IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	**BRIEF ON BEHALF**
Appellee	)	**OF APPELLANT**
	)	
v.	)	
	)	**USCA Dkt. No. 18-0372/AF**
PAUL D. VOORHEES	)	
Major (O-4)	)	**Crim. App. No. 38836 (reh)**
United States Air Force,	)	
Appellant	)	

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

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Issues Presented

I. TRIAL COUNSEL'S IMPROPER ARGUMENT

THE AFCCA ERRED IN FINDING NO PLAIN ERROR DESPITE TRIAL COUNSEL'S ARGUMENT ON FINDINGS THAT PERSONALLY ATTACKED MAJ VOORHEES AND TRIAL DEFENSE COUNSEL, COMMENTED ON MAJ VOORHEES' SILENCE, EXPRESSED HIS PERSONAL OPINIONS, BOLSTERED HIS OWN CREDIBILITY, VOUCHED FOR GOVERNMENT WITNESSES, SPECULATED, AND MADE REFERENCE TO FACTS NOT IN EVIDENCE.

II. FAILURE TO STATE AN OFFENSE

THE AFCCA ERRED IN FINDING THAT THE SPECIFICATIONS ALLEGING VIOLATIONS OF ARTICLE 133, UCMJ STATED AN OFFENSE DESPITE THE FACT THAT THEY LACK WORDS OF CRIMINALITY OR A MENS REA.

III. IMPROPER INSTRUCTIONS

PLAIN ERROR OCCURRED WHEN THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS THAT MENS REA WAS AN ELEMENT OF AN OFFENSE UNDER ARTICLE 133.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case under Article 66(b), Uniform Code of Military Justice. This Court has jurisdiction under Article 67(a)(3), UCMJ.

Statement of the Case

On January 6-9, 2015, Maj Voorhees was tried by a general court-martial before officer members at Davis-Monthan Air Force Base, Arizona. Contrary to his pleas, the members found him guilty of one charge and specification in violation of Article 120, UCMJ (sexual assault); one charge and two specifications in violation of Article 133, UCMJ (conduct unbecoming an officer and gentleman); and an additional charge and three specifications in violation of Article 133. JA 314.[1] Maj Voorhees was acquitted of one specification of the additional charge under Article 133.

The members sentenced Maj Voorhees to dismissal, three years of confinement, and total forfeiture of all pay and allowances. JA 315. The convening authority approved the sentence as adjudged. JA 044.

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[1] The Joint Appendix is cited as "JA page number."

The AFCCA found the evidence as to Charge I and its Specification (alleging a violation of Article 120) factually insufficient and set aside those guilty findings and the sentence, but affirmed the guilty findings as to the remaining five Article 133 specifications. *United States v. Voorhees*, ACM 38836 (A.F. Ct. Crim. App. Nov. 23, 2016) ("*Voorhees I*"), JA 019.

Maj Voorhees timely filed a Petition for Grant of Review and filed his Supplement on the due date, February 28, 2017. However, on March 20, 2017, this Court granted the Government's Motion to Dismiss without prejudice based on the argument that there was a lack of jurisdiction (since the sentence rehearing had not yet taken place). *United States v. Voorhees*, 76 M.J. 173 (C.A.A.F. 2017), JA 076.

A military judge sentenced Maj Voorhees to a dismissal and a reprimand after a resentencing hearing that took place on April 3-5, 2017. JA 069. The convening authority approved only the dismissal. JA 065.

The AFCCA affirmed the sentence on its second review of the case. *United States v. Voorhees*, No. ACM 38836 (reh) (A.F. Ct. Crim. App. July 20, 2018) ("*Voorhees II*"), JA 028. Maj Voorhees timely filed a Petition for Grant of Review. This Court granted review on November 13, 2018. JA 001.

General Statement of Facts[2]

Senior Airman HRB, an airborne maintenance technician, met Maj Voorhees in December 2012 during a TDY to Nellis AFB. JA 153-54, 156-57, 160. During this trip the officers and enlisted members from the unit were drinking and socializing together. JA 158. SrA HRB testified that Maj Voorhees made comments to her during that trip to the effect that he found her attractive and wanted to take her back to his room. JA 159-60. She never mentioned these comments to anyone else.

In 2013 SrA HRB and Maj Voorhees deployed to Afghanistan; he was the aircraft commander. JA 155, 168. The crew (four officers and four enlisted) played a game that involved asking questions of a sexual nature. JA 143, 146. Maj Voorhees was charged with conduct unbecoming for his role in these games but the members acquitted him of that allegation. JA 314.

While deployed, the crew communicated with each other while not in the aircraft by using Facebook because there was no cell service. JA 165. SrA HRB testified that she and Maj Voorhees had "personal chats" on Facebook during which, among personal and professional communication, he allegedly asked her whether she

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[2] Although the AFCCA set aside the findings of guilt on the Article 120 allegation, the facts pertaining to that claim are included in this General Statement of Facts because they provide context to the granted issues. Also, the harm from some of the errors pertaining to the sexual assault claim spilled over to and prejudiced Maj Voorhees with respect to the conduct unbecoming allegations.

had cheated on her husband or had sent her husband pictures. JA 165. Although she admits Maj Voorhees never specified that he was asking about nude pictures, she speculated that was the question's meaning. JA 166. She claimed Maj Voorhees asked her to send him pictures. JA 167. She refused and then allegedly deleted those messages at his request. *Id*. She also testified that she and Maj Voorhees "talked about childhood some" but she did not elaborate. JA 165.

The crew returned from Bagram via Baltimore at the end of July 2013. JA 172-73. That night, they spent time eating and drinking alcohol in the hotel lobby together. JA 173-74. Afterwards, SrA HRB walked to her room unassisted and called her husband. JA 147, 177.

According to SrA HRB, Maj Voorhees sent her a text asking if he could come to her room to talk; initially she said no, but then she agreed. JA 179-80. Significantly, she admitted to deleting those text messages because she was concerned that her husband might read them and she agreed that this "might tip off [her] husband that [she] cheated on him." JA 180, 222-23. There was no forensic evidence regarding SrA HRB's cell phone, nor did any agent from the Air Force Office of Special Investigations testify whether such testing was done or what the results of any testing revealed about the text messages between Maj Voorhees and SrA HRB.

SrA HRB let Maj Voorhees into her hotel room and after talking, Maj Voorhees rubbed her hand, and then massaged her back while she lay on the bed. JA 181-82, 184. They then had vaginal sexual intercourse; engaged in small talk and watched television for 20-30 minutes; kissed passionately; he penetrated her with his fingers and then performed oral sex on her; and then they had vaginal intercourse again before going to breakfast with the crew. JA 210-11.

She admitted it was possible that she told AFOSI that she was "okay with the massage," and during the sexual intercourse she moaned in pleasure. JA 225, 189-90, 228. Further, she testified she felt guilty, "like I was cheating on my husband a bit," that she was thinking about her husband and "did feel like I was cheating on him," and that she was worried about her husband finding out about the cheating. JA 190, 217. Maj Voorhees was in SrA HRB's hotel room for approximately two hours. JA 210.

At no time during this encounter did SrA HRB tell Maj Voorhees to stop or say anything indicating a lack of consent. JA 215, 229. Her explanation for this was that she "just wanted it over with." JA 191. He was not violent with her, did not threaten her physically or in any other way, and in fact, was "nurturing." JA 194, 230-32.

Although these events happened in July, she did not tell anyone about them until seven months later, when she told her husband she "cheated on him." JA 196.

He asked her for details, then asked her whether Maj Voorhees raped her; she said yes. JA 200. Only then did she make reports of sexual assault. JA 200.

SrA HRB made a statement to AFOSI and at their request, made a recorded pretext call to Maj Voorhees. JA 200-01. During the call SrA HRB told Maj Voorhees she had not consented to "what happened in Baltimore," and he became noticeably upset. However, at no time did he admit to any nonconsensual behavior. Instead, he asked, "Oh my God, why didn't you say something?" JA 207, 343.

The defense to the sexual assault allegation at trial and at the AFCCA was actual consent or reasonable mistake of fact as to consent. The AFCCA set aside the findings of guilt of the sexual assault, holding, "the Government failed to prove that the defense of mistake of fact as to consent did not exist." *Voorhees I*, JA 008.

Additional facts necessary to resolve the granted issues are below.

Summary of Argument

I. Improper Argument

Trial counsel's repeated and egregious improper argument constituted prosecutorial misconduct and plain error. Trial counsel personally attacked Maj Voorhees (calling him a "pig," a "narcissistic, chauvinistic, joke of an officer," and "sick and perverted") and trial defense counsel (referring to his "misplaced lying" and "imagination"), commented on Maj Voorhees' silence (saying evidence only Maj

Voorhees could rebut was "uncontradicted"), expressed his personal opinions and bolstered his own credibility (the most bold including, "Members, I don't -- I don't go TDY and leave my family 250 days a year to sell you a story. I don't do that," and "I'm not in the business of convicting innocent people, but this man is guilty."), vouched for Government witnesses ("That was his testimony. That was his perception. That was the truth," and "[The complainant is] not lying. It's the truth. It's what happened."), speculated, and made reference to facts not in evidence (arguing that despite the complete lack of any evidence on an important issue of Maj Voorhees' knowledge, "Perhaps he knew about her tragic past."). The military judge not only failed to instruct the members that the argument was improper, she exacerbated the harm by sua sponte (and incorrectly) instructing the members that civilian trial defense counsel's argument was improper.

II. Failure to State an Offense

The specifications did not contain any words of criminality or a mens rea. They therefore did not include all of the elements of the charged offenses and thus failed to state offenses.

III. Erroneous Instructions

The military judge committed plain error when she failed to instruct the members on an element of the offense – mens rea. The members were thus permitted

to convict Maj Voorhees of violating Article 133, UCMJ without any regard to his mental state whatsoever, in violation of the Supreme Court's holding that if a statute is silent as to mens rea, the required mens rea is at least recklessness.

Argument

I. TRIAL COUNSEL'S IMPROPER ARGUMENT

THE AFCCA ERRED IN FINDING NO PLAIN ERROR DESPITE TRIAL COUNSEL'S ARGUMENT ON FINDINGS THAT PERSONALLY ATTACKED MAJ VOORHEES AND TRIAL DEFENSE COUNSEL, COMMENTED ON MAJ VOORHEES' SILENCE, EXPRESSED HIS PERSONAL OPINIONS, BOLSTERED HIS OWN CREDIBILITY, VOUCHED FOR GOVERNMENT WITNESSES, SPECULATED, AND MADE REFERENCE TO FACTS NOT IN EVIDENCE.

Facts Pertinent to Issue I

The Government presented several witnesses to support its theory that Maj Voorhees sexually assaulted SrA HRB. The Defense vigorously cross-examined them, bringing forth evidence supporting the Defense theory that any sexual activity that took place was either consensual or resulted from an honest and reasonable mistake of fact as to consent. Then, Maj Voorhees exercised his right to remain silent, relied upon the presumption of innocence, and rested behind the Government. JA 242.

During opening and rebuttal final arguments, trial counsel made numerous improper comments, detailed below. Trial defense counsel did not object at all, nor

did the military judge interrupt trial counsel or at any time instruct the members that the arguments were improper.

On the other hand, the military judge *did* instruct the members that civilian defense counsel's argument was improper. JA 292. She did this without any Government objection or request for an instruction. The argument at issue involved trial defense counsel suggesting that the Government had failed to prove guilt beyond a reasonable doubt by referring to evidence that the Government could have presented but did not.

For example, in his closing argument trial counsel relied on SrA HRB's testimony that she had consumed several alcoholic drinks and that one of the crew members had commented on how strong the drinks were to argue SrA HRB was "absolutely intoxicated" during the relevant time period. JA 263. However, SSgt Smith testified he walked SrA HRB to her room after the crew had been drinking in the lobby; she was not stumbling or having any other problems walking and did not seem drunk to him. JA 148, 152. Trial defense counsel asked the members to consider why the Government chose not to call other crew members to corroborate SrA HRB's testimony. JA 281.

Also, trial defense counsel asked the members to consider how important it would be to hear from SrA HRB's husband, since he was the one who first used the

term "rape." JA 287. Finally, trial defense counsel asked why the Government failed to present forensic evidence or call "OSI agents" to testify about the text messages. JA 288, 290.

There was no objection from the prosecutor to any of this argument. Immediately following trial defense counsel's closing argument, however, without the trial counsel requesting any additional instructions, the military judge sua sponte stated, "Before I allow government to provide a rebuttal argument, I need to remind you of some of the instructions that I gave. That -- *I don't believe the argument you heard was consistent with all of my instructions*." JA 292 (emphasis added).

She told the members to remember Maj Voorhees was charged with sexual assault by causing bodily harm, re-instructed on mistake of fact and prior inconsistent statements, and finally, told the members, "And my last is to remind you that only matters properly before the court as a whole should be considered. You may not assume or presume that because the government did not present some evidence that that evidence must have been detrimental to its case. You cannot presume or assume that that evidence that was not presented would even be legally admissible in this trial." JA 292-94.

During the Article 39(a) session immediately following rebuttal, trial defense counsel objected to the military judge's sua sponte instruction regarding the missing

witnesses. JA 304. After a lengthy discussion, the military judge declined to instruct the members further on the issue. JA 311.

The trial on the merits lasted for three days; trial counsel's findings arguments comprise 24 pages of the record; and the members deliberated for two hours and 46 minutes. JA 085-88, 251-70, 313-14.

Argument as to Issue I

A. Standard of Review.

Improper argument, a form of prosecutorial misconduct, is a question of law reviewed *de novo*. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018), *reconsideration denied*, 78 M.J. 34 (C.A.A.F. 2018) (citing *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017)). Because there was no objection at trial, the Court will review for plain error. *Id.*

An appellant has the burden of proving plain error. *Id.* at 398 (citing *Sewell*, 76 M.J. at 18). Such error occurs when "(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (citing *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

When analyzing improper trial counsel argument, "[R]eversal is warranted only 'when the trial counsel's comments taken as a whole were so damaging that we cannot

be confident that the members convicted the appellant on the basis of the evidence alone.'" *Id.* at 401-02 (quoting *Sewell*, 76 M.J. at 18) (further citations omitted). Relevant factors to consider include "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* (quoting *Fletcher*, 62 M.J. at 184).

B. Trial Counsel's Arguments Were Improper.

"Trial counsel may prosecute with earnestness and vigor....But, while he may strike hard blows, he is not at liberty to strike foul ones." *United States v. Frey*, 73 M.J. 245, 247 (C.A.A.F. 2014) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Trial counsel commits prosecutorial misconduct when he "oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Fletcher*, 62 M.J. at 178 . Prosecutorial misconduct can occur even without a "malicious intent on behalf of the prosecutor." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014)).

Trial counsel's improper arguments in the instant case fall into several categories which independently, and especially in combination with each other and considering the military judge gave her tacit approval of the argument, constituted reversible error.

1. Personal Attacks on Maj Voorhees and Trial Defense Counsel

Trial counsel explicitly used the following language referring to Maj Voorhees:

- "perverted" JA 253.
- "pig" JA 255.
- "narcissistic, chauvinistic, joke of an officer" JA 297.
- "sick and perverted" JA 255.
- "Disgusting. Disgusting. Deplorable. Degrading. . . .That's the nature of this man." JA 256.
-

Trial counsel explicitly attacked the integrity of trial defense counsel:

- "defense counsel's misplaced lying" JA 297.
- "defense counsel's imagination is not reasonable doubt" JA 296.

Trial counsel may not personally attack the accused, as opposed to arguing reasonable inferences from the evidence introduced at trial. *Fletcher*, 62 M.J. at 183. "[I]t is also improper for a trial counsel to attempt to win favor with the members by maligning defense counsel." *Id.* at 181 . Trial counsel made disparaging comments directed both at Maj Voorhees and his counsel.

The Government's own evidence contradicted trial counsel's characterizations of Maj Voorhees; many of the Government's witnesses testified that at times they engaged in the same or very similar conduct as Maj Voorhees with respect to improper language and conversation (which likely led to the acquittal on Specification 2 of the

Additional Charge regarding game-playing). JA117-18, 125, 135-36. Trial counsel's argument was simply inflammatory name-calling, not based on any evidence introduced at trial but instead, designed solely to malign and degrade Maj Voorhees and his counsel before the members.

Accusing trial defense counsel of lying to the members is a significant allegation, and functions as a direct attack on the credibility of the trial defense counsel and thus Maj Voorhees, even though he elected not to testify. As this Court explained, attacking and disparaging opposing counsel turns the trial into a popularity contest, inviting the members to decide the case based on the attorney they like better, as opposed to the evidence presented. *Fletcher*, 62 M.J. at 181. Moreover, such prosecutorial misconduct also risks convincing the members that if they cannot trust trial defense counsel's characterization of the evidence, an acquittal would conflict with the "true" state of the evidence. *Id.*

The AFCCA erroneously found, "while trial counsel's use of the above adjectives to describe Appellant was perhaps ill-advised, they do not rise to the level of plain error." *Voorhees I*, JA 013. As Justice Blackmun noted many years ago (joined by Justices Brennan, Marshall, and Stevens), when appellate courts do not reverse for such comments, "It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. . . .If prosecutors win verdicts as a result of

'disapproved' remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure." *Darden v. Wainwright*, 477 U.S. 168, 206 (1986) (Blackmun, J., dissenting).

2. Commenting on Maj Voorhees' Silence

Trial counsel used the term "uncontradicted" three times to describe testimony of Government witnesses. JA 259, 263, 267. The AFCCA noted two of these references involved witnesses other than Maj Voorhees and the complainant. *Voorhees I*, JA 013-14. However, Maj Voorhees relied upon the presumption of innocence and rested after the Government rested. JA 242. He had no obligation to call any witnesses. Thus, the argument shifted the burden of proof to the Defense by implying that Maj Voorhees had some obligation to produce a witness who could contradict the "uncontradicted" testimony in the first two instances.

More significant was the use of "uncontradicted" to refer to the testimony regarding what Maj Voorhees said to SrA HRB when they were the only two people in the room – when he left her hotel room after their sexual activity, he allegedly told her to "be more enthusiastic with [her] husband". JA 188, 267. This was a highly improper comment on Maj Voorhees' right to remain silent because he was the only witness who *could* have contradicted SrA HRB's testimony about what he did or did not say that morning.

"It is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense. Furthermore, he is not permitted to comment on an accused's failure to produce witnesses in his behalf." *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990) (citing *Griffin v. California*, 380 U.S. 609, 614 (1965)). Trial counsel impermissibly violated both of these principles. Because the error violated Maj Voorhees' constitutional rights, this Court must reverse unless the Government can show that the error was harmless beyond a reasonable doubt – in other words, that it "did not contribute to the defendant's conviction or sentence." *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). The Government cannot meet this burden.

The AFCCA found this particular comment was not error because trial defense counsel "invited" the comment during opening statements by discussing Maj Voorhees' interview with AFOSI and failed to cross-examine the complainant about the statement. *Voorhees I*, JA 014. The AFCCA further held that any error was harmless because the witness at issue was the alleged victim of the sexual assault conviction that the AFCCA set aside. *Id.* These rulings are in error.

Trial defense counsel did not invite a comment on Maj Voorhees' silence; he merely summarized the statement to AFOSI as an explanation that the activity was consensual. JA 091, 094 None of the comments addressed the statement at issue,

which is the trial counsel's argument: ". . . Be more enthusiastic. Uncontradicted. Be more enthusiastic when with your husband in a few hours." JA 267. As the opening statement indicates, trial defense counsel mentioned the interview only because he anticipated that the Government would introduce it, and he referenced it only to make the point that both parties agreed sexual activity took place that night. JA 091, 094. There was no "invitation."

Whether trial defense counsel cross-examined the complainant about this statement, is, with respect, completely irrelevant. The witness' own testimony about the statement, whether on direct or cross examination, has nothing to do with the propriety of trial counsel's comments that her testimony was "uncontradicted" by the only other person alive who could have contradicted it.

Finally, the AFCCA's determination that this issue was relevant only to the sexual assault allegation disregarded two important facts: 1) the same complainant who alleged sexual assault also is the only witness to three specifications alleging violation of Article 133 – Maj Voorhees was convicted of all three; and 2) by strongly implying that the witness was telling the truth because Maj Voorhees failed to contradict her, trial counsel bolstered her credibility and attacked Maj Voorhees' character, making it more likely that the members would find him guilty of (and punish him more harshly for) the Article 133 allegations.

All three instances of the trial counsel's reference to prosecution witness testimony being "uncontradicted" constituted harmful error.

3. Expressing Trial Counsel's Personal Opinion That Maj Voorhees Was Guilty, Bolstering His Own Credibility, and Vouching for Government Witnesses

Trial counsel's numerous improper comments in this regard include:

a. Arguments that "Maj Voorhees is guilty"

- "[W]ithout a doubt he's guilty." JA 256.
- "[SrA HRB's] misguided guilt doesn't change the fact that he's guilty." JA 269.
- "Members, I don't -- I don't go TDY and leave my family 250 days a year to sell you a story. I don't do that. And I don't stand up here and try to appeal to your emotions. I think I made that clear in talking about the government's presentation of evidence." JA 294.
- "I'm not in the business of convicting innocent people, but this man is guilty." JA 297.

Court-martial panels must reach a decision based only on the facts in evidence and arguments by counsel are not evidence. *Fletcher*, 62 M.J. at 183 . These principles are violated when trial counsel argues facts not in evidence. *Id.* Unsurprisingly, trial counsel never offered evidence regarding the fact he had family, he leaves them behind when he goes TDY to try cases, or that he goes TDY to try cases 250 days a year. This evidence is irrelevant and serves no purpose other than to impermissibly bolster trial counsel's credibility with the members.

Much more troubling, however, the argument is improper because it was intended to convey to the members trial counsel's personal opinion that Maj Voorhees was guilty. Trial counsel's meaning was clear – he would not have left his family to go TDY to prosecute this case unless Maj Voorhees was, in fact, guilty. Certainly this invaded the province of the panel.

This Court found such opinions are also improper because, "when a trial counsel offers her personal views of a defendant's guilt or innocence, as trial counsel did in this case, it may confuse the jurors and lead them to believe that the issue is whether or not the prosecutor is truthful instead of whether the evidence is to be believed." *Id.* at 181.

b. Arguments to the effect of, "You can trust me, I'm qualified and I know the truth"

- "And here's where attention to detail is important. Here's really where the attention to detail -- and I've been doing this a long time. I've been trying cases a long time and I've quickly learned that attention to detail is as important as any other skill in the courtroom." JA 265.

- "But I'm not going to apologize for becoming emotional when talking about a Major who sexually assaulted a Senior Airman. I'm not going to apologize for that." JA 295.

- "Because the *true facts* were clear. The *true facts* were clear that this was forced and never consensual." JA 266 (emphasis added).

- "[A]nd we win. Clearly." JA 296.

- "I was also taught a lesson in wasting time. . . . I'm not going to waste your time." JA 296.

Trial counsel should not attempt to curry favor with the members, as this risks members deciding guilt or innocence based on which lawyer they like, vice the evidence. *Fletcher*, 62 M.J. at 181. Trial counsel's personal opinions and attempts to build his own credibility were outside the record and irrelevant.

c. Arguments to the effect of, "You can trust the Government witnesses, too"

- "Technical Sergeant [BR] is an outstanding airman; an outstanding noncommissioned officer in the United States Air Force." JA 253.

- "That was his [former TSgt ND's] testimony. That was his perception. That was the truth." JA 261.

- "And if there's any doubt in your mind as to that point or the quality of the United States evidence on this charge, rely entirely on Senior Airman [HRB's] credibility. Hang your hat there, because you can. Because that airman is credible. She testified credibly; she told you what happened to her." JA 268.

- "She's [SrA HRB's] not lying. It's the truth. It's what happened." JA 269.

It is improper for trial counsel to express an opinion about the truth or falsity of any witness or any evidence. *Fletcher*, 62 M.J. at 180-81. Moreover, trial counsel's argument to give the benefit of the doubt to the complainant directly contradicts the constitutionally-guaranteed presumption of innocence, the UCMJ, and the military judge's instruction, which mandate, "if there is reasonable doubt as to the

guilt of the accused, that doubt must be resolved in favor of the accused and he must be acquitted." JA 250 (instruction).

Trial counsel told the members they could resolve their doubt in favor of SrA HRB based on *counsel's* personal opinions that she was credible and her testimony was reliable. This conduct is prohibited because it effectively allows trial counsel to present "evidence" to the panel in "a form of unsworn, unchecked testimony [that tends] to exploit the influence of the office and undermine the objective detachment which should separate a lawyer from the cause for which he argues." *Horn*, 9 M.J. 429, 430 (C.M.A. 1980). It is improper for trial counsel to assure the panel members that the Government's witnesses are being truthful and honest. *United States v. Young*, 470 U.S. 1, 8, 18-19 (1985); *Fletcher*, 62 M.J. at 180 ("Improper vouching occurs when the trial counsel places the prestige of the government behind a witness through personal assurances of the witness's veracity.").

There was no evidence that TSgt BR was an outstanding Airman or noncommissioned officer. She may have been, but it was not established by competent evidence admitted at trial, nor was it relevant. The sole purpose of this argument was to vouch for TSgt BR's testimony.

4. Speculation and Reference to Alleged Facts Not in Evidence

Trial counsel argued:

> [Maj Voorhees and SrA HRB] shared information about their personal lives on Facebook during the deployment. *Perhaps he knew about her tragic past*. Perhaps he knew he could take advantage of her.

JA 260 (emphasis added).

Trial counsel must not inject irrelevant matters into argument, such as facts not in evidence. *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007). Nor may he "make arguments that unduly inflame the passions or prejudices of the court members." *Frey*, 73 M.J. at 248 .

Although the AFCCA set aside the sexual assault conviction, therefore mooting the issue of whether evidence of SrA HRB's childhood sexual abuse was admissible (raised below), this improper argument is relevant to the issue of harm. Key to the Government's theory regarding the sexual assault was whether Maj Voorhees *knew* SrA HRB was abused as a child. If he did know, the Government could then argue Maj Voorhees should have known that her lack of resistance was not consent but instead, due to her previous experience. His lack of knowledge supports his defense of reasonable mistake of fact.

Despite the crucial nature of this evidence, the Government failed to present any evidence to the members from any witness establishing that SrA HRB in fact shared

this information with Maj Voorhees. Simply put, this evidence was not before the members. Trial counsel's speculation that "[p]erhaps he knew" of this vital information was wild speculation. When coworkers "share information about their personal lives," that usually involves discussing relationship issues, children, hobbies, and similar topics – not intimate details about being sexually abused as a child. This argument was a deliberate misrepresentation of the evidence offered to mislead the members in a manner that was consistent with the Government's theory of the case, and it was improper. Based on the verdict, it worked.[3] Moreover, it primed the members to believe anything that SrA HRB said, including with respect to the Article 133 allegations, and made the conduct unbecoming allegations seem more egregious in that Maj Voorhees would have been preying on a damaged young girl.

C. The Improper Arguments Constituted Plain Error.

In light of this Court's many cases involving allegations of improper argument since at least 2005 (*Fletcher*), trial counsel's repeated, egregious arguments were plain and obvious error. This misconduct was so damaging that this Court should find it unduly influenced the members and they convicted Maj Voorhees based on the

[3] It is obvious that the AFCCA did not believe that Maj Voorhees knew of her abusive past.

arguments, not on the evidence – and thus prejudiced Maj Voorhees' substantial right to a fair trial.

Applying the relevant factors:

1. The severity of the trial counsel's misconduct was "sustained and severe." *Hornback*, 73 M.J. at 160.

2. Not only did the military judge adopt no measures to cure the misconduct, giving the members the incorrect impression that the argument was proper, she exacerbated the harm by then instructing the members that trial defense counsel's argument was inconsistent with her instructions. This instruction was an incorrect statement of the law and the military judge abused her discretion in giving it. The Defense had challenged the Government's evidence via cross-examination of Government witnesses, specifically with regard to SrA HRB's level of intoxication, the discussion with her husband during which she confessed that she had cheated and he inserted the issue of "rape," and the fact that she deleted several relevant text messages between herself and Maj Voorhees on the night in question from her phone. Trial defense counsel's argument questioning why the Government did not shore up its case after this cross-examination was proper and zealous advocacy. When the Government fails to call a witness who might have relevant testimony to offer, "a possible

inference might be drawn from her unexplained absence that her testimony would not support the Government or that it would be favorable to the accused." *United States v. Roberts*, 10 M.J. 308, 313 (C.M.A. 1981). That is exactly the situation upon which trial defense counsel was commenting in his argument, and it was proper for him to do so to support his argument that the Government did not prove its case beyond a reasonable doubt. The harm from the military judge's silence in the face of trial counsel's improper opening and rebuttal arguments is magnified in the context of her inappropriate, sua sponte rebuke of trial defense counsel and its effect on the members' evaluation of Maj Voorhees and trial defense counsel. In effect, she corroborated trial counsel's plea to the members to trust him and not to believe trial defense counsel.

3. The weight of the evidence supporting the convictions was weak.[4] While the conduct at issue may have been inappropriate or unprofessional, as the Government charged (*see* Issue II, *infra*), it did not rise to a level to meet the definition of "unbecoming" set forth in the Manual, justifying a felony conviction, dismissal, and loss of retirement.

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[4] *See* insufficiency argument Maj Voorhees personally submits pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), at JA 344.

This Court cannot be confident that Maj Voorhees was convicted based on the admissible evidence alone. *Hornback*, 73 M.J. at 160-61. The prejudice extended to *all* of the charged offenses, including the Article 133 specifications, because the members were called upon to evaluate Maj Voorhees' professional and personal character in determining whether his conduct was unbecoming. All of the improper comments contributed to the members' findings that Maj Voorhees was a "bad person" and therefore, his conduct rose to the level of "unbecoming."

D. Conclusion.

The military judge's failure to interject and instruct the members to disregard trial counsel's improper arguments, especially the personal attacks, communicated to the members her implicit approval of the comments. This, in combination with her inappropriate castigation of trial defense counsel, sent a clear message that the members should trust the trial counsel and not the "lying" trial defense counsel. The highly inflammatory, repeated, and completely unprofessional nature of this misconduct extended the prejudice beyond the Article 120 charge and specification and prejudiced the members with respect to the entire case. Maj Voorhees was deprived of his constitutional right to a fair trial.

Plain and obvious error occurred, resulting in material prejudice to Maj Voorhees' substantial rights. This Honorable Court should set aside the findings and the sentence.

II. FAILURE TO STATE AN OFFENSE

THE AFCCA ERRED IN FINDING THAT THE SPECIFICATIONS ALLEGING VIOLATIONS OF ARTICLE 133, UCMJ STATED AN OFFENSE DESPITE THE FACT THAT THEY LACK WORDS OF CRIMINALITY OR A MENS REA.

III. IMPROPER INSTRUCTIONS

PLAIN ERROR OCCURRED WHEN THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS THAT MENS REA WAS AN ELEMENT OF AN OFFENSE UNDER ARTICLE 133.

Facts Pertinent to Errors II and III

Maj Voorhees was convicted of five specifications alleging violations of Article 133. None of the specifications included words of criminality such as "morally unbefitting and unworthy," "unlawful," "indecent," "dishonorable," or "wrongful." Charge Sheets at JA 058-063. Nor do any of the specifications allege a mens rea such as intentionally, knowingly, recklessly, or negligently. *Id.* There was no objection to the sufficiency of the specifications at trial.

Further, the military judge instructed the members regarding the elements of the Article 133 without instructing them that to convict, they must find Maj Voorhees acted with a particular mens rea. JA 243-46. There was no objection.

Argument as to Issues II and III

A. Standard of Review.

1. Sufficiency of a specification

Whether a specification states an offense is a question of law that this Court reviews *de novo*. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015). When defects on the charge sheet are raised "for the first time on appeal," this Court reviews for plain error. *United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012).

2. Instructions

"Whether a panel was properly instructed is a question of law" this Court reviews *de novo*. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). However, when there is no objection to the military judge's failure to give a required instruction, the Court will review for plain error. *United States v. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017). "Under a plain error analysis, the accused has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Id.*

B. The Government Must Allege and Prove Words of Criminality and Mens Rea.

1. Words of criminality

A specification is defective unless it expressly, or by necessary implication, alleges every element of a constitutionally-valid offense. R.C.M. 307(c)(3); *United*

States v. Fosler, 70 M.J. 225, 232 (C.A.A.F. 2011). A legally sufficient charge and specification does the following: (1) contains the elements of the offense, (2) informs the accused of the conduct against which he must defend, and (3) enables the accused to plead and avoid "future prosecutions for the same offense." *Id*. at 229.

Factors that make otherwise constitutionally-protected conduct criminal must be pleaded in the specification. *United States v. Castellano*, 72 M.J. 217, 222 (C.A.A.F. 2013). "The Supreme Court has held . . . that Article 133 is constitutional as applied to members of the armed forces, so long as the accused has received 'fair warning of the criminality' of his or her conduct." *United States v. Brown*, 55 M.J. 375, 382 (C.A.A.F. 2001) (citing *Parker v. Levy*, 417 U.S. 733, 753-56 (1974)). "When the Government makes speech a crime, the judges on appeal must use an exacting ruler." *United States v. Brinson*, 49 M.J. 360, 361 (C.A.A.F. 1998).

None of the specifications contain language such as "morally unbefitting and unworthy," "unlawful," "indecent," "dishonorable," or even "wrongful" – there are no words suggestive of misconduct. The acts alleged, without more, are not necessarily indicative of wrongful or dishonorable conduct, even if alleged as "inappropriate" or "unprofessional." Charge Sheets at JA 058-063. There are administrative means available for the Air Force to punish merely inappropriate or unprofessional words or conduct. "Offensive conduct does not necessarily constitute

criminal conduct." *Brown*, 55 M.J. at 385. Without alleging words of criminality, the specifications fail to state an offense.

2. Mens rea

The fact that a criminal statute fails to specify a required mental state does not mean that none exists. The Supreme Court has repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with it." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (internal quotations and citation omitted). "This rule of construction reflects the basic principle that wrongdoing must be conscious to be criminal." *Id*. (internal quotations and citation omitted).

In *Elonis*, the appellant made threatening communications using Facebook. *Id*. at 2005-06. At trial, Elonis requested that the judge instruct the jury that the Government must prove he intended to communicate a threat. *Id.* at 2007. The judge rejected that request and instructed the jury to apply an objective standard in determining whether Elonis' communications amounted to threats. *Id*. The Supreme Court recognized this as a negligence standard and concluded that negligence is not sufficient to support a conviction for communicating a threat, as it does not require a guilty mind. *Id.* at 2013.

This Court has applied *Elonis* to find that recklessness is the minimum mens rea of some offenses set forth in the UCMJ. *United States v. Gifford*, 75 M.J. 140, 147 (C.A.A.F. 2016); *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017). The holdings in *Elonis* and *Gifford* also emphasize that the mental state requirement must apply to "the crucial element separating legal innocence from wrongful conduct." *Elonis,* 135 S. Ct. at 2011; *Gifford,* 75 M.J. at 147. It was not enough that Elonis knew he was communicating something. *Elonis*, 135 S. Ct. at 2011. Wrongfulness turned on whether that *something* contained a threat, therefore the Government was required to prove Elonis knew his communication was threatening. *Elonis,* 135 S. Ct. at 2011 (emphasis added). Likewise, it was not enough that Gifford knowingly served alcohol. Wrongfulness turned on whether the recipients were under the age of 21. Therefore, the Government was required to prove Gifford was at least reckless with respect to that element. *Gifford,* 75 M.J. at 148.

This Court has *not* had occasion to state what the applicable mens rea is for an offense under Article 133. In fact, no military court has done so, although the issue has recently been litigated in the service Courts of Criminal Appeals. *See, e.g.*, *United States v. Franks,* 76 M.J. 808, 819 (A. Ct. Crim. App. 2017), *review denied*, 77 M.J. 259 (C.A.A.F. 2018), *reconsideration denied*, 77 M.J. 317 (C.A.A.F. 2018) (finding no harm in failure to instruct on mens rea because the military judge instructed that

the conduct must be "wrongful") (citing *United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016)); *United States v. Livingstone*, No. 1448, 2018 CCA LEXIS 477, at *3 (C.G. Ct. Crim. App. Oct. 5, 2018) (finding the issue of what mens rea applies to Article 133 moot after setting aside the specifications on other grounds).

Article 133 without a mens rea requirement criminalizes conduct as long as the accused knows he is doing the act and a reasonable person would find that act unbecoming. This is analogous to the concept that the Supreme Court disavowed in *Elonis*: "Having liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence, and we have long been reluctant to infer that a negligence standard was intended in criminal statutes." *Elonis*, 135 S. Ct. at 2011 (citations and internal quotes omitted). It is reasonable to apply this Court's holdings in *Gifford* and *Haverty* to Article 133, because if an officer engages in conduct that he or she thinks is lawful and not unbecoming, or is not at least reckless with regard to whether a reasonable person would find that conduct to be unbecoming, that officer has not committed a crime. Under the current jurisprudence without applying *Elonis*, however – omitting the mens rea element – that officer could be convicted of violating Article 133, as Maj Voorhees was.

Elonis makes clear that in the absence of evidence that Congress intended for there to be no mens rea, the Government must plead and prove at least a reckless mens rea to obtain a conviction. *See Elonis*, 135 S. Ct. at 2010. Congress knows how to draft a strict liability statute. *See, e.g.*, Art. 120b, UCMJ; 18 U.S.C.A. § 2243. Article 133 is silent as to mens rea. There is no legislative history, either from the enactment of Article 133 or throughout the myriad changes to the UCMJ Congress has enacted in recent years, indicating it intended a strict liability or negligence standard to apply. A minimum mens rea of reckless is required.

C. The Military Judge Must Instruct the Members as to All Elements of an Offense; the Military Judge Committed Plain Error in Not Instructing the Members on the Element of Mens Rea.

The enumerated elements of an offense under Article 133, are: (1) that the accused did or omitted to do certain acts; and (2) that, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman. Art. 133, UCMJ. As discussed above, mens rea also is a required element. The military judge had a duty to instruct the members regarding mens rea because she was required to instruct them on the elements of each offense. *United States v. Davis*, 73 M.J. 268, 272 (C.A.A.F. 2014); R.C.M. 920(e)(1).

Doing or failing to do something is only proscribed under Article 133 if it constitutes conduct that is objectively "unbecoming," which is the crucial element

separating innocent from wrongful conduct. The mental state requirement applies to this second element and the military judge committed error by instructing the members that they could convict if they found Maj Voorhees's behavior amounted to conduct unbecoming without any regard to his knowledge or intent. This is because the same conduct may be unbecoming under some circumstances and not unbecoming under different circumstances. *United States v. Norvell*, 26 M.J. 477, 481 (C.M.A. 1988) ("the obvious fact that whether an act is unbecoming an officer may depend upon the specific circumstances surrounding that act. Communications which are unbecoming an officer under some circumstances may not be unbecoming under others."). The mens rea element is indispensable.

Once the Supreme Court found error in *Elonis*, it ended its analysis. The Court simply held:

> Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error.

Elonis, 135 S. Ct. at 2012. Thus, the Supreme Court appears to have concluded either that under these circumstances testing for harmlessness was unwarranted or that the application of the analysis was so straightforward that the Court omitted it altogether, despite calls from the dissent to remand for a harmless error analysis. *Elonis*, 135 S. Ct. at 2018 (Alito, J. concurring in part and dissenting in part).

Although *Elonis* was decided in June 2015, after the trial of this case in January 2015, this error is plain and obvious based on the law existing at the time of this appeal, which is the appropriate standard to apply. *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010) ("on direct review, we apply the clear law at the time of *appeal*, not the time of trial.") (emphasis added, citation omitted). Maj Voorhees stands convicted only of Article 133 offenses, now on appeal, but the specifications were deficient and the members were not properly instructed. These errors materially prejudiced his substantial rights. Plain error occurred.

D. Conclusion.

The Supreme Court's holding in *Elonis* applies to offenses under the UCMJ. Applying *Elonis*, especially in conjunction with *Haverty* and *Gifford*, the specifications failed to state offenses and the military judge plainly erred in failing to instruct the members that the Government was required to prove a mens rea to convict Maj Voorhees of violating Article 133. This Court should set aside all of the findings and the sentence.

Conclusion

Trial counsel's improper argument constituted prosecutorial misconduct. The specifications failed to state offenses because they omit words of criminality and mens rea. The military judge's instructions were incorrect because they failed to require the

members to find that the Government proved at least a reckless mens rea beyond a reasonable doubt to convict. Despite the lack of objection at trial, all three of these errors were plain, obvious, and prejudicial. This Court should set aside all of the findings and the sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This Brief complies with the type-volume limitation of Rule 24(c) because: This Brief contains 8235 words.
2. This Brief complies with the typeface and type style requirements of Rule 37.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was sent via email to this Honorable Court and the Director, Air Force Government Trial and Appellate Counsel Division, on December 13, 2018.

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