IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	USCA Dkt. No. 18-0372/AF
Major (O-4) PAUL D. VOORHEES, USAF *Appellant.*	)	Crim. App. No. 38836

FINAL BRIEF ON BEHALF OF THE UNITED STATES

ANNE M. DELMARE, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35989

JOSEPH KUBLER, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33341

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

JULIE L. PITVOREC, Col, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 31747

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

ISSUES PRESENTED

I.

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

II.

WHETHER 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.

WHETHER 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 (AFCCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally correct. At trial, Appellant was charged with 6 specifications of conduct unbecoming an officer and a gentleman. (JA at 58-63.) Of those specifications, the members convicted him of five. (JA at 314.) Those five specifications alleged that Appellant:

> Specification 1 of Charge II: ask[d] [SrA HB], inappropriate questions, to wit: "Have you ever cheated on your husband?", "Have you ever sent him pictures?", and "Can I have pictures of you?" or words to that effect.
>
> Specification 2 of Charge II: massage[d] the back of [SrA HB].
>
> Specification 1 of the Additional Charge: ma[de] to [SrA HB], an inappropriate statement or question, to wit: "I would like to take you back to my room," or words to that effect.

> Specification 2 of the Additional Charge: sen[t] unprofessional text messages to [Capt MQ], to wit: "What I want to say could end my career and marriage." "Your (sic) a very beautiful woman and I would love to be close to you." "What's your definition of cheating?" "So if I asked what color panties you were wearing?" or words to that effect.
>
> Specification 4 of the Additional Charge: sen[t] unprofessional text messages to [TSgt BR], to wit: "This is about to become a game to see what else I can say that will slip by you." "Mind if I ask u (sic) a couple personal questions?" "What I want to say could end my career so I just want to make sure you can keep what I say between us because you seem really cool?" "Oh, really? What's under there?" "I've had a crush on you." Or words to that effect.

(JA at 58-63.)

STATEMENT OF FACTS

During a deployment to Afghanistan between July and October 2012, Appellant (then a captain) was the copilot, but also the highest ranking member on his crew. (JA at 99.) TSgt BR, a female member of Appellant's crew, described the culture of the aircrew during the deployment as "vulgar," every flight having "sexual" conversations, and these lewd conversations, instigated by Appellant, contributed to her deployment being the "worst experience [she] had in the military." (JA at 104-106, 108-109.) TSgt BR "didn't want to be alone with [Appellant]"; because of his comments she did not know what he might do if they were alone together. (JA at 107.)

Shortly prior to departing for deployment, TSgt BR was the resource advisor tasked to oversee administrative matters for the deployment. (JA at 111.) At that time, Appellant was the senior member of the crew, as the aircraft commander was forward-deployed. (JA at 110-111.) A day or two prior to the deployment, TSgt BR responded to a text from Appellate about the status of administrative pre-deployment matters. (JA at 112-113, 326-327.) Appellant then apologized for previously calling TSgt BR "hun," to which TSgt BR wrote "[n]o worries about the message, I didn't notice anything!" Appellant responded by writing "this is about to become a game to see what else I can say that will slip by you." (JA at 328.)

Shortly thereafter, while in route to Afghanistan, the crew was seated in a bar at the airport, when Appellant texted TSgt BR "you mind if I ask u [*sic*] a couple of personal questions?" "First off what I want to say could end my career so I just want to make sure your [*sic*] can keep what I say between us because you seem really cool." Appellant went on to ask TSgt BR, "what's under there," and then later texted TSgt BR, "Sorry if that was too much. I apologize but I've always had a crush on you." (JA at 113-114, 330-332.) These messages were sent the same day TSgt BR had been introduced to Appellant's wife at the Airport. (JA at 116.)

During that same deployment, Capt MQ, then-First Lieutenant MQ, was the navigator for Appellant's crew. (JA at 122.) Capt MQ described the crew's culture as "very sexually explicit in nature," and Appellant "was at the center point of the [. . .] sexually explicit conversations." (JA at 123-124.) These conversations caused Capt MQ to lose a lot of respect for Appellant. (JA at 133.) Several months after the deployment, in January of 2013, Capt MQ went TDY to Joint Base Lewis-McChord with a group that included Appellant. (JA at 127-128.) One night during the TDY, Capt MQ went to dinner and then a bar with Appellant and another officer. (JA at 128-129.) When the other officer went to the restroom, Appellant said to Capt MQ words to the effect of "do you mind if I say something," and then proceeded to tell Capt MQ she was beautiful and he admired her work ethic. (JA at 129.) Capt MQ felt very uncomfortable, stopped drinking, and wanted to go back to the hotel. (JA at 129.)

During that same week, Capt MQ received text messages from Appellant asking "may I say more in confidence" . . . "I just want you to know what I want to say to you could end my career and marriage. Are you really able to flip the switch between professional and not." (JA at 130-132, 333). Appellant went on to text, "[y]our [*sic*] a very beautiful woman and I would love to be close to you without interfering with your relationship." (JA at 334.) After responding that she does not cheat, Appellant asked "what is your definition of cheating?" (JA at 335.)

Despite MQ's response that cheating was anything sexual or emotional, Appellant wrote "if I asked you what color panties you were wearing? Is that to [*sic*] far?" (JA at 336.) Apparently realizing the circumstances he found himself in, Appellant ended the conversation with "…I hope I can trust you." (JA at 337.)

Appellant and Capt MQ were set to deploy again in March of 2012, with Appellant being the aircraft commander and Capt MQ his navigator. (JA at 131.) Capt MQ testified she was "disgusted" by these text messages from Appellant. (JA at 132.) These messages made Capt MQ lose "every ounce of respect that [she] had for [Appellant]," and she requested her commander remove her from their upcoming deployment. (JA at 133.) Ultimately, she was not removed, but instead leadership exchanged Appellant with a different aircraft commander. (JA at 143.) Appellant later apologized to Capt MQ for these messages. (JA at 138.)

In December of 2012, SrA HB had her first interaction with Appellant while TDY to a weapons school at Nellis Air Force Base, Nevada. (JA at 156.) While in downtown Las Vegas for dinner with the crew, Appellant commented to SrA HB that he found her attractive, and then later commented that he wanted to take SrA HB to his room. (JA at 156-158.) This made SrA HB feel uneasy, as she felt it wasn't something he should have said as a married officer. (JA at 159, 170.)

In 2013, Appellant deployed to Afghanistan as the aircraft commander. (JA at 155.) Twenty-one year-old SrA HB was the only female and the junior enlisted

member of his crew. (JA at 144,155, 168.) Again the crew engaged in vulgar and sexual conversations. (JA at 162.) SrA HB observed Appellant and his co-pilot degrading women during these conversations. (JA at 163.)

During the 2013 deployment, Appellant sent SrA HB private messages through Facebook. (JA at 165.) Initially, Appellant would message SrA HB professional things and check on her well-being. (JA at 165.) Then he began asking SrA HB questions like if she ever cheated on her husband or if she sent her husband pictures. (JA at 165.) From the context of these conversations, SrA HB understood Appellant to be talking about nude pictures. (JA at 166.) Appellant complained to SrA HB that his wife was not sending him pictures, and told SrA HB "his wife was a saint because she forgave him multiple times for cheating on her." (JA at 165-166.) This evolved into Appellant asking SrA HB to send him pictures, and when she declined, he apologized and asked her to erase the messages because they could get him in a lot of trouble. (JA at 166-167.) At that time, SrA HB viewed Appellant as a father figure, but not someone she wanted to be alone with or would trust outside work. (JA at 169.)

At the end of the deployment, the crew stopped in Baltimore on the way home. (JA at 173.) Appellant arranged for food and alcohol to be brought to the hotel for the crew. (JA at 174.) SrA HB had approximately 5 or 6 mixed drinks, some she poured for herself, and some Appellant poured for her. (JA at 174, 176.)

After returning to her room that evening, SrA HB received a text message from Appellant asking to come to her room. (JA at 179.) SrA HB initially declined, but Appellant said he wanted to talk to her and wouldn't "get this opportunity again." (JA at 180-181.) SrA HB eventually agreed, and Appellant came to her room and sat on a chair complimenting SrA HB while she sat on the bed. (JA at 181.)

Appellant eventually moved to the bed, removed his shoes, and began rubbing SrA HB's hand. (JA at 182.) She pulled away, and Appellant told her to relax, and continued rubbing her hand. (JA at 182.) Appellant continued rubbing SrA HBs body, then rolled her over onto her stomach and massaged her back under her shirt. (JA at 184.) SrA HB was uncomfortable and tense, while Appellant continued to tell her to relax. (JA at 184.) Appellant laid beside SrA HB, and then straddled her. (JA at 184.) Appellant then pulled-off SrA HB's bra and shirt. (JA at 185.) SrA HB told Appellant they "couldn't do this" and said they were both married. (JA at 185-186.) Appellant responded "don't worry; nothing's going to happen." (JA at 185.) Appellant continued to massage SrA HB, continued to tell her to relax, and then engaged in sexual intercourse with SrA HB. (JA at 187.)

Appellant eventually got up, got dressed, told SrA HB "not to feel guilty and be more enthusiastic with her husband" and then Appellant left. (JA at 188.) Later that day when they arrived home, Appellant made a point to introduce SrA HB to his wife and two daughters at the airport. (JA at 195.)

Approximately 6 months later, SrA HB reported the incident to law enforcement. (JA 200-201.) Several days later, SrA HB conducted a pretext phone call with Appellant. (JA at 202.) SrA HB asked Appellant about the incident in Baltimore, and Appellant stated "you've got me scared." (JA 343.) When asked about his opinion on the incident, Appellant stated "I feel like [. . .] I betrayed you. I feel like I [. . .] had your respect until that day." (JA at 343.) Appellant asked SrA HB if he was in trouble. (JA at 343.) Appellant also stated numerous times during the phone call, "oh my God," and commented "my life is destroyed." (JA at 343.) SrA HB confronted Appellant by saying, "when you were [. . .] massaging my back, you promised nothing would happen." (JA at 343.) Appellant responded, "You're right, I did" and "this is going to go all the way to my command, and I'm going to be dead." (JA at 343.)

After the pretext phone call, Appellant texted SrA HB, asking her "intentions so [he would] know how to prepare [his] daughters?" and "should I expect legal?" (JA 339.) Appellant asked if SrA HB was intending to go to leadership, because "If so, I will need to start bringing my wife home from deployment, stop packing for Little Rock, and start preparing for confinement." (JA 341.)

SUMMARY OF THE ARGUMENT

1. Comments made by trial counsel during argument on the merits did not amount to plain error or prejudice.

Nothing in trial counsel's closing argument on the merits constituted plain error. Albeit at times frank and abrasive, trial counsel's closing arguments were mostly proper comment on the evidence presented, and any comments that arguably crossed the line were not so improper as to amount to plain error. Additionally, trial counsel's rebuttal arguments were proper response to arguments raised by trial defense counsel during his closing argument. None of the comments made by trial counsel drew objections from trial defense counsel, and Appellant did not meet his burden of showing comments by trial counsel amounted to plain error. Therefore, Appellant is not entitled to relief.

Nevertheless, even if this Court determines plain error occurred, Appellant has not demonstrated prejudice. The strength of the government's case alone should preclude a finding of prejudice. Concerning the conduct unbecoming specifications, neither at trial nor on appeal has Appellant challenged that the underlying conduct actually took place.[1] The specifications concerning

[1] Rather, in opening statement, trial defense counsel stated "we're not standing here this week trying to say [Appellant] is a saint. You're going to hear he cheated on his wife; he hit on women, a lot of women. He made comments twice; he made sexual jokes; he did things of that nature. Those facts are not in dispute." (JA at 88.) During findings argument, trial defense counsel then argued, "should he have been massaging her? Absolutely not; he's a married officer." (JA at 90.)

Appellant's behavior towards Capt MQ and TSgt BR were corroborated by text messages. Additionally, evidence of Appellant's contact with SrA HB was clear and corroborated by the pretext phone call with Appellant. SrA HB's testimony was strong and was not undermined by cross-examination. The disgraceful and dishonorable nature of Appellant's conduct was apparent. This Court can be confident that Appellant was convicted based off the evidence alone.

2. The specifications alleging violation of Article 133, UCMJ, each state an offense because the language of the specifications adequately depict actions that constitute conduct unbecoming an officer and a gentleman sufficient to separate lawful conduct from unlawful conduct.

All five specifications alleging conduct unbecoming an officer in violation of Article 133, UCMJ, state an offense. First, all specifications contained the two required elements of the offense. The law does not require additional words of criminality, beyond stating 1) specific conduct occurred, and 2) that behavior amounted to conduct unbecoming of an officer and a gentleman. Second, the specifications informed Appellant of the specific acts that he must defend against. Finally, given the specificity of the acts alleged, the specifications will bar future prosecutions for the same offenses.

In this case, all relevant charges and specifications alleged Appellant engaged in conduct of a sexual nature with military members junior in rank to him, and that the conduct "under the circumstances, was unbecoming an officer and a gentleman." The government proved beyond a reasonable doubt the conduct was

criminal by demonstrating the behavior was "dishonoring" or "disgracing" the person as an officer.

3. The military judge properly instructed the members on each element of the charges and their specifications.

Conduct unbecoming an officer under Article 133, UCMJ, is a general intent crime that does not require additional language in order to separate wrongful conduct from innocent conduct. The military judge properly instructed the members on all elements of the offense, and any failure to provide a more specific instruction on mens rea did not result in error.

Even if this Court were to determine Article 133, UCMJ, offenses require a minimum mens rea of "recklessness," as proposed by Appellant, or the military judge should have provided more detailed instruction on general intent, any error in instructing the members was harmless beyond a reasonable doubt. The facts in this case still overwhelmingly suffice a higher standard of "recklessness." Appellant had failed to demonstrate prejudice.

ARGUMENT

I.

TRIAL COUNSEL'S ARGUMENT IN FINDINGS, WHICH DREW NO OBJECTIONS FROM DEFENSE, DID NOT AMOUNT TO PLAIN ERROR. EVEN IF THIS COURT FINDS THAT CERTAIN PORTIONS OF TRIAL COUNSEL'S ARGUMENT AMOUNTED TO PLAIN ERROR, APPELLANT HAS NOT DEMONSTRATED PREJUDICE.

Standard of Review

Allegations of improper argument and prosecutorial misconduct are reviewed de novo. United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F 2018) (*citing* United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017)). If proper objection is made, this court reviews for prejudicial error. Id. (*citing* United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005)). If no objection is made, "appellant has forfeited his right to appeal and [appellate courts] review for plain error." Id. (internal citations omitted.) Appellant has the burden of proof under plain error review. Id.

Statement of Facts

The relevant facts for this issue are primarily contained in the findings arguments and rebuttal argument of counsel. (JA at 251-297.) The challenged portions of the argument are listed below, followed by the corresponding analysis. As noted by Appellant, none of the following arguments drew an objection at trial. (App. Br. at 12.)

Law

Trial counsel is "charged with being as zealous an advocate for the government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 266 (C.M.A. 1986). In his arguments, trial counsel "may strike hard blows, [but] he is not a liberty to strike foul ones."

Sewell, 76 M.J. at 18, quoting Berger v. United States, 295 U.S. 78, 88 (1935). In this regard, it is appropriate for trial counsel "to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation but on the argument as 'viewed in context.'" Baer, 53 M.J. at 238 (*quoting* United States v. Young, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. Additionally, "If every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Id. (*quoting* Dunlop v. United States, 165 U.S. 486, 498 (1897)). To that end, courts have struggled to draw the "exceedingly fine line which distinguishes permissible advocacy from impermissible excess." Fletcher, 62 M.J. at 183 (internal citations omitted).

"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." Sewell, 76 M.J. at 19 (internal quotation marks omitted). Such conduct "can be generally defined as action or inaction by a

prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." Andrews, 77 M.J. at 402 (internal citations omitted).

While Trial Counsel may argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence, he may not inject his personal opinion into the panel's deliberations, inflame the members' passions or prejudices, or ask them to convict the accused on the basis of criminal predisposition. *See* United States v. Burton, 67 M.J. 150, 153 (C.A.A.F. 2009).

"Plain 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." Andrews, 77 M.J. 393, 402. (citations omitted). Under a plain error review, the court considers whether there was prejudicial error, and relief will be granted if the trial counsel's misconduct "actually impacted on a substantial right of an accused." Andrews, 77 M.J. 393, 401-402 (internal citations omitted). Reversal is warranted only "when the trial counsel's comments, taken as a whole, were so damaging that [this Court] cannot be confident that the members convicted the appellant on the basis of the evidence alone." Id.

In evaluating counsel's argument, this Court has held its decision need not depend on whether any of trial counsel's arguments were, in fact, improper if Appellant has not met his burden of establishing the prejudice prong of the plain

error analysis. United States v. Erickson, 65 M.J. 221, 224 (C.A.A.F. 2007). In Fletcher, this Court set out three factors to guide its determination of the prejudicial effect of improper argument: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction[s]." 62 M.J. at 184.

"[T]he third [Fletcher] factor [alone] may so clearly favor the government that the appellant cannot demonstrate prejudice." Sewell, 76 M.J. at 18-19 (even assuming that trial counsel's misconduct was severe and the military judges' instructions were insufficient, the third factor was held to be dispositive where the appellant admitted to being at the scene of the crime in "compromising circumstances."); United States v. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013) (finding appellant was not prejudiced by the military judge's inaction or defense counsel's failure to object, due to the ample support of evidence to the finding of guilty.) The lack of defense objection is some measure of the minimal prejudicial impact of the trial counsel's argument. United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001).

Further, it is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct." Andrews, 77 M.J. at 402 (internal citations omitted). In Fletcher, the court applied five factors to determine the severity of the prosecutorial misconduct.

62 M.J. at 184-85. (1) the raw numbers -- the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge. Id.; *See* Andrews, 77 M.J. at 402-403.

Analysis

Appellant alleges various words used by trial counsel amounted to improper argument, none of which trial defense counsel objected to at trial. Some of the arguments at issue are directly related to Charge I, the sexual assault charge, which the AFCCA reversed on the basis of factual insufficiency. (JA at 19.) Nevertheless, although at times perhaps ill-advised, trial counsel's arguments were reasonable inferences fairly derived from the evidence. The specific language Appellant now objects to is discussed in turn below. Unless noted otherwise, the emphasized language below is the specific language Appellant alleges is error.

1. Adjectives used by trial counsel to describe Appellant's behavior were fair argument based on the evidence presented at trial.

During his findings argument, trial counsel argued the following:

> Technical Sergeant [BR] is an outstanding airman; an outstanding noncommissioned officer in the United States Air Force, and she wants a staff job; not to fight for her country deployed overseas, but instead to simply have a staff job so that she never has to deal with **perverted**

> individuals like [Appellant] again. This was more than inappropriate; this was disgusting. This disgraced the officer corps.

(JA at 253)

> [. . .]
>
> And you heard the more vulgar term that he used. He's willing to degrade his own wife by talking about her need for breast augmentation in order to try to close the deal with other women. Luckily, those were women who knew better. Those were women like [Capt MQ] and [TSgt BR] who knew what they were looking at. Not an officer, not a gentleman, but a **pig**.

(JA at 255)

> [. . .]
>
> She didn't have the experience of a commissioned officer, spending four years at an institution of higher learning, like Captain [MQ] did. She didn't have the experience to know how to identify a **sick and perverted** man like this.

(JA at 255).

> [. . .]
>
> [W]hen he was back on home station he said, "I should have had a stack of EO complaints by now and I should have lost my career. Oh, and there goes [TSgt BR].
>
> **Disgusting. Disgusting. Deplorable. Degrading.** Absolutely dishonoring. That's the nature of the conduct that the accused committed. **That's the nature of this man**. And that's why without a doubt he's guilty.

(JA at 256.)

Additionally, during rebuttal argument trial counsel comment,

> The last question I want to leave you with is this: Why would she consent? She's married to the man that she's always been with; her high school sweetheart. She's on a second deployment, 100 days away from her family. And within hours of arriving in Tucson, Arizona, she's going to allow this **narcissistic, chauvinistic, joke of an officer** to penetrate her from behind? No way.[2]

(JA at 297.)

Disparaging comments directed at an accused can be improper when the language amounts to "more of a personal attack on the [accused] rather than a commentary on the evidence." Fletcher, 62 M.J. at 183. Not all characterizing comments directed at an accused are improper. *See* United States v. Cron, 73 M.J. 718, 735 (A.F. Ct. Crim. App. 2014) (finding proper trial counsel's reference in sentencing argument to appellant as "a coward," "pathetic," and a "waste of space" where appellant stabbed the victim in the back of his neck). *Cf.* United States v. Erickson, 63 M.J. 504 (A.F. Ct. Crim. App. 2006) (comparisons to Adolph Hitler, Saddam Hussein, Osama bin Laden, and the devil were outside bounds).

In this case, trial counsel's comments were a reasonable inference from the evidence admitted at trial, and not outside the norms of fair comment in a court-martial where the appellant was accused of conduct unbecoming of an officer. Given the charges of conduct unbecoming an officer, the government was required

[2] This argument concerns Charge 1 and its specification, in violation of Article 120, UCMJ. This charge has since been dismissed with prejudice. (JA at 19.)

to prove that Appellant's actions were disgraceful and dishonoring. Trial counsel's comment on Appellant's conduct being "perverted," a "pig," "deplorable," "degrading," and "despicable," where all commentary on the evidence meant to demonstrate to the members how Appellant's behavior amounted to conduct unbecoming of an officer.

Although blunt, the word "pig" is commonly understood as synonymous with a dishonorable or disgraceful person. The above arguments were a comment on Appellant's conduct as a failed officer with TSgt BR and Capt MQ, which demonstrates that Appellant dishonored and disgraced himself. This conduct included asking TSgt BR what she was wearing under her clothes, and asking Capt MQ what color panties she was wearing. (JA at 331, 336.) This was not an attempt to inflame the passions of the members. Rather, the comments were inferences fairly derived from the evidence on the record and within the bounds of acceptable argument – especially where trial defense counsel did not even think to object.

Trial counsel's argument that SrA HB would not want to have sex with this "narcissistic, chauvinistic, joke of an officer" was consistent with SrA HB's testimony that Appellant's comments in Las Vegas, charged in Specification 1 of the Additional Charge, made her uncomfortable and lowered her opinion of him. (JA at 161, 234.) Ultimately, the point of trial counsel's argument was that SrA

HB did not have a high regard for Appellant, so it is nonsensical that she consented to sexual intercourse with him just prior to returning to her husband.

The government was required to prove that Appellant's actions were disgraceful and dishonoring, detracted from his character as a gentleman, and undermined his standing as a commissioned officer. (JA at 243.) Dishonorable disgraceful behavior requires a vernacular that captures its essence. Although certainly unpolished, the descriptors above are synonymous with dishonorable or disgraceful behavior. Trial counsel was referring to Appellant's behavior, and not personally attacking Appellant when arguing his conduct "dishonored the commissioned officer corps by absolutely disgusting those he was intending to lead"; "was more than inappropriate; it was disgusting. [It] disgraced the officer corps"; the "disgusting comments continued in the direction of female subordinates"; and Appellant's conduct was a "disgusting means by which he perverted the officer corps." (JA at 400-401, 405.) In sum, trial counsel's characterizations of Appellant's conduct were harsh, but not foul, and did not amount to plain error.

2. Trial counsel's rebuttal to defense counsel's presentation during closing argument is not plain error.

During rebuttal argument, trial counsel stated:

> And I know that the defense counsel's imagination; him asking you to fill in the blank, is not reasonable doubt. **The defense counsel's imagination is not reasonable doubt**.

(JA at 296.)

> [. . .]
>
> And I'm not going to waste your time by answering the litany of questions you were asked, because I gave you the answers already. And I trust you will apply those answers. It's **the defense counsel's misplaced lying**.

(JA at 297.)

It is true that trial counsel may not "attempt to win favor with the members by maligning defense counsel." Fletcher, 62 M.J. at 181 (finding trial counsel erroneously encouraged the members to decide the case based on the personal qualities of counsel rather than the facts, when trial counsel made disparaging comments about defense counsel's style and also suggested that the defense in the case was invented by trial defense counsel). The danger is that "members may be convinced to decide the case on which lawyer they like better." Id.

The two comments made by trial counsel when rebutting trial defense counsel's argument were not plain error. In both arguments, trial counsel was responding to trial defense counsel's misrepresentation of the record and the law during closing argument. The point of the argument was that certain inferences or alternate theories trial defense counsel posited to the members were not based on the evidence. Trial counsel was simply challenging defense counsel's claims, which is not prohibited.

For example, trial defense counsel asked the members to infer what potential witnesses would have testified to if they had been present at trial. (JA at 275.) Trial defense counsel also claimed that trial counsel was asking the members to fill in the gaps in the evidence and guess what happened in the room that night in Baltimore. (JA at 291.) Trial defense counsel misrepresented the evidence regarding SrA HB reporting the assault to her husband. (JA at 196-200, 215-217, 276-277, 283.) Trial defense counsel also misrepresented portions of trial counsel's closing argument, claiming trial counsel had stated that Appellant had pinned down SrA HB. (JA at 273, 278-279.) Trial counsel never stated SrA HB was pinned down by Appellant.

In response to this argument, on rebuttal trial counsel argued "defense counsel's imagination is not reasonable doubt." Trial counsel was not maligning trial defense counsel personally, but rather attacking and responding to trial defense counsel's argument. That is what happens in litigation. *See* United States v. Gonzalez, ACM 38154, (A.F. Ct. Crim. App. 9 October 2013) (unpub. op.) *pet. denied*, 73 M.J. 209 (C.A.A.F. 2014) (finding trial counsel's argument that included the statement that defense counsel was inviting the members into a "world free of reason, logic, and common sense" as properly attacking the defense theory").

While also made in rebuttable to trial defense counsel's misrepresentations of the record, trial counsel's characterization of "misplaced lying" was probably better avoided. However, it was brief and not disproportionate to defense counsel's attacks on trial counsel in argument.

This Court can assume that defense counsel considered the response in rebuttal fair, or non-prejudicial, as trial counsel's above arguments drew no objection. For these reasons, this Court should find that the above arguments do not rise to plain error.

3. Trial counsel's comments on the credibility of the witnesses, including commenting on "uncontradicted" evidence, was a reasonable and permissible comment on the evidence presented at trial.

During closing argument, trial counsel stated,

> **Uncontradicted**, [Mr. D] testified to you that at some point during that deployment the accused found out about a birthday -- her birthday -- and said, "As soon as we get back to Baltimore I cannot wait to get [SrA HRB] -- excuse me --shit-faced. When we get back to Baltimore I can't wait to get [SrA HRB] shit-faced."

(R. at 406.)

> [. . .]
>
> And what was also **uncontradicted** yesterday: that she's not a heavy drinker, and that when the accused brought her a drink outside while they were smoking cigars, another airman there on that deployment returning to Baltimore looked in the glass and said, "Is there any Coke in that?" No. Just rum, maybe Jack Daniels. That's the coercive environment she found herself in.

(R. at 410).

> [. . .]
>
> Well, she wasn't enthusiastic. She never wanted him in the first place. She never told anyone she wanted him in the first place. She absolutely never consented to that, but he [Appellant] had the gall -- the audacity to say to her, "Be more enthusiastic." **Uncontradicted.** "Be more enthusiastic when with your husband in a few hours."

(R. at 414.)

"[A] trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005) (internal quotations omitted). However, "it is permissible for trial counsel to comment on the defense's failure to refute government evidence or to support its own claims." United States v. Paige, 67 M.J. 442, 448 (C.A.A.F. 2009). A violation occurs "only if either the defendant alone has the information to contradict the government evidence referred to or the [members] 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify." Id.

Regarding the first two arguments above, trial counsel was discussing comments made by Appellant in front of a group of people. (JA at 144.) During his trial testimony, Mr. D stated that "everybody was kind of asking if [Appellant] found out that [SrA HB] was having her 21st and there was a comment made that, 'Can't wait to have a drinking party with [SrA HB] and can't wait to get her shit

faced.'" (JA at 144.) Given the language used by Mr. D, it is clear that Appellant made this comment not to just him, but to everyone involved in that conversation. Similarly, at least one other Airman observed Appellant bring SrA HB a drink at the hotel gathering, and even commented on the apparent strength of the drink. (JA at 176.)

Trial defense counsel even noted this in his argument, asking the members "where are the people that were there watching her get plastered by [Appellant], as they allege?" and "where's the guy [the government] is claiming [asked SrA HB], 'hey, is there any coke in there?'" Because someone other than Appellant could contradict Mr. D's and SrA HB's testimony in both these instances, trial counsel's statement was not a reference to Appellant's right to silence, but rather a comment on the strength of the government's evidence. Therefore, Appellant has not shown that this portion of trial counsel's argument amounted to plain error.

The third reference to "uncontradicted" evidence was fair comment based on the trial defense counsel's cross-examination of SrA HB. Through cross-examination, the defense attempted to confront SrA HB on prior inconsistent statements. (JA at 224-334, 229, 240-41.) However, trial defense counsel did not attack SrA HB's statement that Appellant had told her to be more enthusiastic with her husband. This reference to uncontradicted evidence was confined to that one aspect of testimony, and trial counsel's argument was narrowly tailored.

Therefore, this Court should interpret trial counsel's use of the word "uncontradicted," as properly highlighting to the strength of SrA HB's testimony, despite defense counsel's failed attempt to impeach her.

Alternatively, the comment "Uncontradicted. 'Be more enthusiastic when with your husband in a few hours'" was a fair response to trial defense counsel's opening statement. In opening, trial defense counsel described Appellant's version of the events from his OSI interview. (JA at 91, 94.) Trial defense counsel described Appellant's version of events as "[h]e talked about how it was consensual, how they're kissing; how they're touching and all those things that I just said." (JA at 94.) Trial counsel's statement above was an invited reply to trial defense counsel's failed promise to the members that they would hear Appellant's account.

Appellant's failure to support his claims does not equate to error by trial counsel in commenting on such failure, as "under the 'invited response' or 'invited reply' doctrine, the prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense." Carter, 61 M.J. at 33. *See* Lockett v. Ohio, 438 U.S. 586, 595 (1978) (a prosecutor's comments that certain evidence was "uncontradicted" did not violate the Fifth Amendment, as appellant's own counsel, rather than the prosecution, focused the jury's attention on appellant's silence by promising a defense in opening and telling the jury that

petitioner would testify); United States v. Webb, 38 M.J. a62, 66 (C.A.A.F. 1993) (holding that where defense counsel told the members that appellant's wife would testify as to the appellant's alibi, but she did not testify, "the prosecutor's closing remarks add little to the impression created after the jury had been promised a defense by appellant's lawyer"); Gilley, 56 M.J. at 120 (noting that the government "is permitted to make 'a fair response' to claims made by the defense even when a Fifth Amendment right is at stake").

Even if this Court finds that this statement was not in fair response to trial defense counsel's opening statement, this comment still does not amount to plain error. There is no indication that trial counsel was purposely drawing attention to Appellant's right to remain silent. This case is readily distinguishable from the facts in Carter. In Carter, the Court found that trial counsel's general reference to the words "uncontroverted" and "uncontradicted" eleven times made Appellant's decision not to testify a "centerpiece of the closing argument." Carter, 61 M.J. at 34 (Noting the comments "were not isolated or a 'slip of the tongue.'").

Here, trial counsel said uncontradicted three times. On two of those occasions someone other than Appellant could have contradicted the evidence. Therefore, there was no error in those two instances. That leaves this one comment, in isolation. Thus, unlike Carter, it cannot be said that this alleged error was a focal point of trial counsel's argument. The trial on the merits lasted three

days; trial counsel's closing argument comprised 24 pages of the record; trial defense counsel's closing argument comprised 23 pages of the record; the record through findings is 470 pages; the members deliberated for approximately 3 hours and 19 minutes. It was evident the members properly considered the evidence, and acquitted Appellant of 1 of the 6 specifications in violation of Article 133, UCMJ. (JA at 314.) Even if this court were to determine the use of the word "uncontradicted" improperly referenced Appellant's right not to testify, it did not become the focal point of trial counsel's argument.

As supported by trial defense counsel's lack of objection, trial counsel's statements were not perceived by anyone at trial as a comment on Appellant's failure to testify. Moreover, the military judge instructed the members that Appellant had an absolute right to remain silent and the members were not to draw any adverse inference from his failure to testify. (JA at 240, 322.) The military judge provided the members a handwritten copy of those instructions, which contained a stand-alone section devoted to that instruction. (JA at 322.)

Appellant has not met his burden in showing plain error. Appellant has not shown that this was anything other than an isolated comment unworthy of defense objection, has not demonstrated that it was intended to draw attention to Appellant's right to remain silent, and has not shown that the military judge's instructions were undermined.

Finally, trial counsel's arguments about uncontradicted evidence related primarily to evidence supporting the sexual assault specification that AFCCA later found factually insufficient. (JA at 19.) These facts were seemingly presented to show SrA HB's lack of consent. This diminishes any prejudice Appellant might have suffered from such statements.

4. Comments made by trial counsel during closing did not amount to personal vouching.

a. During argument on the merits, trial counsel stated,

> Absolutely dishonoring. That's the nature of the conduct that the accused committed. That's the nature of this man. And that's why **without a doubt he's guilty.**

(JA at 256.)

> If she was lying to you, why would she admit that? I can't get that out of my head. She couldn't even control that. She couldn't even control that.
>
> Members, her misguided guilt as to what happened that night; that she could have drank less, known more; **her misguided guilt doesn't change the fact that he's guilty**. It doesn't change that fact.

(JA at 269.)

It is true that a trial counsel may not improperly interject his or her personal beliefs of an accused's guilt. Fletcher, 62 M.J. at 179. This "can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed." Id. at 180. The above comments, however, were not personal vouching

on behalf of trial counsel. It was forceful but fair argument. In each of the above instances, trial counsel had just discussed the evidence underlying charged offenses. He was, in frank fashion, arguing that Appellant was guilty as shown by the evidence. To argue that the evidence in the case demonstrates that Appellant is guilty is not personal vouching, it is the point of a closing argument.

b. During rebuttal argument, trial counsel also said,

> **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.**
>
> 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 at 294.)

> [. . .]
>
> The last question I want to leave you with is this: Why would she consent? She's married to the man that she's always been with; her high school sweetheart. She's on a second deployment, 100 days away from her family. And within hours of arriving in Tucson, Arizona, she's going to allow this narcissistic, chauvinistic, joke of an officer to penetrate her from behind? No way.
>
> **I'm not in the business of convicting innocent people, but this man is guilty**.

(JA at 297.)

Here, trial counsel had already introduced himself and his background in voir dire, including the number of days he traveled trying cases. (JA 78-79.) Any reference by trial counsel concerning his position or days TDY was mundane and generic, given the context. Second, the above argument was made in fair response to trial defense counsel's characterization of the government's argument and case.

As noted above, the prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense. Carter, 61 M.J. at 33. Trial defense counsel described trial counsel's argument as appealing to emotions, a presentation, theatrics, as selling stories, fist pounding, raised voices, pointing, illogical, trickery, and emotional manipulation. (JA at 271-272, 280-283, 292.) He implied that the government's presentation of the case was designed to convict an innocent person. (JA at 290-292.) He also characterized trial counsel's arguments as factually inaccurate, alleging trial counsel misquoted testimony, and characterized some of trial counsel's arguments as "just plain silly." (JA at 272, 278.) Trial counsel responded to these assertions by explaining his purpose was not to send innocent people to jail. He was merely defending his presentation of the case from defense counsel's characterization. The above argument was in fair response to these attacks from trial defense counsel.

c. During findings argument, trial counsel argued,

> **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.** The military judge talked to you about two different types of prior statements and the one type she said that you could actually consider for substantive evidence was this idea of the question of whether he could perform oral sex on her.

(JA at 265.)

Although a trial counsel may not comment on facts outside the record, it is proper for a trial counsel to comment during argument on "contemporary history or matters of common knowledge within the community.'" Fletcher, 62 M.J. at 183. Trial counsel's reference to courtroom work was generic. He had already introduced himself, and his background, in voir dire, to include the number of days he traveled trying cases. (JA at 78-79.) This was similar to defense counsel's introduction, and extremely common trial advocacy by both parties to the litigation. (JA at 84.) Trial counsel's argument was simply nothing more than reiterating to the members that attention to detail is important to deciding Appellant's case. Additionally, paying careful attention during the trial was something the military judge instructed the members to do. (JA at 77.) Accordingly, Appellant has not shown plain error.

d. During findings argument, trial counsel argued,

> The military judge talked about a negligent failure to discover the true facts. If this was consensual, why did he even have to ask? And if she didn't respond -- when she

> didn't respond, why didn't he discover the true facts? **Because the true facts were clear. The true facts were clear that this was forced and never consensual**.

(JA at 266.)

Here, trial counsel's argument was referring to whether Appellant failed to discover the true facts of whether SrA HB consented, a point the military judge instructed the members to consider in determining whether Appellant had a reasonable mistake of fact as to consent. Trial counsel was not personally vouching for the veracity of either a witness or evidence. He was instead using the language from the instruction by the military judge and arguing what the evidence shows in the case. That is proper argument. Moreover, trial counsel's reference to "true facts" directly related to the sexual assault specification which AFCCA eventually found factually insufficient, and is therefore not at issue here.

e. In rebuttal to trial defense counsel's argument that the government had failed to present sufficient evidence, trial counsel argued,

> Those are the facts. Not emotionally presented; no pounding on the podium, and **we win. Clearly**.

(JA at 296.)

> [. . .]
>
> And I know that defense counsel's imagination; him asking you to fill in the blank, is not reasonable doubt. The defense counsel's imagination is not reasonable doubt. "I don't know what I was thinking, because I never gave consent."

> **I was also taught a lesson in wasting time.** And to bring 10 to 12 crew members in here to recount for you these sexualized conversation would have appealed to your emotions and **I'm not going to waste your time.**

(JA at 296.)

> [. . .]

Additionally, during findings, trial counsel argued,

> **Technical Sergeant [BR] is an outstanding airman; an outstanding noncommissioned officer in the United States Air Force**, and she wants a staff job; not to fight for her country deployed overseas, but instead to simply have a staff job so that she never has to deal with perverted individuals like [Appellant] again. This was more than inappropriate; this was disgusting. This disgraced the officer corps.

(JA at 253.)

> [. . .]
>
> But Technical Sergeant [D], retired; now Mr. [D], told you that when he said that comment about what was going to happen back in Baltimore, it was as if he was targeting her. **That was his testimony. That was his perception. That was the truth**.

(JA at 261.)

> [. . .]
>
> There was never an agreement. There was never consent. **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 [HB'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 at 268.)

> [. . .]
>
> She was going to a source that she trusted, because the Air Force betrayed her. She was going to someone that she trusted, and now we're left to think that it was only because of a sermon she heard? So her will can be overcome by a pastor standing maybe 100 yards away. Her will can be overcome by a pastor, but it can't be overcome by a major? It's absurd. **She's not lying. It's the truth. It's what happened.**
>
> And I think these words were crucial: telling my husband I cheated on him was a personal choice I could control. Rape I couldn't.

(JA at 269.)

Once again, this is not personal vouching. Instead, trial counsel did what he is tasked to do in nearly every closing argument: argue that a government witness is credible, and the evidence supports a finding of proof beyond a reasonable doubt. This is no different than the defense counsel arguing the witness is not credible.

The argument above concerning TSgt BR comes from facts in evidence or fair inferences from those facts. In introducing herself, TSgt BR testified to her past and current positions. (JA at 97-98.) This included her current position as flight chief of training in combination with her position as a Russian airborne

cryptologic language analyst. (JA at 97-98.) Among her previous positions was acting as an interpreter for the State Department flying the Open Skies Mission. (JA at 98.) It is fair to say that such positions substantiated trial counsel's argument that she was an outstanding Airman. Furthermore, TSgt BR also testified to not wanting to deploy again and taking a staff position. (JA at 109.) Trial counsel was not claiming that TSgt BR was an outstanding Airman as a way to vouch for her credibility. Instead, the argument was made to illustrate that Appellant's actions were so disgraceful that they resulted in even a motivated noncommissioned officer never wanting to deploy again.

Trial counsel did not personally vouch for the accuracy of Mr. D, nor did he place the prestige of the government behind Mr. D through personal assurances. Trial counsel used no personal pronouns, but rather argued that the evidence showed Appellant was actually targeting SrA HB, as had been perceived by Mr. D on that particular occasion. That was a fair and proper argument.

Regarding the statement "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 [HB's] credibility," trial counsel did not argue that if the members had any doubt, it must be resolved in favor of SrA HB. Instead, trial counsel argued that if the members had concerns about the evidence for the sexual assault

charge, they could look to SrA HB's credibility. Members are in fact instructed to determine the credibility of witnesses. (JA at 248.)

Trial counsel argued what the evidence demonstrated, not what trial counsel personally believed to be the truth. Specifically, trial counsel argued that the weight of the evidence showed that SrA HB did not report the incident to her husband because of guilt from a sermon, but instead to deal with the sexual assault. This was proper argument, not personal vouching.

f. During argument on the merits, trial counsel argued,

> And then he arranged for alcohol to be at the hotel when they got there. Look, it's one thing -- it's one thing to buy a round of drinks when you return from deployment. It's one thing to get a six-pack of beer to have in the lobby when you return from deployment if the bar is closed. That's one thing. But handles of liquor? Handles of Jack Daniels? Captain Morgan? Had to get her shit-faced, right? How else do you know that he knew what he was getting into with [SrA HB]?
>
> **They 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.** He had the means, he had the plan; he controlled those things.

(JA at 260.)

SrA HB testified that she had personal chats with Appellant, including about their childhoods. (JA at 165-66, 170.) A fair inference to be made, given the extremely personal nature of these discussions, was that maybe Appellant knew

about SrA HB's abusive past. Further, by stating Appellant only "perhaps" knew, trial counsel indicated to the members that the evidence was weak on this point, and trial defense counsel effectively argued against the above point in his closing argument. (JA at 277.) The comment carried with it such little weight that it drew no objection at trial. Finally, this argument pertained to the sexual assault charge that has since been dismissed by the AFCCA.

5. Trial Counsel's argument and rebuttal argument on the merits were not plain error, and did not prejudice Appellant.

Given the above analysis, even if this Court finds that trial counsel's arguments were not a proper comment on the testimony or fair reply to trial defense counsel's opening statement and closing argument, Appellant still has not met his burden in showing plain error. Appellant has not shown that this was anything but unobjected-to, isolated comments. Nonetheless, even if this Court finds error, there was no prejudice.

The strength of the government's case alone should preclude a finding of prejudice. Appellant's conduct charged in Specifications 3 and 4 of the Additional Charge was memorialized in text messages. (JA at 60, 327-337.) The evidence of Appellant's contact with SrA HB is also clear, and his massaging of SrA HB's back was corroborated during the pretext phone call with Appellant. Additionally, SrA HB's testimony was strong and was not undermined by cross-examination.

Appellant was the aircraft commander and in charge of his crew. His behavior resulted in Capt MQ loss of respect, and such discomfort that she requested to be removed from a deployment with Appellant. Appellant's behavior was so egregious, TSgt BR lost all respect for him as a leader. Appellant's conduct culminated in him going to the room of the only female and lowest ranking enlisted member of his crew, removing her clothes, and massaging SrA HB. Thus, this Court can be confident that Appellant was convicted on basis of the evidence alone, and not any improper argument by trial counsel.

It is telling that none of the above comments drew an objection from trial defense counsel. The absence of a defense objection is some persuasive measure of the minimal impact the prosecutor's remark may have had on the court. Gilley, 56 M.J. at 123. As the Court stated in Doctor, "It is a little difficult for us to find misconduct which compels a reversal when it purportedly arises out of an argument which had so little impact on defense counsel that they sat silently by and failed to mention it . . . at the time of trial." 21 C.M.R. 252, 261 (C.M.A. 1956). If trial defense counsel did not find the above arguments detrimental enough to prompt an objection at trial, this Court should have little difficulty in denying Appellant's claim for lack of prejudice.

Conclusion

As none of the above comments drew objections, it is Appellant's burden to show plain error occurred and prejudice resulted. Appellant has accomplished neither. Trial counsel's arguments were not plain error, and, if this Court were to find otherwise, they were so minor that Appellant cannot establish prejudice. The weight of evidence of Appellant's guilt was overwhelming, thus this Court can be confident the members convicted Appellant on the evidence alone.

II.

THE SPECIFICATIONS ALLEGING CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, IN VIOLATION OF ARTICLE 133, UCMJ, EACH STATE AN OFFENSE BECAUSE THE LANGUAGE OF THE SPECIFICATIONS ADEQUATELY DEPICT ACTIONS THAT CONSTITUTE CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN SUFFICIENT TO SEPARATE LAWFUL CONDUCT FROM UNLAWFUL CONDUCT

Standard of Review

Whether a specification states an offense is a question of law that we review de novo. United States v. Ballan, 71 M.J. 28, 33 (C.A.A.F. 2012). If no objection is raised at trial, as is the case here, a claim of failure to state an offense is reviewed for plain error. United States v. Tunstall, 72 M.J. 191, 196 (C.A.A.F. 2013). The plain error test is the same as articulated under Issue I. When testing

legal sufficiency, the court considers the evidence in the light most favorable to the prosecution. United States v. Turner, 25 M.J. 324 (C.M.A 1987).

Law

It is a fundamental principle of criminal law that "'wrongdoing must be conscious to be criminal.'" United States v. Rapert, 75 M.J. 164, 167 n.6 (C.A.A.F. 2016) (*quoting* Elonis v, United States, 135 U.S. 2001, 2009 (2015)). "The military is a notice pleading jurisdiction." United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011). Charges and specifications will be found sufficient if they, "first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Id. (internal citations and quotations omitted).

Conduct unbecoming an officer and a gentleman is a centuries-old offense focused on preserving the ability of officers to lead and to command. Parker v. Levy, 417 U.S. 733, 743-45, (1974). Currently codified in Article 133, UCMJ, conduct unbecoming survives constitutional challenges not only because of the unique needs of the military, but because customs and usages of the services narrow its breadth and provide it context and meaning. Parker, 417 U.S. at 746-47. The elements of conduct unbecoming an officer and a gentlemen are as follows:

(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.

MCM, part IV, para. 59(b) (2012 ed.). Regarding conduct captured under this Article, the Manual notes:

> Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer. [. ..] There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.

MCM, part IV, para. 59(c)2 (2012 ed.).

This Court has held an officer's conduct need not violate other provisions of the UCMJ or even be otherwise criminal to violate Article 133, UCMJ. United States v. Lofton, 69 M.J. 386, 388 (C.A.A.F. 2011) (internal quotation marks and citations omitted.) "The gravamen of the offense is that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission." Id. It is certain that "the military is, by necessity, a specialized society." Parker, 417 U.S. at 743. In sum, the need for effective leadership in harm's way requires a broader scope of criminal accountability for the service officer. United States v. Frazier, 34 M.J. 194, 198 (C.M.A. 1994)

As this Court recently concluded:

> "'[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history [and] are founded on unique military exigencies as powerful now as in the past.'" United States v. Heyward, 22 M.J. 35, 37 (C.M.A. 1968) (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)). Unlike his civilian counterparts, "it is [the servicemember's] primary business ... to fight or be ready to fight wars should the occasion arise.'" [Levy, 417 U.S. at 744 (citation omitted)].

United States v. Caldwell, 75 M.J. 276, 281-82 (C.A.A.F. 2016) (alterations in original).

Notably, the court has approved the enforcement of military customs and usages by courts-martial since the early days of this Nation. Parker, 417 U.S. at 474. An examination of the British antecedents of our military law shows that the military law of Britain long contained remarkably similar language to the current Article 133, UCMJ. Id. at 475. In 1775, a conduct unbecoming article was adopted into the Articles of War. Id. From 1806, it remained basically unchanged through numerous congressional re-enactments until it was enacted as Article 133 of the UCMJ in 1951. Id.

Generally speaking, criminal statutes should be interpreted by courts as still including "broadly applicable [mens rea] requirements, even where the statute ... does not contain them." United States v. X-Citement Video, Inc., 513 U.S. 64, 70

(1994). However, when inferring a mens rea requirement in a statute that is otherwise silent, courts must only read into the statute "that mens rea which is necessary to separate" wrongful conduct from innocent conduct. Carter v. United States, 530 U.S. 255, 269 (2000); *accord* Rapert, 75 M.J. at 167 n.6; Elonis, 135 U.S. at 2010.

In rejecting a general challenge to the constitutionality of Article 133, UCMJ, "[t]he Supreme Court noted that [the CAAF] and other military courts had 'narrowed the very broad reach of the literal language of [Articles 133 and 134, UCMJ,] and at the same time had supplied considerable specificity by way of examples of the conduct which they cover.'" United States v. Rogers, 54 M.J. 244, 256 (C.A.A.F. 2000) (quoting Parker, 417 U. S. at 754). The Manual for Courts-Martial also narrows the reach of Article 133, UCMJ, specifying conduct which is "indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty." MCM, Part IV, para. 59(c)(2).

In Elonis, the Court addressed the mens rea required for violating a criminal statute, 18 U.S.C. § 875(c), that criminalized communicating a threat through interstate commerce, but was silent on the mens rea required to commit the offense. The Court stated that when a statute is silent on the scienter needed to commit the offense and a scienter requirement is needed to separate wrongful from

innocent conduct, the mens rea required to commit the offense must be greater than simple negligence. Elonis, 135 U.S. at 2010.

"In some instances, the mere requirement in a statute that a defendant commit an act with knowledge of certain facts—i.e., that the defendant possessed 'general intent'—is enough to ensure that innocent conduct can be separated from wrongful conduct." Caldwell, 75 M.J. 276, 281). In Carter v. United States, the Supreme Court considered whether a conviction under 18 U.S.C. § 2113(a), which criminalizes taking "by force and violence" items of value belonging to or in the care of a bank, requires proof of intent to steal. 530 U.S. 255, 261 (2000). The Supreme Court held that once the Government proves that a defendant forcibly took money, "the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of ... 'otherwise innocent'" conduct. Id. at 269-70. Thus, the Supreme Court held the general intent requirement contained in the statute was sufficient.

In Rapert, this Court considered the applicability of Elonis to the military specific offense of communicating a threat under Article 134, UCMJ, as articulated by the President. 75 M.J. 164. While Elonis involved communicating a threat, the military offense of communicating a threat contains an element—absent in the federal offense—that the conduct be "wrongful." *Compare* 18 U.S.C. § 875(c)

with MCM, pt. IV, ¶ 110.b. In Rapert, the Court found the requirement that the accused's acts be "wrongful" prevents the criminalization of otherwise innocent conduct and places the case at bar beyond the reach of Elonis." Id.

In Caldwell, this Court considered whether it was error when the military judge instructed the panel using a negligence standard for maltreatment of a subordinate in violation of Article 93, UCMJ. This Court found that "there is no scenario where a superior who engages in the type of conduct prohibited under Article 93, UCMJ, can be said to have engaged in innocent conduct." Id. at 281. This is based on "the unique and long-recognized importance of the superior-subordinate relationship in the United States armed forces, and the deeply corrosive effect that maltreatment can have on the military's paramount mission to defend our nation." Id. Thus, "a superior who voluntarily engages in *objectively* abusive conduct towards a subordinate cannot be heard to complain that his actions were protected by his freedom of speech, or that his actions were lawful in any other sense." Id. at 282 n. 8 (emphasis added).

In Caldwell, this Court further found, "because of the unique nature of the offense of maltreatment in the military, a determination that the government is only required to prove general intent in order to obtain a conviction under Article 93, UCMJ, satisfies the key principles enunciated by the [United States] Supreme Court in Elonis. Id. at 278. Accordingly, the key question is whether appellant

possessed general intent to undertake the conduct that either caused or could have caused suffering. Carter, 530 U.S. at 269-270 (2000).

"General intent" merely requires that an accused commit an act with knowledge of certain facts. Caldwell, 75 M.J. at 280-281. With respect to Article 133 offenses, the question is whether a "reasonable military officer would have no doubt that the activities charged constituted conduct unbecoming an officer." Frazier, 34 M.J. 194, 198. In the context of a military specific offense, this actus reus is the underlying, inappropriate conduct. *See* Carson, 57 M.J. at 415 ("The essence of the Article 134, UCMJ offense, is abuse of authority").

Where defects in a specification are raised for the first time on appeal, "the question is whether the defective specification[s] resulted in material prejudice to appell[ant]'s substantial right to notice." United States v. Humphries, 71 M.J. 29, 213 (C.A.A.F. 2012); *accord.* United States v. Gaskins, 72 M.J. 225, 232 (C.A.A.F. 2013) (internal citations and quotations omitted.)

Analysis

General intent sufficiently separates lawful conduct from unlawful conduct under Article 133, UCMJ. As Appellant did not object at trial, this Court only grants relief for plain error. Appellant cannot show error, let alone plain error. All five specifications contain the two elements of the offense of conduct unbecoming an officer and a gentleman, as proscribed by Congress and the President. MCM,

part IV, para. 59(b) (2012 ed.) These two elements serve to inform Appellant of the specific acts against which he needed to defend. The second element, that the conduct be unbecoming of an officer, sufficiently states words of criminality, distinguishing lawful from unlawful conduct. Words such as "wrongful" or "dishonorable" are not necessary because the wrongfulness of the conduct is inherently encompassed in "conduct unbecoming of an officer." Finally, the elements are charged with sufficient specificity to prevent future prosecutions for the same offenses. This is all that is required.

Appellant essentially argues Elonis v. United States, 135 U.S. 2001 (2015), creates new requirements for charging and instructing on Article 133 offenses. However, the military specific nature of the offenses in this case makes it far more similar to Carter and Caldwell than Elonis. Just like Carter, where an individual was held criminally responsible for theft by merely having the general intent to take money from a bank by force, so too can a military officer be held criminally responsible for voluntary conduct that amounts to "dishonoring" or "disgracing." "The key question is whether the [officer] possessed general intent to [. . .] undertake the conduct that either caused or could have caused suffering. Caldwell, 75 M.J. at 282; *Cf.* Carter, 530 U.S. at 269-70. In other words, the focus of the conduct unbecoming offense is the objective act and its effect, rather than on the subjective intent of the actor.

The statute at issue in Elonis, 18 U.S.C. § 875(c), regulates the conduct between civilians (i.e., threats to kidnap or injure) who have no special duty towards (or authority over) one another. Article 133, UCMJ, on the other hand delineates the outer limit of conduct by officers of the military who have been entrusted with leadership. It is wrongful to engage in conduct that is "dishonoring" or "disgracing" the person as an officer. MCM, pt. IV, para. 59b(2).

In Caldwell, this Court determined "abusive conduct that is consciously directed at a subordinate is in no sense lawful," and such "behavior undermines the integrity of the military's command structure." 75 M.J. at 282. Therefore, this Court concluded that "general intent sufficiently separates lawful and unlawful behavior in this context, and there is no basis to intuit a mens rea beyond that which we have traditionally required for Article 93, UCMJ." Id. Similarly here, there is no scenario where an officer who engages in the type of conduct prohibited under Article 133, UCMJ, i.e. conduct which dishonors and disgraces the officer, can be said to have engaged in innocent conduct. Akin to the reasoning of this Court in Caldwell, this conclusion is based on the unique and long-recognized importance of the role of an officer in the United States Armed Forces, and the deeply corrosive effect that conduct unbecoming of an officer can have on the military's paramount mission to defend our nation. Caldwell, 75 M.J. at 281.

Here, all five specifications allege acts that constitute conduct unbecoming an officer and a gentleman. Specification 1 of Charge II alleges that Appellant asked a subordinate if she had ever cheated on her husband, and solicited her for nude pictures. Specification 2 of Charge II alleges that Appellant gave that same subordinate a back rub. Specification 1 of the additional charge alleges that Appellant offered to, or stated his desire to, take this airman back to his room. Specification 2 of the Additional Charge alleges that Appellant, a married man, told a lower ranking female officer that she was beautiful, that he would love to be close to her, asked her about cheating, and questioned her on what color panties she was wearing. Finally, in Specification 4 of the Additional Charge, Appellant asked a subordinate non-commissioned officer what she was wearing under her clothes, and that he had a crush on her.

In each of these specifications, Appellant's conduct was alleged to have taken place with junior military members. Each specification alleged actions and language that were sexual in nature. In four of the five specifications, the conduct took place with enlisted members. Regarding the conduct with another officer, the conversation entailed propositioning the officer for a relationship that would result in cheating on a spouse and asking the officer what color panties she was wearing. Accordingly, each specification alleged conduct that dishonored and disgraced

Appellant and compromised his position as a commissioned officer. There is no difficulty in separating the "wrongful" from "innocent" conduct here.

Appellant did not object at trial to failure to state an offense, indicating to this Court that notice was not at issue. When considering whether an allegation reasonably puts the member on notice of criminal wrongdoing, the question becomes whether a reasonable person in Appellant's position would have known that the conduct at issue was criminal. United States v. Hartwig, 39 M.J. 125, 130 (C.M.A. 1994) ("Any reasonable officer would recognize that [the conduct in issue] would risk bringing disrepute upon himself and his profession," in violation of Article 133, UCMJ.); Frazier, 34 M.J. at 198-99 ("a reasonable military officer would have no doubt that the activities charged in this case constituted conduct unbecoming an officer")(footnote omitted). Here, a reasonable officer in the United Stated Air Force would know that asking a senior airman inappropriate sexual questions, including asking for photos of her, telling her that he would like to take her back to his room, and also removing the senior airman's clothes and giving her a massage, would constitute conduct unbecoming of an officer. Similarly, a reasonable officer would know that a married officer telling a subordinate that he wanted to get close to her, and asking what color panties she was wearing, would constitute conduct unbecoming of an officer. Finally, a reasonable officer would know telling an enlisted subordinate he has a crush on

her, and asking her what is under her clothing constitutes conduct unbecoming of an officer.

Even if this Court were to find the conduct unbecoming specifications lack sufficient language of criminality, and should have included a mens rea of "recklessness," Appellant was not prejudiced. As this Court noted in Gaskins and Humphries, when defects in a specification are raised for the first time on appeal, dismissal will depend on whether the defective specification resulted in material prejudice to appellant's substantial right to notice. Here, the facts overwhelming prove Appellants was on notice, and the overwhelming evidence would satisfy a higher level of proof.

Moreover, by Appellant's own admissions his conduct was unbecoming and therefore criminal. The record shows that Appellant at the very least acted with reckless disregard with the fact that his conduct could be unbecoming. Appellant recognized that asking his subordinate for nude pictures could get him in a lot of trouble, so much so that he asked SrA HB to delete the messages. (JA at 167.) During a pretext phone call with SrA HB concerning the night Appellant massaged her, Appellant apologized and acknowledged that he betrayed SrA HB's trust. (JA at 343.) Appellant then texted SrA HB, asking for a heads-up if she was going to report to leadership, because he would need to start preparing for confinement. (JA at 341.)

Additionally, Appellant recognized his comments to TSgt BR "could end [his] career," and later apologized for asking the inappropriate question of "what's under there." (JA at 331.) Appellant also acknowledged that the text messages he was sending to another officer that "flipped the switch between professional and not" … "could end his career and his marriage." (JA at 333.) Thus, not only did the specifications allege actions that any officer would know to constitute an offense of conduct unbecoming, Appellant himself was clearly aware of the criminality of his actions. Appellant's consciousness of guilt and fear of disciplinary action, are indicators that he was on notice that his conduct was criminal.

Appellant's trial defense counsel's findings argument highlighted Appellant had sufficient notice of the criminality of his actions. Trial defense counsel argued that during the pretext phone call with SrA HB, Appellant thought "he was going to get busted for adultery and for making these comments," and he was worried his career was ruined for having sex with SrA HB (JA at 283-284.) Trial defense counsel also argued, "[Appellant is] no saint. We can't stand here with a straight face and try to justify some of the things you hear about." (JA at 273.) In other words, trial defense counsel had to acknowledge based on the facts, Appellant knew his conduct was inappropriate and there was no way to justify that conduct.

Even if this Court determined Appellant lacked notice, Appellant has failed to establish prejudice.

Conclusion

The five specifications of conduct unbecoming of an officer contained sufficient words of criminality, included each element of the offense, sufficiently apprised Appellant of what he must defend against, and protected him from double jeopardy. The conduct alleged, combined with the language "conduct unbecoming of an officer," states words of criminality and sufficiently separates lawful conduct from unlawful conduct under Article 133, UCMJ. Finally, even if this Court were to find plain error in the charging, Appellant was not prejudiced, as Appellant was on sufficient notice of the conduct he had to defend against.

III.

THE MILITARY JUDGE PROPERLY INSTRUCTED THE MEMBERS ON EACH ELEMENT OF THE OFFENSE UNDER ARTICLE 133, UCMJ.

Standard of Review

In general, whether a panel was properly instructed is a question of law reviewed de novo. United States v. McClour, 76 M.J. 23, 25 (C.A.A.F. 2017). R.C.M. 920(f) states "[f]ailure to object to an instruction . . . before the members close to deliberate constitutes waiver of the objection in the absence of plain error." United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017). "Under a plain

error analysis, [Appellant] has the burden of demonstrating that: (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right...." United States v. Payne, 73 M.J. 19, 22 (C.A.A.F. 2014) (internal citations and quotation marks omitted).

Statement of facts

The military judge provided to the members, both orally and in writing, the following definition for conduct unbecoming for each specification alleged under Article 133, UCMJ,

> "conduct unbecoming an officer and gentleman" means behavior in an official capacity which, in dishonoring or disgracing the individual as a commissioned officer, seriously detracts from his character as a gentleman, or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously detracts from his standing as a commissioned officer. "unbecoming conduct" means misbehaving more serious than slight, and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste and priority.

(JA at 243-246; 318-320.)

Law

A military judge has a sua sponte duty to instruct on the elements of every offense. Payne, 73 M.J. 24; R.C.M. 920(e)(1); Article 51(c), UCMJ. Since trial

defense counsel did not object to any instructions concerning the allegations under Article 133, UCMJ, this Court applies a plain error analysis. Payne, 73 M.J. at 22.

"General intent requires 'knowledge with respect to the actus reus of the crime.'" Caldwell, 75 M.J. at 284 (*quoting* Carter, 530 U.S. at 268); *see also* United States v. Bailey, 444 U.S. 394, 403 (1980) (explaining that in a general sense knowledge corresponds loosely with the concept of general intent). In Caldwell, after determining an offense under Article 92, UCMJ only required the mens rea of general intent, this Court stated "though the relevant instructions were less-than-explicit with respect to mens rea, we do not find a sufficient basis to conclude that the military judge's instructions were erroneous in light of their proper emphasis on general intent." 75 M.J. at 283 (finding the military judge instruction to consider Appellant's conduct "under all the circumstances," required the panel members to determine whether Appellant possessed the requisite general intent mens rea.)

In United States v. Robinson, 77 M.J. 294, 299 (C.A.A.F. 2018), this Court determined it was unnecessary to make a determination on the appropriate mens rea, when the third element of the plain error analysis was dispositive. The third prong is satisfied if the appellant shows "a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different." Id. quoting United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (citation

omitted) (internal quotation marks omitted). This Court stated "even if we were to assume without deciding that 'recklessness'—or even 'knowledge'—was the appropriate mens rea for this Article 92, UCMJ, offense and that the military judge erred in failing to instruct the panel accordingly, [a]ppellant has failed to meet his burden of showing that but for [this error], the outcome of the proceeding would have been different." Id. at 299 (citations omitted) (where uncontroverted evidence demonstrated Appellant knowledge.)

Additionally in Payne, this Court found the trial judge's failure to instruct on two of the four elements for an allegation charged under Article 80, UCMJ, to be plain and obvious error. Nonetheless, this Court ultimately determined the omission of instructions on the third and fourth elements for an allegation of attempt did not materially prejudice appellant's substantial rights, because the evidence was so overwhelming that the jury verdict would have been the same absent the error. Payne, 73 M.J. at 24-25.

Analysis

The military judge properly instructed on the two elements required to prove each specification of conduct unbecoming of an officer, where the actus reus was the underlying, inappropriate conduct. *See* Caldwell, 75 M.J. at 284 (In the context of maltreatment, the actus reus is the underlying, inappropriate conduct); Carson,

57 M.J. at 415 ("The essence of the offense is abuse of authority."). Thus, the judge's instruction was neither error, nor plain error.

The military judge made clear that the panel members were required to determine if the behavior was dishonoring or disgracing Appellant as a commissioned officer, or seriously detracted from Appellant's standing as a commissioned officer. The members also had to determine if the misbehavior was more serious than slight, and of a material and pronounced character. Appellant's conduct had to be morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste and priority. The military judge's instruction sufficiently encompassed the concept of general intent.

Even if this court were to determine some other standard of mens rea was required, and the military judge erred in not giving a more specific instruction on mens rea, any such error was harmless beyond a reasonable doubt. Due to the overwhelming corroborated evidence in the record, which was highlighted in detail above, the members would still have found Appellant guilty under a stricter mens rea, such as recklessness.

In each instance of misconduct, Appellant made apparent that he knew his conduct was unbecoming, which establishes a mens rea much higher than even recklessness. Appellant acknowledged to TSgt BR that his actions could end his

career, and then acknowledged his culpability to Capt MQ by disclosing that his conduct could end his marriage and career. Appellant told SrA HB to delete his text messages because they could get him in trouble, and that he would be packing for confinement if she disclosed his conduct to leadership.

Even if this Court determined the government had to prove a mens rea of recklessness, and the military judge's instruction had been insufficient, the outcome would have been the same. The evidence supported Appellant knew his behavior was unbecoming and criminal. In other words, Appellant was aware of the criminal intent he was defending against, and has failed in his burden of proving prejudice.

Conclusion

The military judge properly instructed on the elements of Article 133, UCMJ. Even if this Court were to find insufficient instruction on the mens rea, or that a higher standard of culpability was required, such deficiency was harmless beyond a reasonable doubt.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

ANNE M. DELMARE, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4812
Court Bar No. 35989

Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 340884

JOSEPH KUBLER, Lt Col, USAF
Deputy Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33341

JULIE L. PITVOREC, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 31747

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 15 January 2019 via electronic filing.

ANNE M. DELMARE, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4812
Court Bar No. 35989

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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/s/
ANNE M. DELMARE, Capt, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 15 January 2019

APPENDIX A

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As of: January 15, 2019 11:54 PM Z

United States v. Gonzalez

United States Air Force Court of Criminal Appeals

October 9, 2013, Decided

ACM 38154

Reporter
2013 CCA LEXIS 849 *; 2013 WL 5878962

UNITED STATES v. Senior Airman ALEJANDRO E. GONZALEZ, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Review denied by *United States v. Gonzalez, 2014 CAAF LEXIS 122 (C.A.A.F., Jan. 29, 2014)*

Prior History: **[*1]** Sentence adjudged 10 March 2012 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Natalie D. Richardson. Approved Sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Core Terms

files, downloaded, child pornography, investigator

Case Summary

Overview
HOLDINGS: [1]-The court did not find error in this case, plain or otherwise. When considered in context, the trial counsel's argument was aimed at attacking the defense theory of the case and did not shift the burden of proof; [2]-The burden of proof never shifts to the defense and the Government may not comment on the failure of the defense to call witnesses, R.C.M. 919(b) discussion, Manual Courts-Martial; [3]-The military judge properly instructed the members that the Government always carried the burden of proving the accused's guilt beyond a reasonable doubt and the burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the offense; [4]-Trial counsel's remarks, in context, did not improperly shift the Government's burden. Even if the trial counsel's argument was error, it was harmless beyond a reasonable doubt.

Outcome
The approved findings and sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Trial Procedures, Arguments on Findings**

The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused. When defense counsel fails to object or request a curative instruction, a court of criminal appeals grants relief only if the improper argument amounts to plain error. Under the plain error standard, an appellant must show (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. An error is not plain and obvious if, in the context of the entire trial, the accused fails to show the military judge should be faulted for taking no action even without an objection. If the error is constitutional, the prejudice prong is satisfied if the Government cannot show that the error was harmless beyond a reasonable doubt.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

HN2[] Trial Procedures, Arguments on Findings

The Government always has the burden of proof to produce evidence on every element and to persuade the members of guilt beyond a reasonable doubt. The burden of proof never shifts to the defense and the Government may not comment on the failure of the defense to call witnesses. R.C.M. 919(b) discussion, Manual Courts-Martial. A trial counsel's suggestion that an accused may have an obligation to produce evidence of his own innocence is error of constitutional dimension. However, not every comment by the prosecution is a constitutional violation. Instead, a court of criminal appeals evaluates the comment in the context of the overall record and the facts of the case. It is important that both the defendant and prosecutor have the opportunity to meet fairly the evidence and arguments of one another. A trial counsel is permitted to make a "fair response" to claims made by the defense, even where a constitutional right is at stake. A prosecutor's argument must be examined in light of its context within the entire trial.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

HN3[] Trial Procedures, Burdens of Proof

The Government always carried the burden of proving the appellant's guilt beyond a reasonable doubt and the burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the offense.

Counsel: For the Appellant: Major Zaven T. Saroyan and Captain Luke D. Wilson.

For the United States: Colonel Don M. Christensen; Major Jason M. Kellhofer; and Gerald R. Bruce, Esquire.

Judges: Before ROAN, HECKER, and WIEDIE, Appellate Military Judges.

Opinion by: HECKER

Opinion

OPINION OF THE COURT

HECKER, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification of possessing one or more visual depictions of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, *10 U.S.C. § 934*, and sentenced him to a bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence except for the adjudged forfeitures, and waived mandatory forfeitures for the benefit of the appellant's dependent. On appeal, the appellant asserts his due process rights were violated when the trial counsel's findings argument improperly shifted **[*2]** the burden to the defense by indicating the defense had failed to call a witness. Finding no error that materially prejudices the appellant, we affirm.

Background

On 23 December 2010, a civilian investigator working on an internet crime task force was alerted though a law enforcement computer program that a certain computer had been used to access files indicative of child pornography. The sharing software program allows a user to link to and then search the computers of other users for content those users have agreed to share, using either search terms or searching by category.

The investigator then used his own computer to monitor the suspect computer's activity. For over a month, the suspect computer did not connect to the file sharing network. However, on 29 January 2011, additional downloads of files with names indicative of child pornography were made from the suspect computer. Using the digital signature associated with one of these files, the investigator found it within the file sharing network and determined it was a videorecording of a child under the age of 18 engaged in sexual activity.

After issuing a subpoena to the suspect computer's internet service provider, the investigator **[*3]** learned the appellant owned the computer and it was located in the on-base residence the appellant shared with his wife and young son. Military investigators later executed a search warrant on the appellant's home and seized multiple items of computer media.

Subsequent forensic analysis found thousands of video files on the computer media, 12 of which were determined to contain images of minors engaging in sexually explicit conduct. These files had been moved from their initial download folder on the laptop and placed into a folder named "Lolita" on an external hard

drive. The court-martial panel found the appellant guilty of possessing these images between 23 December 2010 and 10 February 2011.

Findings Argument

The defense theory at trial was that the government had failed to prove the appellant had knowingly possessed the images. This multi-pronged approach included expert testimony about the possibility of the files ending up on the appellant's computer through a mass download of multiple files, the lack of evidence the files were ever opened, and the possibility that someone else downloaded the files on the two days in question.

On this latter point, the trial defense counsel made **[*4]** the following findings argument:

> The government also talked a lot about dates in this case, 23 December, 29 January, of 2010 and 2011 respectively. But guess what? No one testified who was in the house on [the] 23rd of December. No one testified who was in the house on the 29th of January. He had a wife at the time, now his ex-wife. Where was she today? Why isn't she here? Why didn't she take the witness stand to tell you what she knows?
>
> . . . You can't say that he was at the screen . . . . Can't physically put him there . . . ."

During the Government rebuttal argument, the senior trial counsel argued:

> [T]he defense's argument invites you to a world free of reason, logic, and common sense. How did this get on his computer?
>
> . . . What kind of fantasy where we've been told stories where a fairy, I guess, came into his house . . . downloaded and started moving . . . file names indicative of child pornography.
>
> Not only that, after they're downloaded, they're moved and stored in a folder called [L]olita. I guess that just happens. Don't know who snuck into their house at 0200 that morning and did this. They want you to believe it wasn't him. . . . Don't know how this happened. . . .
>
> [T]he defense **[*5]** is saying, 'Well, maybe it's his wife.' Well, you didn't hear from her. Agent [P] testified she didn't report the child pornography. She didn't have anything to talk to you about. I submit to you that's why we didn't hear from her.

Following a defense objection to "facts not in evidence," the military judge instructed the panel to disregard the trial counsel's comment that the appellant's wife did not testify because she did not have anything to say. The trial counsel then continued:

> [T]he defense wants you to believe that some stranger or whatever was in the house looking for, I guess, adult pornography and just happened to find all these file names indicative of child pornography.
>
> Members, that didn't happen. That defies reason and common sense. It wasn't the toddler. It wasn't his wife. It was him.
>
> . . . Members, it's him, nobody else.

Although the defense counsel did not object that the trial counsel's argument improperly shifted the burden to the defense, he now raises this issue on appeal.

HN1[↑] The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused. *United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)*. **[*6]** When defense counsel fails to object or request a curative instruction, we grant relief only if the improper argument amounts to plain error. *United States v. Erickson, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006)*, *aff'd*, *65 M.J. 221 (C.A.A.F. 2007)*. Under the plain error standard, an appellant must show (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. *United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008)* (internal quotation marks and citation omitted). An error is not plain and obvious if, in the context of the entire trial, the accused fails to show the military judge should be faulted for taking no action even without an objection. *United States v. Burton, 67 M.J. 150, 153 (C.A.A.F. 2009)*. If the error is constitutional, the prejudice prong is satisfied if the Government cannot show that the error was harmless beyond a reasonable doubt. *United States v. Sweeney, 70 M.J. 296, 304 (C.A.A.F. 2011)*.

HN2[↑] The Government always has the burden of proof to produce evidence on every element and to persuade the members of guilt beyond a reasonable doubt. *United States v. Czekala, 42 M.J. 168, 170 (C.A.A.F. 1995)*. **[*7]** The burden of proof never shifts to the defense and the Government "may not comment on the failure of the defense to call witnesses." Rule for Courts-Martial 919(b), Discussion; *United States v. Mobley, 31 M.J. 273, 279 (C.M.A. 1990)*. A trial counsel's suggestion that an accused may have an obligation to produce evidence of his own innocence is "error of constitutional dimension." *United States v. Mason, 59 M.J. 416, 424 (C.A.A.F. 2004)*.

However, not every comment by the prosecution is a constitutional violation. Instead, we evaluate the comment in the context of the overall record and the facts of the case. The Supreme Court has stated that "[i]t is important that both the defendant and prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson, 485 U.S. 25, 33, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988)*. A trial counsel is permitted to make a "fair response" to claims made by the defense, even where a constitutional right is at stake. *Id. at 32*; *United States v. Gilley, 56 M.J. 113, 121 (C.A.A.F. 2001)*. A prosecutor's argument must be examined in light of its context within the entire trial. *Robinson, 485 U.S. at 33*; *Gilley, 56 M.J. at 121*; *Lockett v. Ohio, 438 U.S. 586, 595, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*; **[*8]** *United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005)*.

Here, we do not find error in this case, plain or otherwise. When considered in context, we find the trial counsel's argument was aimed at attacking the defense theory of the case and did not shift the burden of proof. *United States v. Vandyke, 56 M.J. 812, 817 (N.M. Ct. Crim. App. 2002)*. Furthermore, the military judge properly instructed the members that ***HN3***[⬆] the Government always carried the burden of proving the appellant's guilt beyond a reasonable doubt and the burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the offense. After a thorough review of the record, we are convinced the trial counsel's remarks, when taken in context, did not improperly shift the Government's burden to the appellant. Even if the trial counsel's argument was error, we find it harmless beyond a reasonable doubt.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. **[*9]** Accordingly, the approved findings and sentence are

AFFIRMED.