

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

O'Brian RODRIGUEZDEJESUS
Gunnery Sergeant (E-7)
United States Marine Corps,

Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

Crim. App. Dkt. No. 202300262

USCA Dkt. No. 26-0288/MC

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

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Issues Presented

I.

Whether the Military Judge abused his discretion in denying Appellant’s three motions for a mistrial.

II.

Whether Trial Counsel committed prosecutorial misconduct requiring reversal.

III.

Whether the lower court applied an incorrect standard of review in analyzing whether the trial counsel committed prosecutorial misconduct and an incorrect test for prejudice.

Introduction

Trial Counsel did not believe he should have to follow the “dictates of . . . the Court” on the admissibility of evidence.¹ He repeatedly defied the Military Judge’s rulings, ignoring judicial rulings, the Rules of Evidence, and any concept of fair play.² The military judge never took meaningful corrective action—resulting in at least forty-four sustained objections on character, propensity, and

¹ R. at 698.

² *Id.*; R. at 1065 (complaining the court’s rulings were making it “impossible to have a coherent story”), 1243 (describing the court’s rulings as unreasonable); *see also* R. at 1016-27 (attempting to elicit testimony the judge ruled inadmissible), 1375-80 (same), 1363-64 (same), 1392-95 (same).

Fifth Amendment grounds during the complaining witness's testimony.³ While he issued twenty-seven "disregard the last answer" instructions, those instructions did not cure the prejudice.⁴

Throughout the three-week trial, Appellant objected dozens of times to no avail. Trial Counsel questioned and criticized the Military Judge's rulings, then disregarded them. This culminated in the Panel President wanting to ask a witness about the precise topic that led to a sustained objection and Appellant's third mistrial request—Appellant's purported propensity for domestic violence.⁵ The members could not follow or did not understand the Military Judge's dozens of "sustained, disregard the last answer" rulings. And the Military Judge never readdressed the propensity issue that led to the third mistrial motion with the panel or reinforced his prior, futile instruction.

Almost ten years ago, Judge Ohlson and Judge Sparks dissented in *United States v. Short*, a similar but far less egregious case.⁶ The dissent was prophetic in

³ R. at 1013, 1022, 1024, 1035, 1047, 1058, 1068, 1118, 1185, 1187, 1194, 1219, 1220, 1263, 1275, 1280, 1283, 1341, 1343, 1357, 1364, 1376, 1377, 1389, 1392, 1934, 1941, 1967.

⁴ R. at 1013, 1022, 1024, 1035, 1047, 1058, 1068, 1118, 1185, 1187, 1194, 1219, 1220, 1263, 1275, 1280, 1283, 1341, 1343, 1357, 1364, 1376-77, 1389, 1392, 1934, 1941, 1967.

⁵ R. at 1956-58, 2385.

⁶ *United States v. Short*, 77 M.J. 148, 152–53 (C.A.A.F. 2018) (Ohlson, J., dissenting).

explaining the dangers of foregoing de novo review for prosecutorial misconduct and excusing the repeated eliciting of inadmissible character evidence.⁷ Those problems came alive in this case. This case is a clean vehicle to establish guardrails to the problems *Short* left open, such as when a member specifically asks about the topic of a prior sustained objection and instruction. There is a line where a military judge fails to stop a trial counsel's repeated eliciting of improper evidence.⁸ This case is far over that line. This Court should grant review and reverse the decision below.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a punitive discharge.⁹ The Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b)(1)(3), UCMJ.¹⁰ Appellant invokes this Court's Article 67(a)(3), UCMJ jurisdiction.¹¹

⁷ *Id.* at 152-54.

⁸ *Id.* at 154 (“Because of the frequency and severity of the prosecutorial misconduct, the insufficiency of the corrective actions, and the minimal weight of the admitted evidence, I cannot be confident that the members convicted Appellant based on the evidence alone.”).

⁹ Entry of Judgment (Sept. 15, 2023).

¹⁰ 10 U.S.C. § 866(b)(1)(3) (2024).

¹¹ 10 U.S.C. § 867(a)(3) (2024).

Statement of the Case

A general court-martial consisting of officer and enlisted members convicted Appellant, contrary to his pleas, of three lesser-included offenses: one specification of sexual assault by placing another person in fear (Article 120(b)(1)(A), UCMJ), and two specifications of domestic violence by commission of a violent offense: assault consummated by a battery and aggravated assault by causing substantial bodily harm (Article 128b, UCMJ).¹²

The members acquitted Appellant of the greater charged offenses as well as kidnapping and ten other domestic violence specifications.¹³ The members sentenced Appellant to a dishonorable discharge, confinement for 412 days, and reduction to the pay grade of E-3.¹⁴ The convening authority waived automatic forfeitures for six months for the complaining witness to receive an allotment, but took no other action on the sentence, and the military judge entered it into

¹² 10 U.S.C. § 920(b)(1)(A) (2024); 10 U.S.C. § 928b (2024); Entry of Judgment.

¹³ Entry of Judgment (Sept. 15, 2023). The Government withdrew and dismissed another domestic violence specification after the introduction of evidence on the general issue of guilt.

¹⁴ R. at 2909. Appellant was awarded 232 days of confinement credit for pretrial confinement and an additional one day of judicially ordered credit. Entry of Judgment (Sept. 15, 2023).

judgment.¹⁵ Appellant raised five assignments of error to the lower court; the lower court found no prejudicial error and affirmed.¹⁶

¹⁵ Convening Authority Action (June 1, 2023); Entry of Judgment (Sept. 23, 2023).

¹⁶ *United States v. Rodriguezdejesus*, NMCCA No. 202300262, slip op. (N-M. Ct. Crim. App. July 13, 2006).

Statement of Facts

A. Capt Tango, who the same Military Judge had recently dismissed from *United States v. Shelby* for unlawful command influence, drafted the charge sheet, alleging fourteen specifications of domestic violence and sexual offenses.

Capt Tango, the lead prosecutor in this case, personally drafted the charges.¹⁷ At the start of trial, he put on the record that the same judge had recently found he committed unlawful command influence in *United States v. Shelby*.¹⁸ In *Shelby*, two months before Appellant’s trial, the military judge dismissed Capt Tango from the case due to his “misleading representations” to the convening authority about the victim’s allegations.¹⁹ There, the military judge found the “[Case Action Memo and its addendum] were both clear attempts by the Trial Counsel to influence the decision-making of the [Staff Judge Advocate] and [Sexual Assault Initial Disposition Authority]” because they included misleading

¹⁷ Appellate Ex. LXXXVI at 89.

¹⁸ R. at 15.

¹⁹ *United States v. Shelby*, 85 M.J. 292, 293–94 (C.A.A.F. 2025) (“Prior to trial, the military judge determined that trial counsel’s misleading representation for Charge II to the staff judge advocate prior to preferring charges resulted in unlawful command influence (UCI). As a remedy for the UCI, the military judge dismissed Charge II without prejudice, disqualified the convening authority from further action on Charge II, and the offending trial counsel from the case.”); *see also United States v. Shelby*, 84 M.J. 639, 642 (N-M. Ct. Crim. App. 2024).

statements.”²⁰ One judge on the lower court described these actions as “a series of concerning actions and decisions by the Government . . . that could be construed to demonstrate a ‘win at all costs’ mentality.”²¹

Capt Tango’s charges in this case included fourteen specifications of domestic violence, and one each of kidnapping and rape, all regarding Appellant’s then-wife, Ms. Charlie.²² The allegations spanned nine months, culminating in an August 4, 2022 incident—the only incident containing a sexual allegation.²³ Before trial, the complaining witness and her victim legal counsel (VLC) informed Capt Tango she had a “strong desire” the sexual offense be removed “considering [her] actions during the incident.”²⁴

There is no indication Capt Tango informed the Convening Authority of her position, and it is absent from the Article 32 report and Article 34 advice.²⁵ But after this conversation, the complaining witness was informed that she would be

²⁰ Suppl. to Pet. for Grant of Review at 4–7, *United States v. Shelby*, 85 M.J. 292 (C.A.A.F. 2025) (No. 24-0186/MC).
<https://www.armfor.uscourts.gov/briefs/2024Term/Shelby240186AppellantSupplement.pdf>.

²¹ *United States v. Shelby*, 84 M.J. 639, 651 (N-M. Ct. Crim. App. 2024) (Gross, J., concurring).

²² Charge Sheet.

²³ Charge Sheet.

²⁴ Appellate Ex. LXXXVI at 89; R. at 1906–07, 1925–26.

²⁵ Staff Judge Advocate, 1st Marine Aircraft Wing Article 34 Advice (Nov. 29, 2022) (Volume 1, PDF p. 80); Preliminary Hearing Officer Report Supplement (Nov. 27, 2022) (Volume 1, PDF pp. 83–105).

subpoenaed if she backed out, even though subpoenas are unenforceable in Japan.²⁶ Capt Tango did not disclose any of this to the Defense, only eventually responding to a discovery request that Ms. Charlie expressed “guilt” but insisting she never disclosed exculpatory information.²⁷

B. During the complaining witness’s testimony alone, there were forty-four sustained objections and twenty-seven “disregard the last answer” instructions.

Before trial, the Government provided notice of twenty-seven items it intended to admit pursuant to Military Rule of Evidence (MRE) 404(b).²⁸ At a pretrial Article 39(a) session, the Military Judge ruled that some of the items, such as Appellant’s suicidal ideations, his alleged use of suicidal ideations to control Ms. Charlie and his girlfriend, Ms. Alpha, and allegations involving Appellant and Ms. Alpha, were inadmissible.²⁹ The Military Judge never ruled that any of the twenty-seven requested items were admissible under MRE 404(b).³⁰

²⁶ Appellant’s Mot. to Attach, Aug. 25, 2025, App. A; Appellate Ex. LXXXVI at 91–92.

²⁷ Appellate Exs. LXXXV at 7–8, LXXXVI at 94.

²⁸ Appellate Ex. LXXXVI at 33–36.

²⁹ R. at 110, 132–33. The Military Judge expressed skepticism about many other items, e.g. Appellant “crying,” “acting strangely,” and placing air tags in his wife’s and girlfriend’s cars, by explaining that “we are not putting this evidence in to show that the accused is a bad person,” and that he was “curious” about evidence “tapping into this topic of paranoia.” Ultimately, he left it open to the Government to come back and clarify if any M.R.E. 404(b) issues were in dispute. R. at 129–34.

³⁰ R. at 107–37.

Ms. Charlie’s testimony took several days as the Government struggled through dozens of Article 39(a) sessions, evidentiary objections, MRE 304 notice issues, and translation issues.³¹ The Defense routinely objected to impermissible character, propensity, and Fifth Amendment testimony, and the Military Judge routinely sustained those objections.³² Subtracting routine objections such as hearsay, speculation, non-responsive testimony, and foundation—of which there were dozens—at least forty-four sustained objections and twenty-seven “disregard the last answer” instructions related to character, propensity, or Fifth Amendment issues.³³

The Military Judge sustained objections and/or told the members to disregard testimony that Appellant was suicidal,³⁴ had PTSD,³⁵ needed anger management,³⁶ stole Ms. Charlie’s wedding ring, pushed his friends, and got in a fight at a strip club,³⁷ was hitting himself, screaming and looked evil,³⁸ was “crazy”

³¹ *See, e.g.*, R. at 1013, 1022, 1024, 1035, 1047, 1058, 1068, 1118, 1185, 1187, 1194, 1219, 1220, 1263, 1275, 1280, 1283, 1341, 1343, 1357, 1364, 1376-77, 1389, 1392, 1934, 1941, 1967.

³² *Id.*

³³ *Id.*

³⁴ R. at 1059–68, 1118, 1219–20, 1947–49.

³⁵ R. at 1047.

³⁶ R. at 1934.

³⁷ R. at 1016–27.

³⁸ R. at 1053.

and “nuts,”³⁹ had a drinking problem,⁴⁰ was publicly intoxicated,⁴¹ was drinking and missed his daughter’s soccer game,⁴² wanted to watch his wife have sex with another man and have a “threesome,”⁴³ had manipulated a phone or destroyed evidence,⁴⁴ lied to his daughters,⁴⁵ was going to “take his daughters away,”⁴⁶ and had assaulted his girlfriend.⁴⁷ He also excluded testimony regarding uncharged misconduct,⁴⁸ the fact that base police arrested Appellant,⁴⁹ and when Ms. Charlie testified “[Appellant]’s here, you can ask him.”⁵⁰ But the members heard all of this testimony.

While the Military Judge’s limiting instructions early in the trial on hearsay issues were detailed, several paragraphs long, and included voir dire of the members,⁵¹ that changed by the time Ms. Charlie testified. By the time of the objections in question, his instructions mostly consisted of merely “disregard the

³⁹ R. at 1280, 1343.

⁴⁰ R. at 1044.

⁴¹ R. at 1181–85.

⁴² R. at 1189–91.

⁴³ R. at 1375–80.

⁴⁴ R. at 1942–51.

⁴⁵ *See, e.g.*, R. at 1953.

⁴⁶ R. at 1389–92.

⁴⁷ R. at 1955–66.

⁴⁸ R. at 1263–66, 1425, 1461–64.

⁴⁹ R. at 1392–94.

⁵⁰ R. at 1035.

⁵¹ R. at 658–59.

last answer,” or words to that effect, with no explanation.⁵² Only one of the twenty-seven instructions included voir dire of the members.⁵³ Often, these instructions came after Article 39(a) sessions, with a gap between the objectionable questions and answers and the instruction.

C. Capt Tango disagreed with the court’s ruling and routinely re-asked questions after sustained objections.

Captain Tango lamented to the Military Judge that the “government should not be under the dictates of either the Court or defense on how to prove its case.”⁵⁴ He later complained to the Military Judge that there “has to be some reasonableness to these [MRE 404(b)] rulings.”⁵⁵ He also complained that the Military Judge’s rulings were making it “impossible to have a coherent story as to what actually occurred.”⁵⁶ Throughout Ms. Charlie’s testimony, he re-elicited impermissible testimony after sustained objections, only to receive more sustained objections and rebukes to honor the rulings and “move on:”

⁵² Compare R. at 1013, 1118, 1185, 1280, 1283, 1357, 1377, 1389 (providing some context) with R. at 1022, 1024, 1035, 1047, 1058, 1068, 1187, 1194, 1219, 1220, 1263, 1275, 1341, 1343, 1364, 1376, 1392, 1934, 1941, 1967 (providing no context).

⁵³ R. at 1118.

⁵⁴ R. at 698.

⁵⁵ R. at 1245.

⁵⁶ R. at 1065.

- Trial Counsel asked about an alleged altercation and several incidents of uncharged misconduct; the Military Judge sustained seven objections in total on this matter, including five after instructing the members to disregard the questions.⁵⁷
- The Military Judge sustained four objections on the exact same issue regarding allegations that Appellant wanted Ms. Charlie to have a “threesome” or to be with another man.⁵⁸
- The Military Judge sustained an objection and issued an instruction to disregard regarding Appellant’s motive, and Trial Counsel immediately re-asked the witness: “But that’s what you were thinking, right?” (referring to the witness’s previous, inadmissible answer).⁵⁹ The Military Judge “[a]gain” sustained an objection.⁶⁰
- The Military Judge ruled that the fact Appellant was arrested by base police was inadmissible.⁶¹ Trial Counsel elicited the testimony anyway,⁶²

⁵⁷ R. at 1016–27.

⁵⁸ R. at 1375–80.

⁵⁹ R. at 1363–64.

⁶⁰ R. at 1363–64.

⁶¹ R. at 594–95.

⁶² R. at 1392–93.

and then continued arguing for its admissibility even after the Military Judge reiterated his prior ruling.⁶³

The Military Judge rebuked Trial Counsel on eliciting character evidence at least sixteen times throughout Ms. Charlie's testimony.⁶⁴ This included his "surprise" at Trial Counsel justifying inadmissible testimony,⁶⁵ his expectation that Trial Counsel ensure witnesses do not testify about inadmissible character evidence,⁶⁶ and reinforcing that Trial Counsel argued new MRE 404(b) theories⁶⁷ or violated prior "explicit rulings."⁶⁸

D. The Defense moved for a mistrial three times, made forty-four sustained objections to Capt Tango's actions (during Ms. Charlie's testimony alone), and repeatedly put the prejudice of his actions on the record.

During Ms. Charlie's testimony, the Defense moved for three mistrials. In the first, it argued that the "bell" could not be "unrung," and expressed concern for Capt Tango's willful disregard of the MRE 404(b) rulings.⁶⁹ The Defense also argued that the members would no longer be able to disregard the Military Judge's

⁶³ R. at 1393–95.

⁶⁴ R. at 1042, 1055, 1063–64, 1094, 1097–98, 1182, 1209–10, 1239–40, 1246, 1252, 1378, 1445, 1575, 1921, 1949, 1966.

⁶⁵ R. at 1055.

⁶⁶ R. at 1055, 1182.

⁶⁷ R. 1097–98, 1182, 1209–10, 1252, 1378, 1445.

⁶⁸ R. at 1094, 1246.

⁶⁹ Appellate Ex. LXXXV; R. at 1071–99.

curative instructions.⁷⁰ The Defense explained that Capt Tango was “willingly and knowingly violat[ing] the Court’s order,” reserved the right to renew the motion if the Military Judge denied it, and asked that Capt Tango be placed on notice.⁷¹ The Defense predicted the case “will outpace *Short* in terms of curative instructions, Article 39(a)s, evidentiary gaffes, and improper questions by the half point mark in [Ms. Charlie’s] testimony, which has only just begun.”⁷²

The Military Judge agreed the Government had “offered impermissible character evidence in the form of [Ms. Charlie’s] testimony regarding PTSD and [Appellant’s] alleged enraged or ‘evil’ behavior[,]”⁷³ but denied the motion.⁷⁴ The Military Judge “directed” the Government “to not intentionally offer evidence of prior suicidal thoughts of the accused or evidence of violent, psychotic post-offense behavior.”⁷⁵

As the same problems continued unabated, the Defense repeated its concerns about the fairness of the trial and its concerns that Capt Tango continued to put inadmissible character evidence before the members.⁷⁶ The Military Judge warned

⁷⁰ Appellate Ex. LXXXV; R. at 1082.

⁷¹ R. at 1098.

⁷² Appellate Ex. LXXXV at 19.

⁷³ R. at 1104–05.

⁷⁴ R. at 1105.

⁷⁵ R. at 1107.

⁷⁶ R. at 1152, 1215, 1291–92, 1300.

the Government and VLC to “explain the parameters [to Ms. Charlie]” and acknowledged that “at a certain point limiting instructions or restrictions or striking testimony becomes ineffective.”⁷⁷

The Defense moved for a second mistrial, raising many of the same issues from the first mistrial request, which the Military Judge also denied.⁷⁸ The Defense continued raising concerns about the fairness of the trial, including concern that the number of objections would lead the members to hold objections against Appellant.⁷⁹ The Military Judge directed the Government to “look [at] and scrutinize[e] [its] evidence for potential impermissible character evidence that would raise an objection” because Trial Counsel continued to elicit impermissible character evidence.⁸⁰

Finally, Ms. Charlie implied Appellant assaulted his girlfriend, Ms. Alpha.⁸¹ The Defense objected and moved for a third mistrial. It pointed out that the Government had investigated allegations by Ms. Alpha and knew this was a MRE 404(b) concern, and that Trial Counsel argued that this was admissible evidence, contrary to the Military Judge’s prior ruling excluding this evidence.⁸²

⁷⁷ R. at 1111; *see also* R. at 1292 (“And I’m concerned about that as well.”).

⁷⁸ Appellate Ex. XCIX; R. at 1539-43.

⁷⁹ R. at 1575.

⁸⁰ R. at 1575.

⁸¹ R. at 1955.

⁸² R. at 1956–58.

The Military Judge sustained the objection, noting he already addressed “domestic violence allegations against [Ms. Alpha] not being admissible in any way.”⁸³ He summarily denied the mistrial motion without conducting any analysis or placing his reasoning on the record.⁸⁴ Outside the presence of the members, he again rebuked Trial Counsel for eliciting this testimony, but took no other action besides telling the members to “disregard [Ms. Charlie’s] answer to that last question that was sustained.”⁸⁵ At that point, there had been thirteen Article 39(a) sessions, forty-four sustained objections, and twenty-seven instructions during Ms. Charlie’s testimony regarding character, propensity, or Fifth Amendment issues.⁸⁶

E. The Government continued to elicit improper character testimony from other witnesses, and then the Panel President asked a question about the subject of the third mistrial motion four days later.

During the next several witnesses, Trial Counsel continued to elicit impermissible character testimony. He elicited inadmissible testimony, with sustained objections and cursory “disregard” instructions, about Appellant’s mental health, jealousy, erratic behavior, misrepresentations, hostile attitude, Appellant’s arrest, consciousness of guilt, Appellant’s “typical” angry behavior, that Ms.

⁸³ R. at 1956–57.

⁸⁴ R. at 1956.

⁸⁵ R. at 1956–60; 1967.

⁸⁶ R. at 1013, 1022, 1024, 1035, 1047, 1058, 1068, 1118, 1185, 1187, 1194, 1219, 1220, 1263, 1275, 1280, 1283, 1341, 1343, 1357, 1364, 1376, 1377, 1389, 1392, 1934, 1941, 1967.

Charlie was a “victim of domestic violence,” and that Appellant was potentially not on authorized leave or liberty during one of the allegations.⁸⁷

The Defense continued to raise concerns about the fairness of the trial and the futility of the instructions on the record.⁸⁸ The Military Judge rebuked Trial Counsel about impermissible character evidence at least four more times.⁸⁹

Four days after the third mistrial request, Trial Counsel called Ms. Alpha to testify.⁹⁰ Her direct testimony focused on Appellant’s conversations with her regarding Ms. Charlie’s feelings about the divorce.⁹¹ No questions about domestic violence or Appellant’s character came up, and the Defense did not cross-examine her.⁹² However, the Panel President submitted a question, asking her “During your

⁸⁷ R. at 2022, 2024–25, 2028, 2032–34, 2043–45, 2058, 2060, 2063–64, 2073–75, 2089, 2092–93, 2120, 2225, 2243–45.

⁸⁸ R. at 2095–99 (“how many more limiting instructions can we have until they don’t work;” “serious concerns about the fairness of this trial, witness after witness;” “defense’s concerns about the fairness of this trial grow with every limiting instruction the Court is required to give;” “fundamentally not a fair trial;” “appellate authority will review whether this is a fair trial”).

⁸⁹ R. at 2033–35 (“you’re weaving in character evidence into this story. . . stay away from anything that might be impermissible character evidence”), 2045 (“we’ve covered this ground previously . . . this wasn’t an issue that we litigated through 404b”), 2049 (“I’ve given a ruling. We’re not getting into that. All right. So let’s move on.”), 2101–02 (“request again before you elicit impermissible testimony that you pause . . . recommend the government ask for a recess to speak with supervisory counsel”).

⁹⁰ R. at 2361–85.

⁹¹ R. at 2361–85.

⁹² R. at 2385.

relationship with the Accused, did he ever make you feel concerned for your safety?”⁹³ The Defense objected on MRE 401, 403, and 404(b) grounds and requested an Article 39(a) session.⁹⁴ The Government did not object.⁹⁵ The Military Judge did not conduct an Article 39(a) session and merely told the members: “I rule on matters of admissibility and I will not be able to ask that question to this witness.”⁹⁶

Later that day, the Military Judge explained to the parties that he sustained the Defense objection, expressing “concern[.]” that “the government did not object.”⁹⁷ He explained the question was “related to an objection from last week that initiated the defense’s third mistrial motion,” and that he sustained the objection.⁹⁸ But he did not issue another curative instruction, provide any explanation or context to the members, or voir dire the Panel President regarding the efficacy of the instruction on that issue from four days earlier.⁹⁹

⁹³ R. at 2385; Appellate Ex. CXXVI.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ R. at 2385.

⁹⁷ R. at 2406–07.

⁹⁸ R. at 2407.

⁹⁹ R. at 2406–07.

Reasons to Grant Review

I, II, III.

The lower court’s opinion directly conflicts with *Pastor*, *Diaz*, and *Taylor* on curative instructions and resulting prejudice; it then wielded *Short* in a way that conflicts with other case law on the standard of review for prosecutorial misconduct.

A. The lower court’s opinion squarely conflicts with *Pastor*, *Diaz*, *Taylor*, and *Short* on curative instructions and voir dire of the members after instructions.

The Government concedes on appeal that “Trial Counsel elicited inadmissible 404(b) evidence and was repeatedly warned by the Military Judge to not elicit such evidence.”¹⁰⁰ But of the forty-four sustained objections and twenty-seven “disregard the last answer” instructions, the lower court focused on only one early objection.¹⁰¹ It did not discuss the other forty-three objections, claiming “no authority” requires that a curative instruction “must be a certain length, or that the military judge must conduct voir dire of the members every time he issues a curative instruction, and we know of none.”¹⁰²

But the question was not whether *every* ruling needed voir dire, it was whether more than one out of twenty-seven of them did. The question was not

¹⁰⁰ Gov’t Answer at 23.

¹⁰¹ *Rodriguezdejesus*, No. 202300262, slip op. at 12.

¹⁰² *Id.* (emphasis added).

whether that one objection was cured; it was whether the prejudicial impact of *all forty-four* objections was cured—that was the number by the third mistrial request. In arriving at its blanket statement that “no authority” governs the quality of curative instructions or voir dire of the members after them, the lower court’s holding directly conflicts with this Court’s opinions in *United States v. Pastor*, *United States v. Diaz*, *United States v. Taylor*, and *United States v. Short*.¹⁰³

As the declarative line of its holding, the lower court stated this Court “specifically stated in *Pastor* [that] instructions like the ones Appellant now complains of can be sufficient to cure the error of improperly elicited evidence.”¹⁰⁴ But that’s not what this Court said in *Pastor*, nor was that *Pastor*’s holding. Rather, in *Pastor*, this Court explained the judge: (1) highlighted the inadmissible testimony, (2) told the members they “must completely put it out of their minds[,]” (3) asked the members whether they could do so, and (4) put on the record that he “took it that each member will completely put that out of his mind and give it no further credit or any consideration whatsoever.”¹⁰⁵

Never once did *Pastor* address a bare “disregard the last answer” instruction with no voir dire, let alone dozens of them. There, with just *one* improper

¹⁰³ C.A.A.F. Rule 21(b)(5)(b)(i).

¹⁰⁴ *Rodriguezdejesus*, No. 202300262, slip op. at 12. (citing *United States v. Pastor*, 8 M.J. 280, 284 (C.M.A. 1980)).

¹⁰⁵ *Pastor*, 8 M.J. at 283.

statement and a stronger instruction with voir dire, this Court nonetheless found the “risk that the court members would not put it aside was too large to be tolerable” and held the judge should have granted the mistrial.¹⁰⁶ The lower court’s use of *Pastor* to support its declarative holding on the central issue of this appeal directly conflicts with this Court’s opinion in *Pastor*.

Similarly, *Diaz*, *Taylor*, and *Short* all point directly to voir dire of the members to ensure they understand curative instructions.¹⁰⁷ Even though *Diaz* and *Taylor*, like *Pastor*, only considered discrete incidents instead of dozens, this Court still pointed to the strong instructions and analyzed why and how they cured (or

¹⁰⁶ *Id.* at 284–85.

¹⁰⁷ *Short*, 77 M.J. at 149-50 (“On more than one occasion, the military judge asked if the members would abide by his curative instructions. . . .”); *United States v. Diaz*, 59 M.J. 79, 92–93 (C.A.A.F. 2003) (encouraging “voir dire to ensure the members not only understand but also will adhere to the curative instructions”); *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (“The military judge concluded by asking the members if they understood the instruction and could abide by it.”); see also *United States v. Short*, No. ARMY 20150320, 2016 CCA LEXIS 670, at *9 (A. Ct. Crim. App. Nov. 17, 2016), *aff’d*, 77 M.J. 148 (C.A.A.F. 2018) (the military judge “found that the ‘panel members indicated readily that they understood’ his instructions).

didn't cure) the prejudice.¹⁰⁸ But in the lower court's view, those cases either did not do that, or it did not matter that they did. That conclusion conflicts with *Pastor*, *Diaz*, *Taylor*, and *Short* and was a misapprehension of the law.

There is an elementary logic to the proposition that: (1) curative instructions must cure the prejudicial information; (2) to do so, the members need to know what testimony the instruction is about; and (3) the members need to confirm they understand and can follow the instruction. If not, the instruction is not curative. In addition, as the *Short* dissent explains, even if some instructions could be curative, the sheer volume of inadmissible evidence eventually becomes impossible to parse out.¹⁰⁹

Pastor, *Diaz*, *Taylor*, and *Short* all stand for the unremarkable proposition that curative instructions must cure prejudice and the members must understand

¹⁰⁸ *Diaz*, 59 M.J. at 88-89 (outlining the eleven-paragraph, detailed group curative instruction, followed by individual voir dire of each member); *Taylor*, 53 M.J. at 197, n.5 (describing the curative instruction that identified the subject, called the statement "improper" and not admissible, explained statements by counsel are not evidence, reinforced that it cannot be considered, reinforced that only admitted evidence could be considered, and "specifically instructed the members to disregard the statement because "there will be no evidence of that matter before the court"); see *Pastor*, 8 M.J. at 283-85.

¹⁰⁹ *Short*, 77 M.J. at 153 (Ohlson, J., dissenting) ("[T]here is a point at which prosecutorial misconduct is so pervasive that instructions from the bench are insufficient to counter the prejudicial effect to the appellant. In other words, at some juncture multiple 'limiting instructions' can no longer be considered 'curative instructions.'").

them. These cases hold that bare “disregard the last answer” rulings with no voir dire are sufficient, let alone dozens of them. The Court should grant review because the lower court concluded otherwise, declaring that “no authority” contradicted its broad legal conclusion.¹¹⁰ That decision will open the floodgates for unchecked prosecutorial misconduct. It leaves no need for curative instructions or mistrials, so long as the judge sustains the objection (or dozens of objections). Prosecutors, like the one here, will be left free to ignore rulings they disagree with and will elicit any testimony they desire the members to hear.

¹¹⁰ *Rodriguezdejesus*, No. 202300262, slip op. at 12.

B. The Court should grant review because the lower court did not review prosecutorial misconduct de novo, conflicting with this Court’s case law and nine federal circuits.

This Court, like nine of the twelve federal circuits, applies a de novo standard of review for preserved issues of prosecutorial misconduct.¹¹¹ While those courts “use a variety of different tests to determine the impact of prosecutorial misconduct on a trial[,]” this Court in *United States v. Fletcher* balanced and adopted those tests as: “prosecutorial misconduct by a trial counsel will require reversal when the trial counsel’s [actions], taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on

¹¹¹ *United States v. Vorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 298 (C.A.A.F. 2018)); *United States v. Santos-Rivera*, 726 F.3d 17, 27 (1st Cir. 2013) (citation omitted); *United States v. Oreckinto*, 774 F. App’x 698, 702 (2d Cir. 2019); *United States v. McComber*, No. 24-4376, 2026 U.S. App. LEXIS 3266, at *24 (4th Cir. Feb. 2, 2026); *United States v. Garcia*, 887 F.3d 205, 209 (5th Cir. 2018) (citation omitted); *United States v. Siefert*, 161 F.4th 379, 397 (6th Cir. 2025) (citation omitted); *United States ex rel. Shaw v. De Robertis*, 755 F.2d 1279, 1282 n.2 (7th Cir. 1985); *United States v. Flores*, 802 F.3d 1028, 1034 (9th Cir. 2015) (citation omitted); *United States v. Stein*, 985 F.3d 1254, 1267 (10th Cir. 2021) (citation omitted); *United States v. Pegg*, 812 F. App’x 851, 857 (11th Cir. 2020) (citation omitted). *But see United States v. Titus*, 78 F.4th 595, 602 (3d Cir. 2023) (reviewing “alleged prosecutorial misconduct for abuse of discretion”) (citation omitted); *United States v. Thao*, 76 F.4th 773, 779 (8th Cir. 2023) (same); *United States v. Moore*, 651 F.3d 30, 50 (D.C. Cir. 2011) (reviewing denial of a mistrial on the basis of prosecutorial misconduct for abuse of discretion).

the basis of the evidence alone.”¹¹² The standard of review for denial of a motion for mistrial, comparatively, is far more deferential: a “clear” abuse of discretion.¹¹³

In *Short*, like here, multiple instances of prosecutorial misconduct led to three motions for a mistrial. While the three-judge *Short* majority analyzed that case through the “clear” abuse of discretion lens, Judge Ohlson and Judge Sparks argued the *Fletcher* test was the “proper standard” to analyze the repeated eliciting of impermissible evidence, as opposed to the heavily deferential mistrial standard.¹¹⁴ As the dissent argued, “an appellant should not be penalized by the imposition of a more stringent standard of review simply because the trial defense counsel appropriately made a motion for a mistrial.”¹¹⁵

The dangers the *Short* dissent foresaw happened here. Before reaching the prejudice or impact question, the lower court applied a deferential review to the prosecutor’s actions—it did not review them de novo.¹¹⁶ It never once stated the de novo standard of review for prosecutorial misconduct, and it proceeded to heavily defer to the Military Judge—in *both* the mistrial *and* prosecutorial

¹¹² *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). Of the circuits that apply the de novo standard, the Fifth Circuit applies an abuse of discretion standard to the prejudice question. *Garcia*, 887 F.3d at 209.

¹¹³ *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015).

¹¹⁴ *Short*, 77 M.J. at 153 (Ohlson, J., dissenting) (citing *Fletcher*, 62 M.J. at 184).

¹¹⁵ *Id.*

¹¹⁶ *Rodriguezdejesus*, No. 202300262, slip op. at 10-17.

misconduct sections of the opinion.¹¹⁷ Both sections are replete with deference to the Military Judge on prosecutorial misconduct questions, before reaching the prejudice question.¹¹⁸ For one conclusion in the prosecutorial misconduct section, the lower court deferred to the military judge’s finding and specifically applied the abuse of discretion standard.¹¹⁹ The lower court carried over this deferential review to the prejudice question, again conflicting with this Court’s precedent and most of the federal circuits.¹²⁰

As *Short* cautioned, Appellant was worse off for having appropriately moved for a mistrial three times. In the prosecutorial misconduct analysis, the lower court deferred to the judge, then mostly focused on other allegations of prosecutorial misconduct—sidestepping the main question in the case: repeated eliciting of impermissible character evidence.¹²¹ In the short portion of the opinion that did address the main issue, the court continued deferring to the judge with

¹¹⁷ *Id.*

¹¹⁸ *See, e.g., id.* at 15, n.52 (heavily deferring to the judge’s conclusion that Capt Tango did not mislead the Court or the defense); *id.* at 16, n.54 (heavily deferring to the judge’s conclusion that Capt Tango’s eliciting of unnoticed Mil. R. Evid. 404(b) evidence was unintentional).

¹¹⁹ *Id.* at 16 (“The military judge, however, found that the Government had met its notice obligations . . . and we do not find his decision to be an abuse of discretion.”).

¹²⁰ *Id.* at 15–17; C.A.A.F. Rule 21(b)(5)(B)(i), (v).

¹²¹ *Rodriguezdejesus*, No. 202300262, slip op. at 15–17.

analysis identical to its deferential mistrial analysis.¹²² While it nominally recited the *Fletcher* prejudice test, it did not apply it de novo or in any distinguishable way from its mistrial analysis.¹²³

This approach is different from other service courts and most federal circuits.¹²⁴ In *United States v. Henderson*, the Army Court of Criminal Appeals (ACCA) analyzed both prosecutorial misconduct and mistrial issues.¹²⁵ It made clear prosecutorial misconduct is reviewed de novo, and it applied that standard for the prosecutor's actions within the mistrial question.¹²⁶ *Henderson* found prosecutorial misconduct and found the curative instruction inadequate.¹²⁷ While *Henderson* did not find error in denying a mistrial, it found prejudicial error in not awarding a sufficient remedy to cure the error.¹²⁸ *Henderson* treated the prejudice tests for prosecutorial misconduct and mistrial separately, unlike the lower court here. And most importantly, *Henderson* applied de novo review to the threshold question of whether the actions were prosecutorial misconduct.

¹²² *Id.* at 13 (pointing to mixed findings as the reason for lack of prejudice for the mistrial request); 15–16 (pointing to mixed findings as the reason for a lack of prejudice of prosecutorial misconduct).

¹²³ *Id.* at 13, 15–16.

¹²⁴ C.A.A.F. Rule 21(b)(5)(B)(iii), (v).

¹²⁵ *United States v. Henderson*, 83 M.J. 735, 746–47 (A. Ct. Crim. App. 2023).

¹²⁶ *Id.*

¹²⁷ *Id.* at 750–51.

¹²⁸ *Id.* at 751.

Generally, most federal circuits apply a version of the ACCA’s approach, which is also in line with *Fletcher*—they conduct de novo review of prosecutorial misconduct for both the actions and prejudice.¹²⁹ Where there is a corresponding mistrial motion or similar request (such as a motion for a new trial), some circuit courts adopt an approach similar to the ACCA’s in *Henderson*. They review prosecutorial misconduct (including prejudice) de novo, and then separately review the trial judge’s decision under an abuse of discretion.¹³⁰

The lower court’s approach skipped this nuance. Instead, it applied a blunt, heavily deferential instrument to the entire review by deferring to the judge on all decisions. And it missed the main question—the cumulative effect of forty-four sustained objections and twenty-seven weak instructions during Ms. Charlie’s testimony. The lower court gave a high level of deference for every prosecutorial

¹²⁹ See, e.g., *McComber*, 2026 U.S. App. LEXIS 3266, at *24 (reviewing both “whether the acts complained of were in fact misconduct, and if so, whether they had the effect of depriving the defendant of a fair trial” de novo); *Siefert*, 161 F.4th at 397, 399 (reviewing de novo and applying a “two-step test” of whether the action was improper and whether it warrants reversal); *Pegg*, 812 F. App’x at 857 (reviewing “the question of prosecutorial misconduct[,]” including whether to reverse, de novo); *Flores*, 802 F.3d at 1034 (same); *Stein*, 985 F.3d at 1268 (same).

¹³⁰ See, e.g., *Siefert*, 161 F.4th at 397, 399 (reviewing prosecutorial misconduct de novo and the district court’s denial of a motion for a new trial for abuse of discretion); *Pegg*, 812 F. App’x at 857 (reviewing prosecutorial misconduct de novo and denial of a motion for mistrial for abuse of discretion. *But see Moore*, 651 F.3d at 50 (reviewing both prosecutorial misconduct and denial of a motion for mistrial de novo when the alleged prosecutorial misconduct “forms the basis for an unsuccessful motion for a mistrial”).

misconduct question *and* for prejudice to a judge who conducted a “relatively brief” hearing on MRE 404(b) and “did not issue a written ruling,” who was ineffective in stopping Capt Tango’s onslaught, and who only gave non-curative “disregard the last answer” rulings with no voir dire.¹³¹

This Court should grant review to articulate the correct the standard of review. If the lower court applied *Short* accurately, then *Short* changed the standard of review for prosecutorial misconduct, which would bring it into conflict with most federal circuits. This would also place the accused in a Hobson’s choice: either move for a mistrial and lose de novo review for prosecutorial misconduct, or do not move for a mistrial and risk appellate courts considering the issue waived or forfeited. But if *Short* did not remove de novo review for prosecutorial misconduct, then the lower court’s decision explicitly conflicts with this Court’s precedent. Both scenarios warrant review.¹³²

¹³¹ *Rodriguezdejesus*, No. 202300262, slip op. at 15–16.

¹³² C.A.A.F. Rule 21(b)(5)(B)(i), (iii), (v).

C. The lower court ignored *Short*'s only limiting principle: the Panel President demonstrated he either could not follow, or did not understand, the instruction.

In *Short*, this Court explained the presumption that the panel followed the judge's instruction holds "absent contrary indications."¹³³ *Short* found "there [was] simply 'no evidence . . . the members failed to comply with the military judge's [curative] instructions[.]'"¹³⁴ The evidence in question there was arguably admissible under MRE 404(b) anyways, which is not true here (as even the Government acknowledges).¹³⁵ Judge Ohlson reiterated in his *Short* dissent that this "standard assumption . . . is not without borders."¹³⁶ It only holds "*absent contrary indications*," which he found "clearly present" there.¹³⁷

Justice Robert Jackson's words from 1947 still ring true today: "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, all

¹³³ *Short*, 77 M.J. at 151.

¹³⁴ *Id.* (quoting *United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014)).

¹³⁵ *Short*, 77 M.J. at 152 ("the danger of unfair prejudice . . . was slight[.]"); *Short*, 2016 CCA LEXIS 670, at *7 (explaining the evidence was "[a]rguably . . . admissible under [MRE] 404(b)" because it involved the "surrounding circumstances of charged misconduct," such as throwing a beer can after a charged incident); Gov't Answer at 23 (acknowledging that "Trial Counsel elicited inadmissible 404(b) evidence and was repeatedly warned by the Military Judge not to elicit such evidence").

¹³⁶ *Short*, 77 M.J. at 154 (Ohlson, J., dissenting).

¹³⁷ *Id.* (emphasis in original).

practicing lawyers know to be unmitigated fiction.”¹³⁸ While the Supreme Court and this Court have continued to apply the presumption that members follow instructions, this presumption is not conclusive; by definition, it is rebuttable.¹³⁹ The only logical way this presumption could be rebutted (in other words, that “contrary indications” could exist) is if a member asks a question about a topic after being instructed to disregard it. That is precisely what happened here.

The Panel President asked about the precise subject of the third mistrial motion.¹⁴⁰ This was four days after the Military Judge summarily denied that motion and issued a cursory, sanitized “disregard the last answer” ruling without a curative instruction or voir dire.¹⁴¹ After informing the members that he wouldn’t ask the question, the Military Judge never readdressed the issue with them or reinforced the prior instruction he gave.¹⁴²

The member’s question was a “contrary indication,” but the lower court brushed this off as an “isolated incident” in the “midst of a 3-week trial.”¹⁴³ But it

¹³⁸ *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citing *Blumenthal v. United States*, 332 U.S. 539, 559 (1947)).

¹³⁹ *Samia v. United States*, 599 U.S. 635, 647 (2023) (applying the presumption that members follow instructions); *Francis v. Franklin*, 471 U.S. 307, 314 n.2, (1985) (explaining the difference between “conclusive” presumptions and “rebuttable” presumptions)).

¹⁴⁰ R. at 1955–60, 1967, 2385.

¹⁴¹ R. at 1955–60, 1967, 2385.

¹⁴² R. at 2406–07.

¹⁴³ *Rodriguezdejesus*, No. 202300262, slip op. at 13.

wasn't an isolated incident. The inadmissible evidence elicited was one of dozens and the member's question was an indication that the bare "disregard the last answer" instructions were lost in that noise. The Panel President's question reflected that he either did not understand or could not follow the judge's ruling. Even the judge acknowledged the question was "related to an objection from last week that initiated the defense's third mistrial motion."¹⁴⁴

This is precisely what happened in *Pastor*: a "court member's interest in [the inadmissible statement] [was] manifest from the fact" that the member asked the question "after the motion for a mistrial."¹⁴⁵ A member asking a question about the precise topic of an objection, instruction, and mistrial motion is a "contrary indication" that the members did not follow the instruction (and of prejudice).¹⁴⁶ If not, *Short* has no limiting principle. It effectively makes the presumption un-rebuttable—particularly where it's virtually impossible to question the members, let alone admit evidence of their thinking.¹⁴⁷ But *Short*'s "contrary indications" language is the limiting principle, and it was met here, just as in *Pastor*. The lower court's holding that this didn't matter because it was just one incident in a three-

¹⁴⁴ R. at 2407.

¹⁴⁵ *Pastor*, 8 M.J. at 284.

¹⁴⁶ *Short*, 77 M.J. at 151.

¹⁴⁷ See, e.g., *United States v. Rosariomartinez*, No. 25-0102, 2026 CAAF LEXIS 485, at *21 (C.A.A.F. June 2, 2026) (explaining the narrow exceptions under the Military Rules of Evidence to admit testimony from members).

week-long trial has no legal import—it was *the* topic of the third mistrial motion. And the Military Judge never cured it or readdressed it with the members, even after the Panel President asked the question.

D. The Court has never addressed the nuance of “mixed findings” presented here, where an overzealous prosecutor overcharges the case, and a strong defense factually disproves weak allegations.

While it’s true that *Short*, and other cases, point to mixed findings as indicative of a lack of prejudice for mistrial motions, this case presents a nuance that this Court has not, but should address.¹⁴⁸ Here, a particularly interested prosecutor with a history of prosecutorial misconduct, ignored the victim’s wishes against charges (and didn’t disclose those wishes), and then personally drafted the charges.¹⁴⁹ He significantly overcharged weak allegations.¹⁵⁰ Appellant did not sit

¹⁴⁸ C.A.A.F. Rule 21(b)(5)(A).

¹⁴⁹ R. at 15; Appellate Exs. LXXXV at 21-25, LXXXVI at 89, 94.

¹⁵⁰ Charge Sheet.

idly by, and instead presented a strong affirmative defense that factually disproved these allegations.¹⁵¹

Courts should not point to earned acquittals for weak or disprovable charges as a reason to excuse a prosecutor's misconduct. Doing so would reward prosecutors for overcharging cases, which this Court should not do. Here, the members acquitted on the allegations that were affirmatively disproved. But that does not mean all these prejudicial errors had zero effect on the one allegation Appellant couldn't necessarily *disprove*. Appellant had a strong defense to the one incident he was convicted of.¹⁵² Just because the accused couldn't affirmatively disprove the allegation does not mean the Government proved guilt beyond a reasonable doubt on admissible evidence alone, without the weight of the impermissible character attacks.

¹⁵¹ R. at 1824–1907 (cross-examination of Ms. Charlie exposing motive to fabricate and confronting her with dozens of text messages concerning her anger, fear of losing Status of Forces Agreement status, TRICARE, and custody of the children), 1985–86 (cross-examination exposing inconsistencies with the 9 April specification), 1992–95 (cross-examination exposing inconsistencies with the 16 December specification), 2109–15 (cross-examination exposing inconsistency with NCIS statement covering December to May timeframe), 1333, 1900, 2149, 2471 (exposing that she could not have answered a call from a touchscreen in the car like she testified she had), 805–11, 1226–27, 1898, 1968–82; 2667–68, Def. Ex. B, C (exposing inconsistency with her testimony about a knife for another charged specification).

¹⁵² See, e.g., R. at 741–43, 795–96, 803, 816, 1389–90, 1636, 1641–42, 2239, Pros. Ex. 12 (exposing inconsistency in evidence an earring during that incident).

There is a spectrum between affirmatively disproving something and proving it happened beyond a reasonable doubt. No case law yet addresses this nuance, and this case presents an opportunity for the Court to clarify. Left unaddressed, the rule would now be that an acquittal on any specification, no matter how weak, excuses any action by the prosecutor and any error by the military judge. That is not, nor should it be, the law.

Conclusion

Appellant requests this Court grant review to (1) resolve the conflict between the lower court's opinion and this Court's opinions in *Pastor*, *Diaz*, *Taylor*, and *Short*; (2) reaffirm that prosecutorial misconduct claims are reviewed de novo in the military; and (3) reinforce that the presumption members understood instructions is rebuttable—particularly where the instructions were voluminous, weak, and there are strong indications the members did not follow or understand them.

Respectfully submitted.

//s//

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Appendix

A. *United States v. Rodriguezdejesus*, No. 202300262, slip op. (N-M. Ct. Crim. App. July 13, 2026).

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 21(b) because it contains 7,500 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

//s//

Benjamin M. Cook
Lieutenant Commander, U.S. Navy
Appellate Defense Counsel

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and opposing counsel on October 1, 2026.

//s//

Benjamin M. Cook
Lieutenant Commander, U.S. Navy
Appellate Defense Counsel

This opinion is subject to administrative correction before final disposition.

United States Navy-Marine Corps
Court of Criminal Appeals

Before
DALY, GROSS, and de GROOT
Appellate Military Judges

UNITED STATES
Appellee

v.

O'Brian RODRIGUEZDEJESUS
Gunnery Sergeant (E-7), U.S. Marine Corps
Appellant

No. 202300262

Decided: 13 July 2026

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Adam M. King (motions, trial)
Benjamin B. Garcia (entry of judgment)

Sentence adjudged 18 May 2023 by a general court-martial tried at Marine Corps Base Camp Foster, Okinawa, Japan, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-3, confinement for 412 days, and a dishonorable discharge.¹

For Appellant:
Lieutenant Benjamin M. Cook, JAGC, USN

¹ Appellant was credited with having served 232 days of pretrial confinement and 1 day of judicially ordered confinement credit.

For Appellee:

Lieutenant Michael G. Osborn, JAGC, USN

Lieutenant K. Matthew Parker, JAGC, USN

Senior Judge GROSS delivered the opinion of the Court, in which Chief Judge DALY and Senior Judge de GROOT joined.

**This opinion does not serve as binding precedent but
may be cited as persuasive authority under
NMCCA Rule of Appellate Procedure 30.2.**

GROSS, Senior Judge:

A panel of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault (a lesser included offense of rape), one specification of domestic violence (assault consummated by a battery, a lesser included offense of strangulation), and one specification of domestic violence (aggravated assault by inflicting substantial bodily harm, a lesser included offense of aggravated assault by inflicting grievous bodily harm) in violation of Articles 120 and 128b, Uniform Code of Military Justice (UCMJ).² The charges and specifications arose out of allegations made by Appellant's wife, Ms. Y.C.C.,³ that Appellant had committed numerous violent offenses upon her over the course of approximately nine months from December 2021 to August 2022. The Government initially charged Appellant with 1 specification of rape by placing Ms. Y.C.C. in fear of death, 1 specification of sexual assault, 1 specification of kidnapping, and 13 specifications of domestic violence. The members acquitted Appellant of all charges and specifications except for the lesser included offenses described above.

Appellant asserts five assignments of error which we summarize as follows: (1) the military judge abused his discretion by denying Appellant's three mo-

² 10 U.S.C. §§ 920, 928b.

³ This opinion will refer to the victim and the minor children of Appellant and the victim by initials. All other names besides Appellant, appellate counsel, and the military judge are pseudonyms.

tions for mistrial; (2) trial counsel committed prosecutorial misconduct requiring reversal; (3) Appellant's conviction for sexual assault is factually and legally insufficient; (4) the military judge abused his discretion in admitting a prior consistent statement of the victim; and (5) cumulative error. Having considered the record as a whole and the pleadings of the parties, we have determined that the findings and sentence are correct in law and fact, and that no error materially prejudicial to Appellant's substantial rights occurred.⁴

I. BACKGROUND

A. Facts of the case

Appellant and Ms. Y.C.C. were married and lived off base near Marine Corps Air Station Iwakuni, Japan, during the time of the charged misconduct. The couple had been married for about 16 years and had two children together, A.R.C. and B.R.C. By the end of 2021, the couple's marriage had begun to deteriorate. Ms. Y.C.C. alleged that in December 2021, Appellant hit her for the first time in their relationship, shoving her and placing his hand on her neck. Ms. Y.C.C. alleged that from December 2021 through August 2022, Appellant engaged in a series of violent offenses against her. Among the allegations were several instances of strangulation, one instance in which she alleged Appellant held a knife to her throat, and one instance in which she alleged Appellant forced her into his car and drove toward a bridge threatening to commit suicide. At the time, Ms. Y.C.C. did not make a report to law enforcement for any of these allegations.

During the time period surrounding Appellant's alleged abuse, the couple separated, and Appellant moved out of the family home and into an apartment. However, Appellant still had access to the family home. Ms. Y.C.C. discovered that Appellant was engaged in an affair with Ms. Alpha, who was also married. In June of 2022, Ms. Y.C.C. went with a friend on a vacation to Korea. While on the trip, Ms. Y.C.C. met First Sergeant (1SG) Sierra, U. S. Army. The two subsequently began a relationship that included sending each other sexually explicit text messages.

On 4 August 2022, Appellant came to the family home unannounced. Ms. Y.C.C. was in the bathroom when Appellant entered the primary bedroom, and except for wearing a bra, Ms. Y.C.C. was naked. Appellant approached her and began to touch her, telling her that he wanted to be with her. Ms. Y.C.C. be-

⁴ Articles 59 & 66, Uniform Code of Military Justice, 10 U.S.C. §§ 859, 866.

came scared because she had recently had her nipples pierced and was concerned with how Appellant would react, since he had told her he did not want her to get the piercings when they were together.

Ms. Y.C.C. told Appellant about the piercings. Appellant then became angry with Ms. Y.C.C., accusing her of having an affair. He forced her onto the bed and began breaking framed decorations in the primary bedroom. As he broke the decorations, Appellant cut himself with a picture frame. During this confrontation, Ms. Y.C.C. warned Appellant that she was considering getting a Military Protective Order (MPO), and Appellant ultimately left the bedroom.

After Appellant left the bedroom, Ms. Y.C.C. texted 1SG Sierra and told him about the confrontation she had just had with Appellant, and sent him a picture of the broken decorations along with what appeared to be blood. In response, 1SG Sierra texted back and urged Ms. Y.C.C. to report Appellant to his command and law enforcement.

Ms. Y.C.C. did not immediately contact the authorities, but returned to the bathroom and began taking a shower. While Ms. Y.C.C. was in the shower, Appellant returned and began groping her. After Appellant left her in the bathroom, he demanded her phone and started going through it. Ms. Y.C.C. was afraid that Appellant would discover her text messages with 1SG Sierra, and she quickly dressed herself.⁵ After Appellant took Ms. Y.C.C.'s phone, he discovered the text messages from 1SG Sierra encouraging her to report Appellant's abuse. Having read that, Appellant became angry. He asked her "You f***** c*****, are you going to report me for real?"⁶ He then grabbed her by the throat and "choked" her very hard.

Ms. Y.C.C. decided at that moment that she was going to fight back because she was afraid that Appellant was going to find the sexually explicit text messages she had exchanged with 1SG Sierra. Appellant then pushed Ms. Y.C.C. to the floor and got on top of her. As Ms. Y.C.C. screamed, Appellant told her "Scream everything you want, because no one is going to hear you. . . . [T]his is your last day. I'm going to f***** kill you."⁷

Ms. Y.C.C. testified that as she and Appellant were struggling, she believed that Appellant was going to kill her. Appellant eventually got off of Ms. Y.C.C. and began going through her text messages with 1SG Sierra. When he reached the first sexually explicit text message between Ms. Y.C.C. and 1SG Sierra,

⁵ R. at 1362.

⁶ R. at 1362.

⁷ R. at 1364–65.

Appellant slapped and punched Ms. Y.C.C. Appellant then continued reading the text messages, and after reading each one would continue to strike her. At one point, Appellant hit Ms. Y.C.C. in the ear, causing significant pain and hearing loss.

After reading all of the messages, Appellant said to Ms. Y.C.C. “This is how you want him to f*** you? Let me show you how he is going to f*** you.”⁸ Appellant then tried to call 1SG Sierra, but he did not answer. Ms. Y.C.C. then kissed Appellant and said “Let’s just forget about this. Let’s try again, now that you know that I have another person. . . . [y]ou finish with [Ms. Alpha]; I finish with [1SG Sierra]; and let’s try again.”⁹ Ms. Y.C.C. testified that she said this “Because that was my only opportunity that I saw to stay alive. I was terrified that if he [continued assaulting me] that it will be my last day.”¹⁰ Ms. Y.C.C. testified that after she proposed sex and kissed Appellant, he took off her clothes.¹¹

After Ms. Y.C.C. kissed Appellant, Appellant penetrated Ms. Y.C.C.’s vulva with his penis, but Ms. Y.C.C. did not respond affectionately to him. After about 2–3 minutes, Appellant stopped penetrating Ms. Y.C.C. and said, “You are not doing this because you love me. You are doing this because you are afraid that I am going to kill you.”¹² Appellant then took Ms. Y.C.C.’s phone and texted SFC Sierra, “You punk, I just finished f***ing her.”¹³

After discovering Appellant’s text to 1SG Sierra, Ms. Y.C.C. sent him another text, telling him what had just happened. In it, she wrote

Hey I am so sorry, this mother f***** came back when I was getting ready to leave the house and found out I was going to the base to report him. I f***** hate him, he got my phone and I forgot to Delete our last conversation from last night. He went to [sic] far this time. He got me naked and want to f*** me after he punched me. He screeshot [sic] us and now have the evidence.¹⁴

⁸ R. at 1372.

⁹ R. at 1382.

¹⁰ R. at 1383.

¹¹ R. at 1383–84.

¹² R. at 1384.

¹³ Pros. Ex. 36.

¹⁴ Pros. Ex. 94.

B. The investigation and trial

After Appellant left the house, Ms. Y.C.C. contacted the authorities and went to the Marine Corps Air Station Iwakuni Branch Health Clinic. At the clinic, Ms. Y.C.C. underwent a physical exam as well as a sexual assault forensic examination (SAFE). The examinations documented injuries to Ms. Y.C.C.'s face and neck, a ruptured ear drum, and the presence of DNA in Ms. Y.C.C.'s vagina that was consistent with that of Appellant. Members of law enforcement interviewed Ms. Y.C.C., and as a result of her allegations, Appellant's commanding officer ordered Appellant into pretrial confinement. The commanding officer also authorized a forensic search of Appellant's cell phone that yielded thousands of text messages between Appellant and Ms. Y.C.C. Many of these messages were in Spanish or a mix of Spanish and English.

Ms. Y.C.C. entered into an attorney-client relationship with Captain (Capt) Smith, a Marine judge advocate who was assigned as her Victims' Legal Counsel (VLC). In the course of his representation, Capt Smith contacted trial counsel, Capt Tango, to discuss Ms. Y.C.C.'s preference regarding disposition of the charges. After that conversation, Capt Smith sent Ms. Y.C.C. a text message, saying,

I just spoke with [Capt Tango]. . . . I explained to him you had a strong desire for [the rape charge] not to be on the charge sheet. I told him it was heavily weighing on you and you did not feel right with that being on there considering your actions during the incident. I explained that this was causing a lot of guilt and we really did not want that specific charge on there.¹⁵

Appellant's counsel became aware of this conversation after Ms. Y.C.C. sent a screenshot of Capt Smith's text message to Appellant's father, Mr. Thomas. Accompanying that text message, Ms. Y.C.C. wrote,

. . . one of the charges that NCIS filed I asked my lawyer to please insist that they remove it, and it is [a] rape charge. I have faith that it will be removed, because he didn't do that to me and I have never accused him of anything they [are] saying. I only told what happened in medical, and they are the ones who have given the name to each incident.¹⁶

¹⁵ Appellant's Mot. to Attach, App'x A, Encl. 1; App. Ex. LXXXVI at 89. We granted Appellant's Motion to Attach on 18 May 2026.

¹⁶ App. Ex. CIX.

After Mr. Thomas provided Ms. Y.C.C.’s message to Appellant, he filed a request for discovery regarding Ms. Y.C.C.’s and Capt Smith’s communications with trial counsel. On 14 February 2023, Captain Tango provided trial defense counsel with a memorandum for the record (MFR), which stated that Capt Smith contacted him in September 2022 and “expressed . . . that [Ms. Y.C.C.] had concerns about testifying [regarding the sexual assault] because she felt embarrassed and guilty (or words to that effect) about what had happened.”¹⁷ Captain Tango stated that Capt Smith informed him that Ms. Y.C.C. did not want to change her preference for case disposition and that Capt Smith did not relay to him any exculpatory information.¹⁸

After receiving Capt Tango’s MFR, the Defense did not file any motion to compel discovery or seek any other relief related to Capt Tango’s communications with VLC prior to trial. In March of 2023, the Government informed the Defense that it had completed a second forensic extraction of Appellant’s cell phone, but that the contents of the extraction were too voluminous to send electronically. Trial counsel made the extraction available for inspection and invited counsel to obtain a copy from the Iwakuni NCIS office. Ultimately, trial counsel sent a physical copy of the extraction to Appellant’s digital forensic examiner in April 2023.

While the Defense did not make any motions relating to the issue of Ms. Y.C.C.’s text chain with her VLC, nor did the Defense file any motions relating to the forensic extraction of his phone prior to trial, the parties did litigate a motion *in limine* pursuant to Military Rule of Evidence (Mil. R. Evid.) 404(b) regarding other allegations of domestic violence and Appellant’s mental health.

Trial began on 28 April 2023. After opening statements, trial counsel believed that many of the text messages contained on Appellant’s phone had become relevant based on trial defense counsel’s opening statement. Trial counsel then provided notice to the Defense and the military judge that the Government intended to introduce those text messages and arranged for a translator to provide certified translations. While the Defense objected to lack of notice, the military judge allowed the Government to use the text messages, subject to their admissibility under the rules of evidence.

The ensuing trial, and Ms. Y.C.C.’s testimony in particular, was not without incident or objection. At one point, as Ms. Y.C.C. was testifying about an

¹⁷ App. Ex. LXXXVI at 94.

¹⁸ App. Ex. LXXXVI at 96.

alleged incident of domestic violence that occurred in December 2022 and trying to explain Appellant's actions, she said, "He's here, you can ask him."¹⁹ The military judge immediately stepped in *sua sponte*, instructing the members to, "... disregard that last comment. Wipe that completely from your minds."²⁰ He then admonished Ms. Y.C.C. in front of the members "Ma'am, please do not make a comment like that in the future."²¹

Ms. Y.C.C.'s examination remained contentious, and in several instances, trial counsel sought to elicit testimony from Ms. Y.C.C. regarding Appellant's demeanor, reactions, and suicidal comments or ideations, eliciting objections from defense counsel. The Government justified the admission of this evidence by claiming it was *res gestae* of the charged offenses. The military judge sustained a majority of these objections and frequently held sessions outside the presence of the members, through the use of Article 39(a) sessions to discuss them with counsel. After one such exchange in which the military judge sustained an objection relating to Appellant's desire to have group sex with Ms. Y.C.C. and another man, the military judge inquired as to what instruction the Defense was requesting. Trial defense counsel responded that the military judge didn't "need to go into what it was about . . . but to disregard the counsel's last question and the witness's answer."²² The military judge gave the requested instruction.²³

Trial defense counsel made three separate motions seeking either a mistrial or dismissal of the charges and specifications with prejudice. The Defense claimed, in part, that the Government was intentionally eliciting inadmissible information and trying to delay the trial. For the first, the military judge found that while there were delays in the presentation of the evidence, much of the delay was due to the Government's misapplication of the *res gestae* doctrine, the evidentiary errors were not intentional, and curative instructions were the appropriate way to handle the missteps that had precipitated the mistrial motion.²⁴

¹⁹ R. at 1035.

²⁰ R. at 1035.

²¹ R. at 1035.

²² R. at 1379.

²³ R. at 1380.

²⁴ R. at 1099–1108.

The second motion was premised largely on the prosecution’s elicitation of impermissible evidence combined with what the Defense alleged were purposeful delay tactics by the Government. However, the military judge again found that the drastic remedies of a mistrial or dismissal with prejudice were not the appropriate remedies. He noted that while the Government could have better prepared its case, he did not believe a mistrial was warranted under the circumstances.²⁵

The third motion for a mistrial was precipitated when Ms. Y.C.C. was asked to explain on redirect examination why she had not reported Appellant’s domestic violence earlier. Ms. Y.C.C. included in her answer that she had told Ms. Alpha about the abuse and asked Ms. Alpha “if she was going through the same thing.”²⁶ The military judge denied the mistrial motion but sustained the Defense objection to the answer. Later, during Ms. Alpha’s testimony, the senior member of the panel proposed a question to her, asking “During your relationship with the accused, did he ever make you feel concerned for your safety?”²⁷ The military judge sustained the Defense objection and told the members, “I rule on matters of admissibility and I will not be able to ask that question to this witness.”²⁸ The Defense did not request any further instruction from the military judge.

After a three-week trial, the parties gave closing arguments and the military judge instructed the panel. The members deliberated for a total of over seven hours prior to reaching findings of guilty only to the lesser included offenses of sexual assault, domestic violence (assault consummated by a battery), and domestic violence (aggravated assault by causing substantial bodily harm) relating to Appellant’s attack on Ms. Y.C.C. on 4 August 2022. They acquitted Appellant of one specification of sexual assault from that day for digitally penetrating Ms. Y.C.C. and of all allegations predating 4 August 2022.

²⁵ R. at 1547.

²⁶ R. at 1955.

²⁷ App. Ex. CXXVI.

²⁸ R. at 2385.

II. DISCUSSION

A. The military judge did not err in denying Appellant's three motions for a mistrial.

1. Law

“The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.”²⁹ The Court of Appeals for the Armed Forces (CAAF) has cautioned that “a mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial.”³⁰ Military judges are enjoined to use extreme caution in granting a mistrial “for plain and obvious reasons.”³¹ “Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions.”³² “A curative instruction is the ‘preferred’ remedy for correcting error when the court members have heard inadmissible evidence, as long as the instruction is adequate to avoid prejudice to the accused.”³³

Assessment of the probable impact of inadmissible evidence upon the court members is always difficult. Sometimes an instruction to disregard the inadmissible evidence is sufficient assurance that it will not be weighed against the accused; other times, the nature of the evidence is such that it is not likely to be erased from the minds of the court members. Each situation must be judged on its own facts.³⁴

²⁹ Rule for Courts-Martial (R.C.M.) 915(a).

³⁰ *United States v. Short*, 77 M.J. 148, 150 (C.A.A.F. 2018) (quoting *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003)).

³¹ R.C.M. 915(a) Discussion.

³² *Short*, 77 M.J. at 150 (quoting *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009)).

³³ *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).

³⁴ *United States v. Pastor*, 8 M.J. 280, 284 (C.M.A. 1980) (citing *United States v. Krokroskia*, 13 C.M.A. 371, 373, 32 C.M.R. 373 (1962)).

“[A] mistrial is viewed as a last resort, only to be implemented if the taint is ineradicable, that is, only if the trial judge believes that the jury’s exposure to the evidence is likely to prove beyond realistic hope of repair.”³⁵

When a military judge denies a motion for mistrial, the CAAF has stated that “[a]bsent clear evidence of an abuse of discretion, this Court will not reverse a military judge’s determination on a motion for mistrial.”³⁶ As we have previously stated, “[n]o bright-line test exists to determine when there is manifest necessity to order a mistrial in a given prosecution.”³⁷ Because the standard for granting a mistrial is very high, we generally defer to the findings of the trial court.³⁸

2. Analysis

We find that the military judge did not abuse his discretion in denying Appellant’s three mistrial motions. Both parties compare this case to *United States v. Short*, where the CAAF found that the military judge did not abuse his discretion in denying three mistrial motions despite multiple sustained objections under Mil. R. Evid. 404(b).³⁹ In *Short*, the CAAF held that the military judge’s issuance of curative instructions and voir dire of the members were sufficient to cure any potential prejudice caused by the inadmissible testimony in a domestic violence case.⁴⁰ Appellant claims that this case presents a more egregious instance of improper testimony and less effective judicial remedies, and we should therefore distinguish *Short*. While we acknowledge that the military judge held more Article 39(a) hearings and sustained more Defense objections to matters under Military Rule of Evidence (Mil. R. Evid.) 404(b) than did the military judge in *Short*, the issue of manifest injustice cannot be decided based solely on a mathematical equation of how many objections were made and sustained.

The question is rather whether the military judge’s instructions were ineffective and the character of the evidence so prejudicial that we can no longer

³⁵ *United States v. Diaz*, 59 M.J. 79, 90–91 (C.A.A.F. 2003) (quoting *United States v. Freeman*, 208 F.3d 332, 339 (1st Cir. 2000)).

³⁶ *Short*, 77 M.J. at 150 (citing *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015)).

³⁷ *United States v. Cabrera*, 83 M.J. 562, 571 (N-M Ct. Crim. App. 2023).

³⁸ *Diaz*, 59 M.J. at 90.

³⁹ 77 M.J. at 150.

⁴⁰ *Id.* at 150–51.

be confident that the members followed the military judge's instructions. We find no prejudicial error for several reasons.

First, the military judge showed a great willingness to hold hearings outside of the presence of the members and sustain objections. He routinely instructed the members to disregard both the question and the answer. Indeed, the statement by Ms. Y.C.C. that Appellant complains of the most (when she said "[Appellant]'s here, you can ask him") drew a rebuke from the military judge in front of the members and a curative instruction without trial defense counsel even objecting.

Second, after the military judge sustained an objection regarding testimony from Ms. Y.C.C. about Appellant's behavior following the alleged domestic violence from 16 December 2021, the military judge brought the members in and issued a curative instruction directing them to disregard all of Ms. Y.C.C.'s testimony about what happened following that offense. The military judge then questioned the panel as to whether they could follow his instructions, and one member asked for clarification regarding other sustained objections. The military judge reiterated his prior rulings, and the members indicated they understood.

Although trial defense counsel was aware that the military judge was willing to engage in this level of curative instruction of the members and conduct this type of voir dire, he never requested the military judge undertake those steps again. Indeed, at one point, when the military judge offered the Defense the opportunity for a more fulsome curative instruction regarding Ms. Y.C.C.'s testimony that Appellant wanted to engage in a threesome with Ms. Y.C.C. and another man, trial defense counsel specifically disclaimed any further instruction beyond telling the members to disregard the testimony.

Despite the fact that Appellant never requested the military judge issue further instructions at trial (and affirmatively requested the military judge not further spotlight the offending testimony on one occasion), he now claims that it was manifest injustice for the military judge not to do so. We disagree. Appellant cites no authority for his proposition that a curative instruction must be a certain length, or that the military judge must conduct voir dire of the members every time he issues a curative instruction, and we know of none. As the Court of Military Appeals specifically stated in *Pastor*, instructions like the ones Appellant now complains of can be sufficient to cure the error of improperly elicited evidence.⁴¹

⁴¹ *Pastor*, 8 M.J. at 284.

This leads us to our third reason that Appellant’s argument fails. Reviewing the record of trial in its entirety, we can affirmatively state that trial counsel’s elicitation of objectionable testimony (and Ms. Y.C.C.’s tendency to occasionally insert such testimony without prompting by trial counsel) did not have an impact on Appellant’s court-martial. Here, as in *Short*, the members returned mixed findings in a domestic violence case in which the Government accused Appellant of a history of domestic violence spanning almost eight months. However, unlike in *Short*, the Government here also presented evidence that tended to corroborate many of Ms. Y.C.C.’s claims of historical abuse including testimony from the couple’s daughter that her mother’s slippers were left on the driveway after Appellant kidnapped her,⁴² a knife found where Ms. Y.C.C. claimed she dropped it after Appellant threatened her with it,⁴³ and text messages that correspond with the dates Ms. Y.C.C.’s allegations of abuse and could be read as apologies from Appellant to Ms. Y.C.C. for striking her.

However, even in light of this corroborative evidence, the members acquitted Appellant of all but the strongest allegations—those that immediately preceded her report. While Appellant challenges the legal and factual sufficiency of his conviction for sexual assault (which we find to be factually and legally sufficient in section C. *infra*), he makes no such challenge to the remaining domestic violence charges for the two domestic violence incidents from 4 August 2022. And we find them sufficient in light of the physical evidence including bruising, DNA evidence, and most telling, Ms. Y.C.C.’s ruptured eardrum.

Appellant claims that there is evidence that the members were unable to follow the military judge’s instructions because the senior member proposed a question to Ms. Alpha inquiring whether Appellant had ever been violent with her. Appellant claims that this proposed question is evidence that the members disregarded the military judge’s instruction for the members to disregard Ms. Y.C.C.’s statement that she had previously asked Ms. Alpha if she had suffered from domestic violence. As an initial matter, we are unpersuaded that this question from the panel president was based on Ms. Y.C.C.’s claim that she asked Ms. Alpha if she had experienced domestic violence.

However, even if Appellant is correct that Ms. Y.C.C.’s single reference to a question she posed to Ms. Alpha initiated this query, we disagree that this one proposed question is sufficient to overcome the general proposition that members are presumed to follow the military judge’s instructions. The question came in the midst of a 3-week trial and was an isolated incident. There is

⁴² R. at 2144.

⁴³ R. at 753–54.

no evidence that the members considered this statement by Ms. Y.C.C. about her question to Ms. Alpha in reaching their verdict.

These mixed findings leave us firmly convinced that the members did not judge Appellant on the basis of evidence the military judge ruled was inadmissible. Regarding the proposed question to Ms. Alpha, her testimony did not relate to the offenses for which Appellant was convicted. Rather, the findings show that the members held the Government to its burden and only convicted Appellant of those specifications they believed were proved beyond a reasonable doubt and only of those offenses for which there was direct corroborating evidence and an immediate report. This included finding Appellant guilty of only domestic violence – assault consummated by a battery when there was direct evidence of bruising near Ms. Y.C.C.’s neck but no documented evidence of petechiae or lowered blood oxygen level as the Defense argued would be present for a charge of strangulation. We therefore find, as did the CAAF in *Short*, “. . . the mixed findings, including several acquittals and convictions based on lesser included offenses, indicate the court members were capable of and did put aside the inadmissible evidence . . .”⁴⁴

B. Trial counsel’s actions did not amount to prosecutorial misconduct requiring reversal of Appellant’s convictions.

1. Law

“Where proper objection is entered at trial, this Court reviews alleged prosecutorial misconduct for prejudicial error.”⁴⁵ “Prosecutorial misconduct occurs when trial counsel ‘overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.’”⁴⁶ Just because a prosecutor commits errors or misconduct does not mean that a conviction must be overturned. Instead, courts must look to the cumulative impact of the misconduct on the rights of the accused.⁴⁷ A prosecutor can commit prosecutorial misconduct by repeatedly eliciting inadmissible evidence at trial.⁴⁸

⁴⁴ *Short*, 77 M.J. at 151.

⁴⁵ *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014) (citing *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

⁴⁶ *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)).

⁴⁷ *Fletcher*, 62 M.J. at 184.

⁴⁸ *Hornback*, 75 M.J. at 160 (“repeated violations of rules of evidence can constitute prosecutorial misconduct.”)

In conducting our prejudice inquiry, we consider 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.”⁴⁹ The CAAF has stated that in some instances, “the third factor may so clearly favor the government that the appellant cannot demonstrate prejudice.”⁵⁰ “The prosecutorial misconduct inquiry is an objective one, requiring no showing of malicious intent on behalf of the prosecutor.”⁵¹

2. Analysis

Appellant claims that Capt Tango committed prosecutorial misconduct in several ways.⁵² First, he repeatedly elicited objectionable testimony in front of the members, including evidence that the military judge ruled was inadmissible. Second, he was dilatory in his discovery responsibilities by providing notice of new text messages throughout the trial. Finally, Appellant claims that Capt Tango withheld evidence by failing to inform the Defense that Ms. Y.C.C. did not want Appellant to be charged with rape and used that charge against Appellant in the plea negotiation process.

We begin by noting, as the military judge did, that the Government’s processing of Appellant’s case certainly could have benefitted from better preparation by trial counsel.⁵³ However, we see several reasons that the severity of trial counsel’s conduct in this case was at least partially mitigated, and, as we will discuss below, we ultimately find that Appellant suffered no prejudice from Capt Tango’s acts.

With respect to trial counsel’s elicitation of testimony that was ultimately ruled inadmissible by the military judge, we first note that none of the parties benefitted from a thorough discussion of myriad pitfalls associated with using Mil. R. Evid. 404(b) in cases of alleged historic and prolonged domestic violence. Here, trial counsel provided trial defense counsel with notice of the

⁴⁹ *Id.* (quoting *Fletcher*, 62 M.J. at 184).

⁵⁰ *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citing *United States v. Halpin*, 71 M.J. 477, 481 (C.A.A.F. 2013)).

⁵¹ *Hornback*, 75 M.J. at 160.

⁵² We decline to address further Appellant’s claim that Capt Tango was untruthful to the trial court when he asked to be excused from the court-martial due to a migraine headache and subsequently filed a bench brief with the trial court the following day. We will not question the integrity of trial counsel on the basis of a claim raised by Appellant at trial, rejected by the military judge, and re-asserted on appeal without any further proof of Capt Tango’s alleged lack of candor.

⁵³ R. at 1092.

404(b) matters the Government intended to introduce at trial, and the Defense filed a motion in opposition.⁵⁴ However, the litigation on the matter was relatively brief, and the military judge did not issue a written ruling on the issue. Most importantly, the members' verdict acquitting Appellant of all historical abuse detracts from Appellant's argument that the members were improperly influenced by the precluded testimony. So even if trial counsel's actions were improper and intended to improperly sway the members, they were ineffective.

Second, we also note that the Government's discovery practices were not as efficient as could be desired, particularly with respect to the discovery of the forensic copy of the data on Appellant's phone. We recognize that the processing of the case was necessarily impacted by the fact that Appellant was placed into pretrial confinement and repeatedly declined to request a continuance. As a result, the Government was forced to perfect its investigation and prepare for trial quicker than it may have liked. While these realities may explain a delayed discovery process, they do not excuse it.

The military judge, however, found that the Government had met its notice obligations regarding the text messages, and ultimately permitted the Government to admit some, but not all, of the text messages in its case in chief, and we do not find his decision to be an abuse of discretion. Also, while Appellant now claims that trial counsel conducted a trial by ambush,⁵⁵ we are not convinced that Appellant was ambushed, or if he was, that he was prejudiced.

First, in Appellant's second motion for a mistrial, Appellant stated,

It would seem that Trial Counsel is operating under the assumption that Defense has not yet translated and read the same 14,000 messages. Trial Counsel would be wrong. The first thing the Defense did when it received the . . . extraction was request its [Digital Forensic Examiner] to format the messages in a spreadsheet, which it then went through great pains to translate. . .⁵⁶

We therefore reject Appellant's claim that trial counsel ambushed him with late discovery given that Appellant's position at trial was that he knew better than the Government what was contained in the forensic extraction. Further,

⁵⁴ The military judge determined that at trial the trial counsel also elicited additional unnoticed matters that were covered by Mil. R. Evid. 404(b). However, he determined that this was not an intentional omission by the trial counsel.

⁵⁵ Appellant's Brief at 60.

⁵⁶ App. Ex. XCIX at 14.

even if we were to accept this claim, we note that the alleged ambush was completely ineffective. The text messages Appellant claims were dumped on him at trial all related to the offenses for which Appellant was acquitted.

Finally, we address Appellant's claim that trial counsel committed misconduct by failing to inform him that the victim did not support the rape charge. Once again, we find that Appellant's complaints ring hollow when considering the record as a whole. While trial counsel certainly would be wise to create and discover a record in an instance where a victim expresses a desire for a particular charge or specification to be dismissed, the victim does not control the charging scheme. It is trial counsel's obligation to review the evidence and determine those offenses that can be proved beyond a reasonable doubt.⁵⁷

Here, although Ms. Y.C.C. expressed guilt regarding her involvement during Appellant's sexual assault of her, there is no evidence that she ever changed her factual narrative of what Appellant did during her discussion with her VLC or trial counsel. As such, her concern regarding that specific charge and specification was not exculpatory, although it may have been mitigating. However, even if Capt Tango was required under the rules to discover this information to Appellant, his failure to do so immediately did not prejudice Appellant because Appellant learned of Ms. Y.C.C.'s views and the VLC's communication from his own father-in-law.

While Appellant now complains that trial counsel and the staff judge advocate sought to induce a plea agreement without disclosing the victim's views, the point is moot because Appellant rejected those plea overtures. To the extent that he believes that the information should have been presented to the convening authority before a referral decision was made, we note that Appellant knew of these communications before pretrial motions were litigated and never sought a new Article 32 preliminary hearing, new advice under Article 34, or a new referral decision. Finally, at trial, Appellant was armed with Ms. Y.C.C.'s communications with both her VLC and with Mr. Thomas and effectively cross-examined her on her own views as to whether she believed she was sexually assaulted. In the end, the members rejected her self-blame, just as we do. While Ms. Y.C.C. may have felt guilt for what happened on 4 August 2022, we are convinced, as were the members, that her acquiescence to sex was not made as a freely given decision, but rather out of self-preservation and to stop Appellant's violent rampage against her.

⁵⁷ See *Manual for Courts-Martial, United States* (2024 ed.), App'x 2.1, Disposition Guidance.

C. The evidence is legally and factually sufficient

1. Law

To determine legal sufficiency, we ask whether, “considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.”⁵⁸ In conducting this analysis, “all of the evidence is to be considered in the light most favorable to the prosecution.”⁵⁹

For offenses that occurred after January 2021, the UCMJ requires that prior to this Court considering whether a conviction is factually sufficient, an appellant must make a specific showing of a deficiency of proof.⁶⁰ A general disagreement with the verdict is insufficient to meet this requirement.⁶¹

We follow the CAAF’s analysis in *United States v. Harvey* and *United States v. Csiti* in assessing the three key components of the amended Article 66(d)(1)(B), UCMJ, factual sufficiency review: (1) Appellant’s specific showing of a deficiency of proof; (2) the Court affording appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence when we weigh the evidence and determine controverted questions of fact; and (3) whether this Court is “clearly convinced that the finding of guilty was against the weight of the evidence.”⁶²

Further, the CAAF explained in *Harvey* that the degree of deference constituting “appropriate deference to the fact that the trial court saw and heard the witnesses” will depend on the nature of the evidence at issue.⁶³ The CAAF specifically stated that “when the CCA can assess documents, videos, and other objective evidence just as well as the court-martial, the CCA might determine that the appropriate deference is low.”⁶⁴

⁵⁸ *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

⁵⁹ *Jackson*, 443 U.S. at 319 (internal citations omitted).

⁶⁰ Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B).

⁶¹ *United States v. Valencia*, 85 M.J. 529, 535 (N-M. Ct. Crim. App. 2025).

⁶² 85 M.J. 127 (C.A.A.F. 2024); 85 M.J. 414 (C.A.A.F. 2025).

⁶³ 85 M.J. at 130.

⁶⁴ *Id.* at 131.

2. Analysis

Appellant claims that the evidence is insufficient because the Government is required and failed to prove that Appellant had the specific intent to induce Ms. Y.C.C. to have sex with him by threatening her. Appellant also claims that the evidence shows that not only did Ms. Y.C.C. consent to the sexual act, but that she initiated it. We reject both assertions.

First, we find no persuasive authority for Appellant’s claim that to prove his guilt for this offense, the Government had to show that he “contemplate[d] placing a person in fear to have sex with them; . . . propose[d] or demand[ed] sex; and the other person [complied] with that demand.”⁶⁵ Indeed, the actual language of the statute states that “threatening or placing that other person in fear means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim . . . being subjected to the wrongful action contemplated. . . .”⁶⁶

But even if we did find that the Government had to show that Appellant had the specific intent to threaten Ms. Y.C.C. with bodily harm to have sex with him, we find that the evidence overwhelmingly shows that this is exactly what happened. Having discovered evidence of communications of a sexual nature by his wife with another man, Appellant repeatedly hit Ms. Y.C.C., perforating her ear drum and causing bruising to her jaw and her neck. He told her that he was going to kill her before saying to her, “this is how you want him to f*** you? Let me show you how he is going to f*** you.”

Terrified that she would die that day, Ms. Y.C.C. begged Appellant not to sexually assault her and she touched his face. She did this because she was terrified that if Appellant did not calm down, he would kill her. After Appellant penetrated Ms. Y.C.C.’s vulva with his penis, he stopped when she was not reacting to the penetration and proclaimed, “you’re only doing this so that I don’t kill you.” This is a textbook description of sexual assault by threatening or placing another person in fear under Article 120(b)(1)(A). Appellant’s conviction is, therefore, legally sufficient.

Further, having found that Appellant has made the requisite showing of a deficiency of proof (by virtue of the evidence that she told her father-in-law that “he did not do that to me” referring to the charge of rape), we are not clearly convinced that the verdict is contrary to the evidence. We give appropriate deference to the members at trial. Here, we afford them high deference in considering the testimony of the witnesses because they heard and saw the witnesses

⁶⁵ Appellant’s Brief at 70.

⁶⁶ Article 120(f)(7), UCMJ, 10 U.S.C. § 920(f)(7).

testify. However, we also consider the text messages that Appellant sent from Ms. Y.C.C.'s phone, the photographs of Ms. Y.C.C.'s injuries, the fact that Ms. Y.C.C. had a perforated eardrum, and the DNA findings from the SAFE exam performed on Ms. Y.C.C., for which we afford less deference.

We are not persuaded by the fact that Ms. Y.C.C. claimed to Mr. Thomas, her father-in-law, that Appellant “did not do that” referring to the rape allegation, nor are we persuaded by her affidavit before us.⁶⁷ While Ms. Y.C.C. does claim that she “initiated the sexual contact” in her affidavit to us, nothing within that affidavit is inconsistent with her testimony at trial. It is entirely consistent with her testimony at trial that she touched Appellant’s face, kissed him, and proposed sex after he threatened to kill her and after he told her he would “show her how [1SG Sierra] would f*** her.” The evidence shows that Ms. Y.C.C.’s actions in acquiescing to sex with Appellant were not done independent of, but rather entirely because of Appellant’s threats of bodily harm.

D. The military judge did not err by admitting a prior consistent statement.

1. Law

We review a military judge’s decision to admit evidence for an abuse of discretion.⁶⁸ “[The] abuse of discretion standard is a strict one, calling for more than a mere difference of opinion—[t]he challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.”⁶⁹ Military Rule of Evidence 801(d)(1)(B) permits admission of prior consistent statements made out of court in two different instances.

Regarding the first exception, the criteria for admissibility are

(1) the declarant of the statement must testify and must be subject to cross-examination about the prior statement; (2) the statement must be consistent with the declarant’s testimony; and (3) the statement must be offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in testifying.⁷⁰

⁶⁷ Appellant’s Mot. to Attach, App’x A.

⁶⁸ *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (citing *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)).

⁶⁹ *United States v. Hendricks*, 76 M.J. 283, 288 (C.A.A.F. 2017) (internal citation omitted).

⁷⁰ *United States v. Frost*, 79 M.J. 104, 110 (C.A.A.F. 2019).

Meanwhile, a proponent offering a prior consistent under the second exception

must satisfy the following: (1) the declarant of the out-of-court statement must testify, (2) the declarant must be subject to cross-examination about the prior statement, (3) the statement must be consistent with the declarant's testimony, (4) the declarant's credibility as a witness must have been “attacked on another ground” other than the ones listed in M.R.E. 801(d)(1)(B)(i), and (5) the prior consistent statement must actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked.⁷¹

If a witness's testimony is attacked on only one ground, “a prior consistent statement offered to rebut that challenge may be eligible for admission under either subparagraph (B)(i) or subparagraph (B)(ii), but not both. . .”⁷² However, if a witness's testimony is challenged on more than one ground (e.g. poor memory and recent fabrication), then a prior consistent statement may be admitted under both subparagraphs of the rule.⁷³ To be admissible as a prior consistent statement, the statement need not be verbatim to the witness's in-court testimony, but only generally consistent.⁷⁴

2. Analysis

We find that the military judge did not abuse his discretion in admitting the text message from Ms. Y.C.C. to 1SG Sierra describing the sexual assault under Mil. R. Evid. 801(d)(1)(B)(i). The military judge found that the “triggering point” for Ms. Y.C.C.'s motive to fabricate was at the time that she reported Appellant's actions to medical providers and law enforcement. Therefore, the military judge found that her text message to 1SG Sierra predated her motive to fabricate and was therefore admissible. The trial counsel also argued that this text message could be admissible under Mil. R. Evid. 801(d)(1)(B)(ii), based on the Defense's impeachment of Ms. Y.C.C. on cross-examination when she told Mr. Thomas that Appellant “did not do that” in reference to the rape

⁷¹ *United States v. Brown*, ___ M.J. ___, No. 25-0181, 2026 CAAF LEXIS 418, at *14 (C.A.A.F. May 12, 2026) (citing *United States v. Finch*, 79 M.J. 389, 396 (C.A.A.F. 2020)).

⁷² *Id.* at *16.

⁷³ *Id.*

⁷⁴ *United States v. Ruiz*, 86 M.J. 75, 82 (C.A.A.F. 2025).

charge. However, the military judge did not accept the Government's proffer under that theory of admissibility.

Appellant takes issue with the military judge's finding that Ms. Y.C.C.'s text message predated her motive to fabricate and urges us to find that it was an abuse of discretion. In doing so, Appellant argues that Ms. Y.C.C. had a motive to fabricate months prior to the sexual assault, and that on 4 August 2023, Ms. Y.C.C. told 1SG Sierra that she was going to base to report Appellant's domestic violence. Appellant also claims that the text message was not consistent with Ms. Y.C.C.'s trial testimony, and that Ms. Y.C.C. was not subject to cross-examination on the statement.

We find that the text message was substantially consistent with Ms. Y.C.C.'s trial testimony. The military judge found that the text message was consistent, except for the part where Ms. Y.C.C. said that Appellant got her naked. We agree, but we also note that at one point, Ms. Y.C.C. did testify that Appellant took off her clothes. Therefore, to the extent that the military judge's finding on that issue was erroneous, it was actually by understating the consistency of the text message. Regardless, the military judge's ruling was not an abuse of discretion.

Although Appellant claims on appeal that Ms. Y.C.C. was not subject to cross-examination on the text message, we note that Ms. Y.C.C. testified and was subject to substantial cross-examination. At trial, Appellant did not challenge the admissibility of the text message on these grounds, so we find the argument waived on appeal. Even if it were not waived though, we would find that Appellant had ample opportunity to cross-examine Ms. Y.C.C. on the text message, including by recalling her to the witness stand if he so desired. The military judge permitted trial defense counsel wide latitude in cross-examining all witnesses in this case.

Additionally, we find the military judge's determination that Ms. Y.C.C.'s motive to fabricate formed when she reported the incidents to law enforcement was not clearly erroneous, and therefore, his admission of the text message was not an abuse of discretion. Although the Defense tried to tie Ms. Y.C.C.'s motive to fabricate far earlier in the alleged abuse and infidelity in the marriage between Appellant and Ms. Y.C.C., the military judge found as fact that her motive to fabricate her sexual assault allegations arose at the time that she reported what Appellant did to her at the time of her report. As the military judge is entitled to substantial deference in admitting a prior consistent statement, we will not substitute our judgement for his on this matter.

Finally, even if the military judge erred in admitting the text message to 1SG Sierra, we would find that the admission of the text message was harmless. The text message was consistent with Ms. Y.C.C.'s testimony at trial, and

her testimony was buttressed by significant corroborating evidence including Appellant's DNA in her genitalia and his admission that he "just finished f***ing" her in his text message to 1SG Sierra. Appellant's claim—that Ms. Y.C.C. consented to this sexual act free from fear of bodily harm from Appellant—is fanciful. Essentially, Appellant would have us believe that Ms. Y.C.C., having been beaten and berated by Appellant, suddenly did not fear that he would harm her and voluntarily agreed to have sex with him. This was despite the fact that all evidence showed the relationship was broken by the time Appellant confronted her in the shower. The Government's case on this specification was strong.

E. Appellant was not denied a fair trial due to cumulative error.

The cumulative effect of all plain errors and preserved errors is reviewed de novo.⁷⁵ "Under the cumulative-error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'"⁷⁶ We will reverse only if we find any cumulative errors to have denied the appellant a fair trial.⁷⁷

In this case, we have presumed error for only one of Appellant's AOE's (and we found that presumed error to be harmless). As a result, the cumulative error doctrine does not apply.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.⁷⁸ The findings and sentence are **AFFIRMED**.



FOR THE COURT:


MARK K. JAMISON
Clerk of Court

⁷⁵ *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) (citation omitted).

⁷⁶ *Id.* (citing *United States v. Banks*, 36 M.J. 150, 170–71 (C.M.A. 1992)).

⁷⁷ *Id.* (citing *Banks*, 36 M.J. at 171).

⁷⁸ Articles 59 & 66, UCMJ.