strong for either specification of which he was convicted.

As to specification 3, SM could not correlate any bruising she saw on CC's arms to CC's right forearm, to a bite mark or bite injury, nor to the charged timeframe in January 2021 for specification 3. JA at 182, 184. A1C Matti's and CC's neighbors, their roommate, and CC's sister never saw any bruising on CC in January 2021. JA at 162-186, 195-202.

For specification 2, while CS saw a bruise on CC's chin once while at work during the time they worked together between April and June 2021, there is no testimony that what she saw was consistent with the injury depicted in Prosecution Exhibit 1, as described by CC, nor even tied to the day CC visited her after work, May 21, 2021. JA at 155, 159. CS was not a witness to what caused that injury. *Id.* Similarly, neighbors never saw these injuries in May 2021. JA at 195-202. CC visited with her sister twice in-person during the charged timeframe for specification 3 and near the time for specification 2, and CayC never saw any injury. JA at 175.

Because all three factors are in A1C Matti's favor, the errors were materially prejudicial to A1C Matti's substantial rights and the findings and sentence should be reversed. *Fletcher*, 62 M.J. at 185.

Trial Counsel Impermissibly Shifted the Burden of Proof to the Defense and This Error Was Not Harmless

The Government has the burden of proof to produce evidence on every element and to persuade the members of guilt beyond a reasonable doubt. *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995) (citing U.S. CONST. amend. V). The burden of proof never shifts to the defense. *United States v. Berri*, 33 M.J. 337, 342-43 (C.M.A. 1991) (citations omitted).

The prosecution's constitutional responsibility is not limited to its affirmative presentation of arguments and evidence to support its case, but also encompasses how it interacts with the defense's case. A trial counsel's suggestion that an accused may have an obligation to produce evidence of his or her own innocence is "error of constitutional dimension." *Mason*, 59 M.J. at 424. Because any burden-shifting is of a constitutional dimension, any such error must be reviewed for whether the Government can show it was harmless beyond a reasonable doubt. *Id*. The Government shifted the burden of proof to the defense in A1C Matti's trial both in the findings argument and in rebuttal.

In the initial findings argument, rather than focusing on the affirmative proof introduced by the prosecution, trial counsel focused on what the defense *was required to do* in order to *disprove* it. Trial counsel did so by critiquing the defense's failure to "*provide* [the members] with any reasonable explanation as to why . . . it's a lie, it's a lie, it's all lies." JA at 234 (emphasis added).

But trial counsel did not limit the critique to what the defense had failed to show. Instead, trial counsel doubled down and asserted, in effect, that A1C Matti was guilty unless he could prove what trial counsel purported to be the defense's theory of the case. Specifically, trial counsel argued, "The defense *needs to get up here and say* that all these people are just lying to you; that it's all one giant conspiracy theory." JA at 235 (emphasis added). To close the loop that the defense had not made this showing—one that it never had to make under A1C Matti's guarantee of due process—trial counsel rhetorically challenged the members, "Who else were you presented with?" JA at 232. As trial counsel argued it, the defense's failure to bring forth witnesses in support of its supposed conspiracy theory rendered the guilty verdict a foregone conclusion. This flipped the Fifth Amendment on its head and suggests the "zeal[]" to which trial counsel alluded during voir dire had overcome the imperative to "seek justice." JA at 052; *Vorhees*, 79 M.J. at 11 (citations omitted).

Trial counsel was persistent in this line of attack when he returned in rebuttal and shifted the burden to the defense to provide an alternate explanation for bruising on CC. In rebuttal, trial counsel focused the Government's argument on the fact that the *defense* did not provide any reasonable explanation for where the bruises came from or what they were about. JA at 250-51. "Defense hasn't given you any explanation but think about where an explanation might be of how someone might

get" the purported injury to CC's chin attributed to the May 21 incident constituting specification 2. JA at 251.

In cases like this, where the alleged violence is against a spouse, as the trial counsel pointed out in voir dire, there are often only two witnesses—the victim and the accused. Here, trial counsel highlighted the lack of explanation for bruising on CC's chin, and given A1C Matti did not testify, this cannot merely be responsive to the defense theory or argument. *See* JA at 011-12 (where the Air Force Court opined that trial counsel was specifically responding to trial defense argument, asserting trial defense counsel's inability to address the evidence of the bruise on CC's chin). Defense counsel's argument on the extent to which the Government's evidence is supported by or contradicted by other evidence, JA at 242-44, does not invite reply given the defense did not produce an alternate theory for injury and A1C Matti was the only other person who could rebut the story about the source of CC's injury. *Carter*, 61 M.J. at 33.

It was error to imply A1C Matti could not exercise his right to remain silent. U.S. CONST. amend. V. And it was a repeated error of constitutional dimension for the trial counsel to state that A1C Matti had any obligation to produce evidence of his innocence—like a non-criminal explanation for the bruise to CC's chin, arm, or knee—or produce evidence that a witness—or all of the witnesses together—was

not just lacking in credibility, but working in tandem with all of the others to defraud the court with lies. *Mason*, 59 M.J. at 424.

Taking these arguments both in isolation and together—asserting the defense was required to provide proof of innocence or offer evidence establishing an alternative basis for the evidence of bruising—the Government cannot now show that they were harmless beyond a reasonable doubt. "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the [accused's] conviction or sentence." *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (citations omitted). The harmless beyond a reasonable doubt standard "is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *United States v. Tovarchavez*, 78 M.J. 458, 460 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). "[W]here a court cannot be certain that the [error] did not taint the proceedings or otherwise contribute to the defendant's conviction or sentence, there is prejudice." *Prasad*, 80 M.J. at 29 (citing *United States v. Williams*, 77 M.J. 459, 464 (C.A.A.F. 2018); *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016)) (alterations from original). "Where constitutional error contributes to a conviction, the conviction cannot stand." *Id*. (citations and internal quotations omitted).

The Government cannot make such a showing here because its purportedly corroborative evidence of CC's in-question credibility was thin. CC's credibility was marred by her vindictive explanation for why she chose to report: ". . . it's only fair that now he loses his dream of being a pilot." JA at 121. Her credibility was also diminished by her conflicting explanations for why she left the marriage. *Compare* JA at 096 (where CC alleged she left the marriage because A1C Matti would not apologize for the physical abuse or get help), *with* JA at 113-14 (where she admitted she told others she was leaving the marriage because A1C Matti dishonored her by looking at other women online). Moreover, CC's testimony was inconsistent with the evidence the Government entered as corroboration. For example, the pictures supposedly supporting the claim for specification 2 predated the well-settled timeframe of the charged conduct and do not actually show proof that A1C Matti took any actions after CC fell to the floor. After all, they depict nothing related to her back where his knee was alleged to have been pressed. Likewise, CS could not tie the chin bruise she saw to May 21, 2021, nor did she tie what she saw to the photographed bruise. This so-called corroboration pales in comparison to the findings argument's saturation with error. And, for specification 3, SM could not correlate the timing or type of injury to the charged conduct given she did not describe with any specificity the date of the bruise, the location, nor if it looked like it came from a bite to the right forearm as alleged.

Yet the weak corroboration, when paired with trial counsel's argument, proved to be a difference-maker, as A1C Matti was only convicted of the two specifications where the Government had any semblance of evidence of bruising—through the testimony of CC, the photographs at Prosecution Exhibit 1, and the testimony of CS and SM. The Government's arguments impermissibly tasked the defense with the obligation to disprove all those pieces of evidence.

The collective potency of the Government's pervasive lines of improper argument is illustrated by comparison with specifications 1 and 4, of which A1C Matti was not convicted. JA at 269-70. For both of those specifications, the Government did not have any corroborating photographic or physical evidence, nor was any support found in testimony from a witness other than CC about bruising or injury. JA at 073-84. As such, even if the defense were able to fend off one of the Government's two improper burden-shifts for these specifications—those related to the alternate explanation—the remaining burden-shift to disprove the basis of bruises purportedly captured in both photograph and witness testimony for specifications 2 and 3 proved too much to avoid conviction.

The severity of the improper argument leveraged by trial counsel, as well as the inability of the Government to now show its harmlessness, is underscored when the repeated and explicit shifts to the defense here are compared to *Mason*. In *Mason,* an isolated burden-shift through improper redirect examination of a DNA

expert about whether either side asked for re-testing was deemed harmless error because the Court found the DNA evidence overwhelming, the military judge gave the proper instructions before deliberation, and this error occurred at no point other than redirect examination. *Mason*, 59 M.J. at 425. In contrast, here the burden-shift was in both findings and rebuttal argument, the military judge issued no curative instructions, and this involved two separate areas at the heart of the litigation: an obligation for A1C Matti to produce evidence of innocence of "all the lies," and an obligation to offer an explanation for bruising.

Trial counsel's arguments were explicit in placing the Government's burden squarely on A1C Matti's shoulders. The relative weakness of the underlying corroborating evidence is highlighted by the misplaced fervor of trial counsel's argument. The Government could not point to any witness who saw these altercations other than CC. Faced with a weak set of evidence, trial counsel turned the members toward the defense to compensate. Such persistent, pervasive, and case-changing errors of constitutional dimension warrant relief.

CONCLUSION

The four interwoven categories of improper argument, pervasive throughout the Government's finding and rebuttal argument, amounted to prosecutorial misconduct. Trial counsel engaged in improper bolstering, improper vouching, improper use of facts not in evidence, and shifted the burden to the defense. The

nature of the overlapping impropriety of the trial counsel arguments, taken as a whole, were so damaging that no court can be confident that the members convicted A1C Matti based on the evidence alone.

WHEREFORE, A1C Matti requests his convictions and sentence be set aside.

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on August 1, 2025 and that a copy was also electronically served on the Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on the same date.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) & 37

This brief complies with the type-volume limitation of Rule 24(b) of no more than 13,000 words because it contains approximately 9,295 words.

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