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

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REPLY BRIEF

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ARGUMENT

Trial counsel committed prejudicial and wide-ranging prosecutorial misconduct throughout findings argument.

Trial counsel is the representative of the sovereign, whose imperative "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The prosecution is tasked with applying above-board methods because the fact-finder trusts the Government to faithfully carry out its duty to seek justice. *Id.* When that trust is abused, a prosecutor's improper suggestions, insinuations, and assertions of personal knowledge are likely to carry much weight against the accused when they should carry none. *Id.*

The central question for this Court is whether trial counsel's cumulative errors—improper vouching, bolstering, asserting facts not in evidence, and burden-shifting in findings argument—strayed from the mandate to do justice by adopting "improper methods calculated to produce a wrongful conviction." *Id*. Trial counsel failed to meet this obligation given the four interwoven categories of improper argument repeated, widespread, and compounding throughout findings and rebuttal argument, resulting in the members finding A1C Matti guilty based on something other than the evidence.

1. Trial counsel's arguments were plain error.[1]

The Government's brief starts with a position untethered from the facts and the law that even the Air Force Court of Criminal Appeals could not tolerate, and builds from there harnessing on two logically flawed propositions.

Unwilling to even agree with the lower court that anything that trial counsel argued was at least "ill-advised" (JA at 012 n.9), the Government holds steadfast that "[t]rial counsel crossed *no* lines." Appellee's Br. at 2 (emphasis added). Trial counsel argued the defense case was a conspiracy theory, that the defense's explanation of the evidence is "it's a lie, it's a lie, it's all lies." JA at 231, 234-35. Those arguments were violative of *Voorhees*, where it was plain error to equate the defense with a fantastical theory, one where the only answer could be that this was all a lie. *United States v. Voorhees,* 79 M.J. 5 (C.A.A.F. 2019). In rebuttal, trial counsel shifted the burden to the defense to provide an alternate explanation for the bruising on CC. JA at 250-51. These arguments, where A1C Matti is the only other witness who could rebut CC's testimony about the source of bruising, is plain error under *United States v. Carter* given A1C Matti's constitutional right to remain silent.

[1] While there are four interwoven improprieties in the trial counsel's argument, *see* Appellant's Br. at 16-34, the focus of this reply is primarily on the most egregious conduct, that of improper bolstering (disparaging the defense by equating the theory to a conspiracy), and the arguments that shifted the burden of proof to the defense.

61 M.J. 30, 33 (C.A.A.F. 2005). Yet according to the Government, this is just a passionate prosecution done right. *See* Appellee's Br. at 1-2.

Such a ringing endorsement of trial counsel's conduct is in accord with the other logical fallacies underlying the Government's brief, the first of which seems to say that any cross-examination invites a reply that the defense theory is "all lies." JA at 234, Appellee's Br. at 24-26. The Government cites to one fact—cross-examination on a single motive to fabricate—and equates that to a license to argue "it's a lie, it's a lie, it's all lies." Appellee's Br. at 24-25 (citing JA at 175-76). If such an instance of standard-issue impeachment is enough to open that door, then every defense case could be couched as a conspiracy theory.

That is, of course, not the law. For example, in the *Nunez* case cited by the Government (Appellee's Br. at 24), the closing argument was within bounds in arguing "in favor of [the law enforcement agent's] version of events was perfectly acceptable, considering [the agent] was the key witness for the government and [the defendant] testified in his own defense" and admitted to multiple instances of lying. *United States v. Nunez*, 532 F.3d 645, 654 (7th Cir. 2008). Even that prosecutor was deemed "inartful" for alleging the defense counsel was "stuck with his client," and never approached calling the defense's case "lies." *Id.* at 653-54. In fact, the Government conceded in *Nunez* that it was improper for the prosecutor to remark during an objection that the defendant's testimony was "patently false." *Id.* at 653.

Yet the Government's logic would have it here that any instance of impeachment would open the door to such an argument against the entirety of the defense's case.

The second glaring defect in the Government's argument is charting a new course for how improper argument should be analyzed, focusing not on what trial counsel actually said, but on what trial counsel meant to say. Appellee's Br. at 19, 42. Use of such a speculative, after-the-fact analysis is not the law. *See Voorhees*, 79 M.J. at 9-12 (where this Court examined the actual words trial counsel used in argument to assess for prosecutorial misconduct); *see also United States v. Chase*, 135 U.S. 225, 262 (1890) (citation omitted) (reflecting on how it is safer to construe legislation using the actual words than the intended verbiage). Even if what the Government really means is that this Court should look to the context of the trial counsel's argument, that context fails to support the Government's premise for why trial counsel's arguments did not amount to plain error.

Improper Bolstering by Disparaging Defense

Grasping at two cases where the notion of a "conspiracy" was responsive to what the defense argued at trial, Appellee's Br. at 24-26, the Government here claims the trial counsel's argument was permitted by a hypothetical: "the theory the defense *would have* to advance" to garner an acquittal. *Id*. at 25. Not only is that a stretch compared to the cases the Government offers, but it is far from the actual defense arguments or state of the evidence in A1C Matti's case.

Neither the evidence nor its context invited the trial counsel to disparage the defense by equating the defense theory to a conspiracy theory. Evaluation of CC's testimony demonstrates more than just her motive to fabricate. The theory that CC fabricated these allegations is tethered to the evidence and does not require the defense to argue that every witness conspired together and lied. On the contrary, it requires the other witness testimony to be truthful. Specifically, CC's cross-examination revealed, in part, issues with memory, JA at 101, 104, 105; prior inconsistent statements, JA at 114, 120,152-53; motive, JA at 114, 121; and established facts which were contradicted by or unsupported by other Government witnesses. JA at 108-10. The other witness testimony, which, if true, contradicted CC's testimony because neither SM or CS provided testimony which fully supported CC's version of events. The cross-examination of SM disclosed her bias, JA at 182; tested the extent to which her recollection of the bruise(s) was consistent with what CC alleged in terms of time and appearance of the injury, JA at 183-84; and revealed prior inconsistent statements of CC. JA at 184. CS's cross-examination was similar. She was tested on her memory of when she saw any injury to CC, JA at 158-59; and prior inconsistent statements of CC. JA at 157.

Examination of the defense's actual theory also negates any invitation to dilute the defense theory down to nothing more than a conspiracy where every witnesses conspired to lie. The defense theory was the loss of CC's marriage and

inability to reconcile that failure, leading to allegations of abuse. JA at 237. Highlighting CC's motive, the defense argued CC tarnished her credibility through inconsistent statements, and focused on the extent to which what CC testified to was contradicted by the Government's documentary evidence, witness testimony, and that it was also internally inconsistent in the manner in which she described the offenses. JA at 237-249. Therefore, in the context of the court-martial, the evidence and the defense's actual argument does not state or imply that the defense's theory was that every witness lied, nor does the evidence limit the defense to that theory. The Government wrongly asserts this was the only option for the defense. Appellee's Br. at 25.

Notwithstanding this state of the evidence, the Government contends that trial counsel's wishful thinking about the defense's case excuses the "it's all lies" argument. According to the Government, "the only way the defense could explain the evidence was by claiming a conspiracy theory between all the government witnesses who did not know each other." Appellee's Br. at 24. That is not true. The members had several available bases to find reasonable doubt without needing to find an across-the-board conspiracy to advance false allegations of domestic abuse. One, the members could have believed CC but found the inconsistencies in the time of the photographs enough to determine her testimony did not support guilt beyond a reasonable doubt. Two, the members could have believed CC and A1C Matti had

a bad marriage, but that CC felt pressure to have a church-approved reason for divorce, with her motive to fabricate being enough to negate guilt beyond a reasonable doubt. Three, the members could have believed CC, but found that the lack of specificity with which either SM or CS could identify or describe any injury consistent with what CC alleged negated proof of guilt beyond a reasonable doubt. Four, the members could have believed CC and yet found the fact that multiple other witnesses who saw CC during this timeframe did not see any abuse or signs of abuse sufficient to negate proof of guilt beyond a reasonable doubt. This list of real possibilities is not exhaustive, yet none of them leave the defense with only the theory that "it's all lies." Appellee's Br. at 19, 24-25. And this is central to both what the Government got wrong in findings and rebuttal arguments about the defense case and what the Government on appeal also misses.

Despite this weak corroborating evidence and the strength of the cross-examinations in revealing these inconsistencies in the Government's case, the Government asserts now, based on no evidence, that the trial counsel intended in his argument to show that the defense's only theory was to claim all these witnesses colluded with one another as part of an elaborate conspiracy theory. Appellee's Br. at 19. The Government was not invited to characterize the defense theory as conspiracy given the reasonable alternate theories of the case, and the one that the defense actually argued at trial—that the allegations against A1C Matti stemmed

from CC's difficulty in reconciling her lost dreams of being a wife with her eventual divorce, and her desire to hurt A1C Matti as she was hurt. JA at 237-50, 229, 230-31, 235.

The Government's repeated reference to conspiracy theories was an unambiguous invitation for the members to mistrust the defense. The Government invited the members to disbelieve the defense's characterization of the evidence and find A1C Matti guilty, not based on the evidence, but because the defense theory—and by extension defense counsel themselves—was untrustworthy. *See Voorhees*, 79 M.J. at 10 (citation omitted). This is plain and obvious error.

Burden Shift

Seeking to change the conversation regarding trial counsel's repeated direction to the members to consider what they had not been provided by the defense, or what the defense had failed to prove or explain (JA at 232-34, 250–51), the Government trains its focus on what it claims—and wishes—to be defense provocation. But the foundation for that claim crumbles upon scrutiny.

Hunting within the record, the Government directs the Court to JA at 243. There, defense counsel argued the inconsistencies with the testimony of CC and the timestamps on the photos, suggesting her testimony lacked corroboration. JA at 243. Specifically, defense counsel contended the timestamps contradicted CC's testimony as to when she took the photos, when the assault occurred, and how long

after the assault the photos were taken. *Id*. Next, the defense highlights the lack of corroborative evidence to support CC's allegation of injury from the actual charged conduct (A1C Matti's knee to CC's back). *Id.* Specifically, he argues: "[w]hat they are alleging is that A1C Matti injured [CC] using his knee. That's what the charge reads. There is no corroborating evidence of that." "If that occurred [the knee to the back], there would be some type of record of that injury; a picture of maybe a bruise on her back." Defense's argument simply highlighted the Government's failure to produce evidence of the charged conduct, and thereby minimized the effectiveness of Prosecution Exhibit 1. This type of attack does not require the defense to provide an alternate theory for CC's chin injury. If commenting on the lack of corroborative evidence for charged misconduct invites reply that the defendant did not produce evidence of innocence, that would mean any cross examination which tested the probative value of the evidence would turn the burden of proof on its head. Despite this illogical conclusion, that is exactly what trial counsel argued. Rather than answer the question posed by defense counsel's argument related to the lack of injury to CC's back, trial counsel engaged in misdirection, by pointing the members away from its own deficiency in proof and placed the issue into the defense's lap by telling the members the defense did not provide any explanation for the injury to CC's chin. JA at 232-34, 250–51.

The Government perseverates on the idea of response/reply to ameliorate trial counsel's arguments, Appellee's Br. at 44, but fails to link these arguments to actual portions of the defense argument. The lack of cited support for the Government's overarching claim makes sense because, as outlined above, cross-examination into witnesses credibility, exposing bias, memory issues, inconsistencies, truthfulness, they are all proper tools to test the Government's evidence and do not open the door to comment on what the defense, and by extension, A1C Matti, failed to produce.

In evaluating trial counsel's arguments, they are more than mere suggestions—they are overt statements that A1C Matti had an obligation to produce the evidence in question, and that he failed to produce this evidence, which are errors of a constitutional dimension. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004). Trial counsel specifically shifted the burden of proof to A1C Matti when he discussed the facts surrounding specification 2 (pressing the knee to the back). JA at 250-51. He told the members they had not been given any reasonable explanation for where the bruises had come from, that they had not been given any reasonable explanation for the bruising, and that specifically the *defense* had not given any explanation. *Id.* A1C Matti was the only witness who could provide a counter to CC's version of events given no one else was present during the alleged incident. JA at 058-154. Trial counsel planted the seed for this scenario back in voir dire when he highlighted that there were two people in play for the charged conduct, with

one quite obviously sitting at the defense table. JA at 054. These arguments, in that context, shift the burden to A1C Matti to testify.

Despite the egregiousness of these initial burden-shifting statements, the burden-shifting did not end. Trial counsel also insinuated A1C Matti had an obligation to produce evidence to test the credibility of CC or to discount the testimony of all the witnesses. JA at 233-35. And if A1C Matti's defense could not or did not do what trial counsel demanded, the only option for the members was to conclude that the defense theory was all lies, a conspiracy, a scheme. *Id*. These are plain and obvious errors.

Trial counsel's improper arguments, as viewed in the context of the court-martial, demonstrate the plain, obvious error. *See United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). When trial counsel introduced the case to the members in voir dire, he primed them to consider that in cases like A1C Matti's there are often only two witnesses to the crime, the accused and the victim. JA at 054. As the trial progressed, the Government did not produce a witness to any of the alleged assaults, other than CC. *See* JA at 058–154 (where CC testified she was alone with A1C Matti for each charged specification). The bolstering argument—that the only way for A1C Matti to be acquitted was that every witness was lying—was not made in isolation. Not only did trial counsel argue the defense theory, and by extension, the defendant, was untrustworthy, this argument was followed by arguments of what the

defense failed to do in not providing an explanation for the bruising because A1C Matti was the only other witness to the alleged conduct and he did not testify.

The Government highlights several federal court cases to dampen concerns of burden-shifting arguments by shifting focus to the defense counsel's failure to rebut or produce evidence as distinguished from A1C Matti's failure to do the same. Appellee's Br. at 40-42. However, A1C Matti's case is factually distinct, and the arguments themselves were focused on evidence only A1C Matti could produce. For example, the Government looks to *Dearden* to assert that trial counsel's arguments here were proper because trial counsel only commented on what the defense failed to do as distinguished from what the defendant failed to counter or explain. *Id.*, *United States v. Dearden*, 546 F.2d 622, 625 (5th Cir. 1977). *Dearden* offers this distinction, but also provides that whether argument is considered a comment on the failure of a defendant to testify is whether or not the statement was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure to testify. *Dearden*, 546 F.2d at 625. In this case, A1C Matti was charged with crime where there were only two sides to the story, that of the accused, and that of the victim. JA at 054. CC was the only witness who testified as to the source of any injury because no one else was present as a witness. JA at 058-154. Trial counsel's arguments naturally and necessarily commented on A1C Matti's failure to testify because only A1C Matti could offer any alternate

explanation for bruising, and that was the focus of these burden-shifting arguments. JA at 250-51. As such, the burden-shifting arguments, in this context, were more than "ill advised," JA at 012 n. 9, they amount to plain error.

2. Prejudice is established.

Even if this Court declines to find a burden-shift and rules based on the prosecution's other instances of improper argument, relief is warranted because, taken as a whole, the arguments which amounted to improper bolstering, vouching, assertion of facts not in evidence, and burden shifting, were so damaging that this Court cannot be confident the members convicted A1C Matti based on the evidence alone. *United States v. Norwood*, 81 M.J. 12, 20 (C.A.A.F. 2021) (citation omitted). Three factors are weighed to determine prejudice: (1) the severity of the misconduct (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.[2] *United States v. Fletcher,* 62 M.J. 175, 184 (C.A.A.F. 2005).

[2] Appellant relies on the analysis and argument in his initial filing related to the second *Fletcher* factor and focuses this reply on the first and third factors: the severity of the misconduct and the weight of the evidence. *See* Appellant's Br. at 25-26.

First Factor - Severity

The Government gets the law wrong when it summarily disposes of the severity of the misconduct as "low" because the trial defense counsel did not object and the jury returned mixed findings. Appellee's Br. at 45-46. As much as the Government might wish to have the lack of objection be dispositive of both error and prejudice, *see, e.g.*, Appellee's Br. at 2 (linking no objection with no error), severity can be illustrated through (1) the raw numbers, that is, the instances of misconduct compared to the length of the argument, (2) whether the misconduct was confined to rebuttal or spread throughout the findings argument, (3) the length of the trial, (4) the length of the panel deliberations, (5) whether the trial counsel abided by any rulings from the military judge. *Fletcher*, 62 M.J. at 184.

Here, the conduct is severe based on the raw numbers and the extent to which both findings and rebuttal arguments were riddled with offending arguments. The following tables visually depict the severity in raw numbers. These repeated instances of misconduct cannot be summarily discounted given the pervasiveness of the misconduct, which started with trial counsel's position as a special prosecutor in voir dire and carried through the whole trial, ending with rebuttal. This factor weighs in favor of A1C Matti.

In addition to the sheer number of improper arguments, the errors in trial counsel's argument built on one-another to compound the severity. At the outset,

the Government's case was introduced by trial counsel as one where there are often only two sides to a story, that of the accused and that of the victim. JA at 054. Trial counsel also got the members to agree they could convict if the one witness in a domestic violence case was credible. *Id*. With that in mind, when trial counsel introduced improper argument, he started with declarative statements that CC's version was true, there were no missing pieces, and she was credible. JA at 217. Armed with his credible witness, trial counsel narrowed the member's obligation simply to: did this happen. JA at 227-28. This over-simplification of the elements focused the members even more keenly on CC, whom they were just told was credible. Trial counsel vouched for the case, telling members they were "absolutely equipped with all the corroborating evidence" they needed. JA at 228. These declarations by trial counsel about the strength of the case were juxtaposed with trial counsel's reduction of the defense case to mere conspiracy, one where every witness had to be a liar. JA at 229, 230-31. Not only did trial counsel repeatedly return to the conspiracy theory rhetoric, he went further and asked the members to consider "who else were [they] presented with" after referring to the Government-friendly witnesses the Government produced. JA at 232. Trial counsel kept on this theme, asking the members to consider both that the defense had not provided an explanation for the evidence, but also that any explanation that they did advance was mere conspiracy. JA at 233, 234. Undeterred, trial counsel returned to the credibility

of CC, and introduced facts unknown to the members to drive his belief in her credibility home. These arguments dovetailed with his earlier declaration of her as a credible witness. In rebuttal, each of these thematic errors returned, when trial counsel asked the members to consider what explanation was not provided by the defense, solidified CC's credibility based on something other than the evidence, tying it instead to her position as a victim, and left the members with no doubt that they should believe CC, not because the evidence demanded it, but because the defense did not disprove it.

For ease of review, these tables are provided to illustrate the number of violative arguments, the fact the improper arguments were both in findings and rebuttal, and to provide a sequential view of the arguments illustrating the compounding effect these arguments had, which led to a verdict on something other than the evidence.

Findings Argument

". . . this makes sense. The allegations you have, the narrative that you've been told . . . . [i]t rings true. There are no big missing pieces here." JA at 217.
"[Y]ou have a credible witness. You have the victim, [CC], who came up here and took the stand and she was credible." JA at 217.
"So looking back [at the specifications] . . . the only real question that you need to worry about, where you are focused in on because there isn't really an issue on these legal matters, is whether this actually happened." JA at 227. "[T]he only question that's really going to be at issue in this court is did these things happen or not." JA at 228.
"[T]hat you members are absolutely equipped with all the corroborating evidence you need to say these did happen, you have been provided with the bruises; pictures that she took of what happened to her." JA at 228.

"Essentially [the defense is] going to want to say everybody is a liar and they're going to say that they have these biases." JA at 229.
"Members, the defense can get up here and come up with any conspiracy theories they want, but that is not reasonable." JA at 230–31.
"Think about this, this grand conspiracy theory, when you have two different witnesses—what are the chances? . . . . You absolutely have all the corroboration you need to know what has happened here." JA at 231.
"Defense is going to say 'hey, these are all government friendly witnesses.' Who else were you presented with?" JA at 232.
"[Y]ou have not been provided with any real reason to doubt the credibility of this witness. She's telling the truth. What does she have to gain by not telling the truth?" JA at 233.
"You have not been provided with any reasonable explanation as to why defense just wants to get up here and say it's a lie, it's a lie, it's all lies. 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-examination sitting up here for hours on the stand as we dig through any text message she might have ever had and confront her on all those things. Members, it is not for the faint of heart to testify in court. It is a long, drawn out, difficult experience for [CC]." JA at 234.
"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. 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 235.
"The defense an get up here and give you all sorts of doubts, all sorts of possible doubts, possible explanations, possible reasons why this might all just be a conspiracy theory . . . ." JA at 235.

Rebuttal Argument

"I'm not going to walk through all of the misstatements of fact . . . ." JA at 250.
Speaking of the bruises on CC's knee and chin: "What you have not been given is any reasonable explanation for where this came from, what these are about. And specifically what I want you to focus on is the chin because the knee, sure, although you've been given no reasonable explanation, people get bruises on their

knees. People fall down and they hit their knee, but what about the chin. Why does she have an injury on her knee and her chin? I really truly challenge you to think about that. Defense hasn't given you any explanation but think about where an explanation might be of how someone might get that." JA at 250–51.
"You have absolutely no reasonable explanation and no reasonable doubt as to what happened there." JA at 251.
"Those are the words of a victim." JA at 252.
"The government absolutely asks that you believe the victim in this case because you have no reasonable reason not to." JA at 252.

Third Factor – Strength of the Evidence

The Government had no meaningful corroboration for the charged conduct for either specification 2 or 3 to support the conviction, which points to the improper argument as the catalyst for conviction. CC's testimony was not strong evidence, given her testimony alone was not enough to convict A1C Matti. The Government admits that A1C Matti was only convicted of the specifications where there was some corroboration. Appellee's Br. at 17. Given CC was the sole witness to those allegations, it is reasonable then to infer that the members would not convict A1C Matti based on CC's testimony alone and her testimony was not "strong evidence." Specifications 2 and 3 had three individual pieces of evidence which attempted to corroborate CC's testimony (the testimony of SM, CS, and Prosecution Exhibit 1). However, none of these three pieces of evidence tips the scale to a strong or moderately-strong case. As to the first piece of evidence to support specification 3, SM testified sometime when she worked with CC she saw her at work with bruising, but she did not correlate what she saw to January 2021 specifically, to CC's right

forearm, nor whether it was a bruise from a bite. JA at 182, 184. This is not strong corroborating evidence for CC's allegation that A1C Matti bit her so hard on the right forearm that she had a bruise for two weeks near her birthday in January 2021. JA at 072-73. The strength of CC's testimony that is barely corroborated by SM is further eroded by the testimony of two other witnesses, who stayed with CC in her house in January 2021 and did not see bruising. JA at 162-186. Additionally, two other witnesses, neighbors of CC and A1C Matti, did not see any bruising or hear any fights. JA at 195-202. The evidence was not even moderately strong considering the equivocal testimony of SM about generic bruising on CC at some point in late 2020 or early 2021, which did not really serve to corroborate a bruise stemming from a bite around CC's birthday in mid-January.

The evidence to corroborate CC's testimony related to specification 2 was even more troubled. CC alleged, and the Government charged, a specific day when A1C Matti was alleged to have placed his knee on her back—May 21, 2021. JA at 205-06. CC testified specifically that this occurred just before she left for work, around 2 p.m. JA at 087-88. The only documentary evidence of bruising was not related to any injury to CC's back, which is the location of the charged assault, but was of purported injury to her chin and knee. Pros. Ex. 1. This evidence did not corroborate whether A1C Matti actually placed his knee on her back as charged. Moreover, CC testified she took the photos of her chin and knee at 10 p.m. after

work and returning home on May 21, 2021. JA at 089. Her testimony as to the timing of these photographs was proven false by the photos themselves, eroding CC's credibility even further. JA at 110-11. These photos, at best, corroborated her version that she fell to the ground, but not in the afternoon of May 21, 2021. In that same vein, CS's testimony that she saw a bruise on CC's chin at some point in April to June of 2021 does not corroborate anything more than CC's version that she fell to the ground during that timeframe. JA at 161. Similarly, the neighbors did not see any bruising or hear any fights in May 2021. JA 195-202. The strength of the evidence is low.

Given the realities of the Government's case—that CC's testimony was propped up by marginal corroboration—trial counsel turned to improper argument to make up for these deficiencies. Understanding CC's credibility was attacked, trial counsel vouched for CC, asserted she was credible, and discounted effective cross-examination by the defense by improperly reducing the defense theory to a conspiracy where every witness lied. To dissuade any thought of acquittal, trial counsel swung for the fences and shifted the burden to A1C Matti to prove his innocence as it related to the bruising (specification 2). He then gave the members outside evidence to vouch for CC's credibility, asked the members to convict, in part, because the defense failed to contradict the Government's assertions that CC

was credible. These arguments, taken together, served to bridge the gap between acquittal and conviction because in concert, they could not be overcome.

Consistent with the relative weakness of the evidence supporting the conviction, the mixed verdict, JA at 254, serves to establish how much these errant arguments tipped the scales of justice. Trial counsel's errant arguments were tied to the alleged corroborating evidence. *See generally* JA at 228, 231, 250-51 (where trial counsel argued the defense failed to provide an explanation for bruising, that the photographs were corroboration, and the defense did not provide the members a reason to distrust the evidence even though the timestamps on the photographs of the purported injury contradicted CC's testimony).

The bulk of the egregious errors in trial counsel's arguments focused on the evidence and testimony related only to specifications 2 and 3, and, tellingly, only those specifications resulted in convictions. JA at 254. As discussed, CC was not credible on her own given the acquittal for specifications 1 and 4. Trial counsel repeatedly argued the defense had to say it was all lies, meaning all the witnesses were lying, to garner an acquittal. Appellee's Br. at 25. In this landscape, where defense had to discount not only CC, who trial counsel improperly vouched for as a credible witness, defense also had to overcome each piece of evidence unique to specifications 2 and 3 (the bruising, and the testimony of SM and CS), not as merely inconsistent, but as an outright lie, to acquit. The final coup degrâce was trial

counsel's rebuttal. "What you have not been given is any reasonable explanation for where this came from, what these are about. Defense hasn't given you any explanation but think about where an explanation might be of how someone might get that." JA at 250-51. The parting thoughts for the members were that A1C Matti had an obligation to produce evidence and failed to do so. With the burden squarely on the defense, and A1C Matti's silence, the members convicted on only those specifications where he did not produce evidence of innocence or where he could not discount all witness testimony as lies. Thus, this Court cannot be confident that the members convicted A1C Matti on the basis of the evidence alone. *Fletcher*, 62 M.J. at 184.

3. The Government cannot prove the burden-shifting arguments were harmless beyond a reasonable doubt.

Because trial counsel shifted the burden to A1C Matti in argument, the Government has the burden to show such error was harmless beyond a reasonable doubt. *Mason*, 59 M.J. at 424. The test is whether, beyond a reasonable doubt, the error did not contribute to the accused's conviction. *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020). The Government fails to carry this burden here, outright dismissing that trial counsel's argument even approached the line. Appellee's Br. at 51.

As outlined above, the focus of the burden-shifting arguments related only to the specifications of which he was convicted. And given the context of the court-

martial (domestic violence allegations where A1C Matti did not testify), the Government cannot now say that the mixed verdict with acquittals on the specifications where trial counsel did not shift the burden to the defense proves any error was harmless beyond a reasonable doubt. Appellee's Br. at 52. Yet, the Government does just that. The Government points the Court only to the mixed verdict and the strength of the case to deem any error harmless. This conclusory approach fails to acknowledge the focus of those burden-shifting arguments, which proved dispositive. *Id.*

The Government also absolves itself of any obligation to prove these burden-shifting arguments were harmless beyond a reasonable doubt by arguing the Eleventh Circuit Court threshold for establishing relief while disregarding the test set forth by this court in *Prasad.* Appellee's Br. at 51. The standard set forth in *United States v. Simon*, that the conduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial" to mandate reversal, is not the law that applies here. 964 F.2d 1082, 1086 (11th Cir. 1992). Here, the question the Government must answer is whether, beyond a reasonable doubt, the error did not contribute to the conviction. *Prasad*, 80 M.J. at 29. Whether this Court finds trial counsels' misconduct permeated the trial or not, the Government cannot show the errors did not contribute to the conviction, beyond a reasonable doubt. As discussed above under prejudice, trial counsel's findings argument set A1C Matti up for

conviction, not based on the evidence, but because (1) the defense was untrustworthy; (2) the defense's only option for acquittal was to prove every witness was lying; (3) CC was credible because trial counsel said so, and because she was a victim; (4) CC was credible because he introduced facts unknown to the members to support her credibility; and (5) A1C Matti had an obligation to produce evidence related to the bruising and failed to do so. Despite the mixed verdict, the Government cannot prove these arguments did not contribute to the conviction. These arguments focused on evidence unique to specifications 2 and 3, including the witness' testimony and the source of injury and could not be overcome. These arguments were not harmless beyond a reasonable doubt.

This Honorable Court should set aside the convictions and the sentence.

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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 September 14, 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 21(b), 24(b) & 37

This brief complies with the type-volume limitation of Rule 24(b) of no more than 6,500 words because it contains approximately 6,383 words, excluding the index, table of cases, and certificates.

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