IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	**BRIEF ON BEHALF OF THE UNITED STATES**
v.	)	Crim. App. No. 22072
Airman First Class (E-3), **JOHN P. MATTI ,** United States Air Force, *Appellant*.	)	USCA Dkt. No. 25-0148/AF
	)	8 September 2025

BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUE PRESENTED

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT THROUGH IMPROPER BOLSTERING, IMPROPER VOUCHING, IMPROPER USE OF FACTS NOT IN EVIDENCE, AND SHIFTING THE BURDEN TO DEFENSE IN FINDINGS ARGUMENT.

INTRODUCTION

In the words of Learned Hand, "It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion." United States v. Wexler, 79 F.2d 526, 529-30 (2d Cir 1935). Indeed, "Courts make no such demand; they recognize . . . that the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is

allowed those appeals in misericordiam which long custom has come to sanction." Id.

Closing argument is about advocacy, and from the government's perspective, the "entire purpose" of closing argument "is to convince the jury of the defendant's guilty based on the evidence presented." Hoever v. Jones, 2015 U.S. Dist. LEXIS 194899, at *19 (S.D. Fla. Aug. 31, 2015). "In our adversary system, prosecutors are permitted to try their cases with earnestness and vigor." United States v. Runyon, 707 F.3d 475, 507 (4th Cir. 2013). A prosecutor "may *state his views* of what the evidence shows and the inferences and conclusions that the evidence supports." United States v. Zehrbach, 47 F.3d 1252, 1265 n.11 (3d Cir. 1995) (emphasis added). And "attacking and exposing flaws in one's opponent's arguments is a major purpose of closing argument." United States v. Rivas, 493 F.3d 131, 139 (3d Cir. 2007). To be sure, there are some lines that prosecutors may not cross. But to parse through a prosecutor's closing statement for minor infelicities loses sight of the function of our adversary system, which is to engage opposing views in a vigorous manner." United States v. Johnson, 587 F.3d 625, 632 (4th Cir. 2009).

Trial counsel crossed no lines in Appellant's case, as reflected by trial defense counsel's failure to object to any argument. Trial counsel properly argued that the evidence supported the conclusion that the victim, CC, was telling the truth

about Appellant's violent assaults. He vigorously attacked trial defense counsel's insinuations that CC and the other corroborating witnesses were all lying. He properly stated his views on inferences that could be drawn from the evidence, such as how CC might have sustained some of her injuries and that CC had no reason to go through the long, drawn-out court-martial process just to advance a false allegation. And he properly commented that the defense (not Appellant) had failed "to counter or explain the testimony presented or evidence introduced." United States v. Dearden, 546 F.2d 622, 625 (5th Cir. 1977). Since all of trial counsel's arguments were grounded in the evidence presented, none of his arguments amounted to error, much less plain and obvious error. This Court should deny Appellant relief.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.[1]

[1] References to the UCMJ, Military Rules of Evidence (Mil. R. Evid.) and Rules for Courts-Martial (R.C.M.) are to the Manual for Courts-Martial, United States (MCM) 2019 edition.

RELEVANT AUTHORITIES

Rules For Court-Martial 919. Argument by counsel on findings:

(a) *In general*. After the closing of evidence, trial counsel shall be permitted to open the argument. Defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal.

(b) *Contents*. Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case.

STATEMENT OF THE CASE

The government charged appellant with one charge and four specifications of assault consummated by a battery upon a spouse in violation of Article 128, UCMJ. At a general court-martial at Luke Air Force Base, Arizona, contrary to Appellant's pleas, a panel of officer and enlisted members convicted him of the following two specifications:

> Did, at or near Surprise Arizona, on or about 21 May 2021, unlawfully pressed his knee on CC's back, the spouse of the accused. (Specification 2)
>
> Did, at or near Surprise Arizona, between on or about 1 January 2021 and on or about 31 January 2021, unlawfully bite CC's arm, the spouse of the accused, on the arm with his mouth. (Specification 3)

(JA at 269.) The members acquitted Appellant of the remaining two specifications. (Id.) The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of 1,222.00 pay per month for two months, and 75 days confinement for Specification 2 and 14 days confinement for

Specification 3 of the charge, both sentences to run concurrently. (JA at 269-70.) Appellant received a notification of his right to submit a direct appeal, and Appellant filed a notice of appeal with AFCCA. (JA at 273.) In a 2-1 decision, AFCCA affirmed the findings and sentence. (JA at 2.)

STATEMENT OF THE FACTS

Appellant's Crimes

January 2021: Appellant unlawfully bit CC's arm (Specification 3)

Appellant and CC got married in June 2020 and lived in Surprise Arizona. (JA at 68, 99.) Prior to the first abuse (unlawful bite) that occurred in January 2021, AA, Appellant's co-worker from technical training, lived with CC and Appellant. (JA at 163.) AA testified that Appellant and CC "argued nonstop" and Appellant started most of the arguments. (JA at 164.) After AA moved out in early January, CC explained that "things got worse. The arguments got worse and [Appellant] became physical." (JA at 69.) In January 2021, Appellant bit CC's arm. (Id.)

Before the incident, Appellant and CC were watching a show, and Appellant commented that a woman had large breasts. (JA at 70.) CC then said, "why are you with me if you wanted someone with large breasts." (Id.) CC wanted to understand "why [Appellant] married [her] if what he wanted wasn't [her]." (Id.) Then Appellant leaned over and bit her forearm. (Id.) CC explained that

Appellant's bite on her forearm was "pretty painful" and she "started to cry." (JA at 71.) Appellant's bite was not a playful bite, and left a bruise that lasted two weeks. (JA at 72.)

When CC asked Appellant why he bit her, Appellant responded, "because I wanted to." (Id.) Appellant then told CC that if she wanted to cry, she would need to go into another room. (Id.) So CC left Appellant and went to another room. (Id.)

SM also testified and provided the following corroborating evidence. SM worked with CC at Kohl's from November 2020 through January 2021. (JA at 181.) In early 2021, SM noticed that CC "came [into work] with a few bruises." (JA at 181-82.) Several months later, in June 2021, CC told SM that Appellant gave her bruises. (JA at 182.) On cross-examination, SM told trial defense counsel that she and CC worked overnight at Kohl's moving and packing boxes. (JA at 183.) The cross-examination of SM highlighted that CC could have sustained bruising on her arm from working a "warehouse operation," "moving boxes around, packing boxes, and putting them on pallets." (Id.) SM told trial defense counsel that when CC was not wearing long sleeves "you could catch glimpses of [the bruise]." (JA at 184.) On redirect examination, trial counsel asked, "Did the bruises that you saw [CC] display appear consistent with the work that you guys were doing?" (JA at 185.) SM responded, "No, not really." (Id.)

Trial defense counsel also cross-examined AA, the couple's roommate, and discussed AA's discontent with the amount of rent he was paying Appellant while living with him. (JA at 172.) AA testified that he was paying too much and told Appellant, "hey this rent isn't fair." (Id.) Still on cross-examination, AA corroborated that Appellant and CC argued a lot because CC knew Appellant had a contact of another female airman from technical school on his phone. (JA at 167-68.)

May 2021: Appellant unlawfully pressed his knee against CC's back (Specification 2)

CC testified that on 21 May 2021, Appellant and CC had a fight about Appellant connecting with another woman on Snapchat. (JA at 85.) CC recounted that she approached Appellant with his phone, turned the phone around and said, "do you think she's cute." (Id.) Next, CC described Appellant's response:

> He looked at me and he said "okay, that's it." I was sitting on the other side of the kitchen island and he walked around and grabbed my wrists behind the bar stool I was sitting on and he lifted them up. I told him to let go of me and he said "no." "I said let go of me. You're hurting me," and he said "no," and he lifted my arms higher so that I would get off the stool. I told him again to let go of me and I tried to kick him off of me with my right leg. While my right leg was still up, he quickly lifted my arms to where I would lose balance and fall onto my left knee and then onto my chin as well.

(Id.) CC hit her knee and chin on hardwood floor. (JA at 86.) The fall hurt CC's chin "a lot." (Id.) While CC was on the floor, in pain, Appellant put his knee on

her back in between her shoulder blades. (Id.) CC screamed, "let go of me" and Appellant said, "no." (Id.) CC then said, "you're hurting me." (Id.) Appellant responded, "I don't care." (Id.) CC and Appellant continued to argue while Appellant had his knee on her back. (Id.) Appellant put most of his body weight on CC's back, which she found very painful. (JA at 87.) Once CC stopped pleading for Appellant to stop, Appellant stopped. (Id.)

CC testified that this assault occurred sometime in the afternoon on 21 May 2021. (Id.) And after the assault, CC went to work around 2:00 pm. (JA at 88.) CC worked at Harley Davidson about 20-25 minutes from her residence. (JA at 87-88.) CC worked until 7:10 pm that day, and after work, went to her coworker's, CS, house. (JA at 88.) Once she returned home around 10:00 pm, CC testified that she took pictures of her leg and chin. (JA at 88-89.) But the timestamps of the photos revealed that CC took the photos of her injuries at 10:58 am and 11:04 am on 21 May 2021. (JA at 90, 256-58.)

CC did confront Appellant the next day about her injuries. CC said, "you left a bruise on my knee and it hurt me." (JA at 91.) Appellant responded, "you hurt my eyes and my ears…by talking and I have to look at you." (Id.)

CS, CC's co-worker and friend, also testified and explained that she noticed that CC "came into work with a bruise on her chin once." (JA at 155.) CS said that she saw CC's bruise around middle to the end of May 2021. (JA at 156.) On

cross-examination, CS then explained that when she saw CC's bruise it was between April and June, during the timeframe when CC and CS worked together. (JA at 159.) CS believed that she saw the bruise closer to when CC left for Florida, which was in June. (JA at 160.)

CS also remembered CC coming to her house on 21 May 2021 and was confident of that date based on text messages that were exchanged. (JA at 161.) During this visit, CC told CS that Appellant physically abused her. (Id.) Trial defense counsel asked cross-examination questions suggesting that CS was biased given that she was CC's friend and co-worker. (JA at 157.) Also, trial defense counsel elicited that CC told CS that she was upset that Appellant would "rather look at images" of other women than look at CC. (Id.)

CC's Cross-examination

Trial defense counsel attacked CC's credibility on cross-examination. Initially, trial defense counsel asked CC about her religious background. (JA at 98.) CC confirmed that religion was a big part of her "life growing up." (Id.) Her father was a minister for 50 years. (Id.)

Next, trial defense counsel questioned CC regarding the timestamp on the photos of her injuries that occurred on 21 May 2021 (Specification 2 – Appellant pressing his knee on CC's back). (JA at 110.) Although CC testified that she took pictures of her injuries when she returned home from work later that night, trial

defense counsel confronted CC with the timestamps of the pictures indicating that CC took the pictures at 10:58 am and 11:04 am in the morning on 21 May 2021. (JA at 110.)

Second, trial defense counsel addressed CC's credibility by eliciting a purported motive to fabricate. Trial defense counsel and CC discussed a message exchange between CC and Appellant's father when CC did not initially discuss the abuse. (JA at 111-12, 265.) In a text conversation that CC had with Appellant's father on 15 June 2021, CC initially told Appellant's father about Appellant's habit of looking at other women. (JA at 112.) CC then went on to tell her father "of course I am embarrassed. That's why I left." (JA at 114.) Trial defense counsel admitted these messages as a prior inconsistent statement. (JA at 113.) But on this same day, CC eventually told Appellant's father the real reason why she left because Appellant harmed her on more than one occasion. (JA at 262.)

Trial defense counsel next highlighted text messages CC sent to Appellant on 25 April 2021, when she never mentioned the physical abuse. (JA at 116.) This conversation occurred before the 21 May 2021 incident (Specification 2). The messages stated, "I don't want a divorce," "I get really hurt when you look at other women." (JA at 266.) Finally, trial defense counsel had CC confirm that in an interview with the prosecutors she made the following statement: "[Appellant] took my dream of being a wife and having a family, so it's only fair that now he

loses his dream of being a pilot." (JA at 121.) Trial defense counsel's questioning of CC suggested that the divorce was about jealousy, not physical abuse, and that therefore the abuse never happened. Only physical abuse could justify a divorce in CC's conservative Christian up bringing.

CC's Religious Background

CayC, CC's sister, also testified as a government witness. On cross-examination, the defense suggested that she was biased because CC was her younger sister. (JA at 175.) Trial defense counsel also discussed with CayC that her father was a minister for almost 50 years and that her family was raised with traditional Christian values. (Id.) Trial defense counsel confirmed with CayC that her family was taught that there "is really only one or two reasons that it's okay to get a divorce. . . one of those is physical abuse." (R. at 175-76.)

RC, CC's father also testified. On 2 June 2021, CC's father, RC, said that CC called and told him about the physical abuse. (JA at 187.) After a quick direct-examination, trial defense counsel on cross-examination inquired about RC's duty as a minister. (R. at 188.) RC confirmed that he raised his family to "follow traditional Christian values." (Id.)

CC Leaves Appellant and Reports the Assaults

Following the assault on 21 May 2021, Appellant did not physically hurt CC anymore because she left him. (JA at 92.) CC left because the fights and physical

abuse kept "getting worse." (Id.) CC testified that once she returned to Florida, she reported Appellant's crimes to law enforcement. (JA at 93.)

Several months later, in August 2021, CC told Appellant that she wanted to file for divorce. (JA at 94.) CC confirmed in her testimony that the divorce was "uncontested, mutually agreed upon divorce." (JA at 95.) The physical abuse allegations were never "brought up in divorce proceedings." (Id.) CC and Appellant's divorce was finalized on 28 December 2021, about six months before Appellant's court-martial. (Id.) Finally, CC testified that she was not receiving any monetary benefit from going through the court-martial process. (JA at 96.) CC wanted closure, and to make sure that Appellant knew what he did was wrong. (Id.)

Military Judge's Findings Instructions

The military judge provided the following instructions to the members before closing argument:

> Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence you are expected to use your own common sense and your knowledge of human nature and the ways of the world. In light of all of the circumstances in the case you should consider the inherent probability or improbability of the evidence. Bear in mind you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The final determination as to the weight and significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

> Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you. As the government has the burden of proof, trial counsel may open and close.

(JA at 213-14.)

Trial Defense Counsel's Opening Statement

Before the presentation of evidence, trial defense counsel began his opening statement with, "Welcome to the divorce case of [Appellant] and [CC]." (JA at 56.) Trial defense counsel made the following statements: 1) "You're not going to hear from witnesses who saw the alleged abuse, because none exist;" 2) "And pay attention to those reports, members. Pay attention to what [CC] tells you and compare that to what she told other people. . . They will be different;" 3) "Also pay attention to the witnesses you will hear from and ask yourself are they unbiased? Are they neutral? What are their motivations for testifying in this case?" and 4) "At the close of this case it will be clear that CC is a young woman whose fairytale marriage did not work out the way that she expected it." (JA at 57-58.)

The opening statement emphasized CC's motive to fabricate – implying that she was "looking for a reason why her marriage failed." (JA at 58.) The defense's case from the start suggested that the assaults never occurred. The defense never claimed it was self-defense, mistake of fact, or even a misunderstanding. The

defense's theory was that CC had been untruthful and motivated by anger that her marriage failed. Finally, the defense suggested that the government witnesses may be biased and motivated to help CC.

Closing Arguments

Trial Counsel's Closing Argument

As relevant to Appellant's claims on appeal, trial counsel made the following argument during closing argument.[2] Trial counsel mentioned a "conspiracy theory" several times: 1) "Members, the defense can get up here and come up with any conspiracy theories they want, but that's not reasonable. . . . Think about this, this grand conspiracy theory when you have two different witnesses -- what are the chances?" 2) "The defense needs to get up here and say that all these people are just lying to you; that it's all one giant conspiracy theory;" 3) "Members what they're going to do with that is trying to tell you if there's any doubt at all, if there's any conspiracy theory they can sell then you need to find him not guilty;" and 4) "The defense can get up here and give you all sorts of doubts, all sorts of possible doubts, possible explanations, possible reasons why this might all just be a conspiracy theory." (JA at 231, 235)

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[2] Although not in argument, Appellant alleges that trial counsel's voir dire introduction was also improper when trial counsel mentioned that he "travel[ed] around to assist in specific cases," and initially asked the members if they would all agree that the prosecution has a duty "in zealously seeking justice, along with maintaining good order and discipline."

When trial counsel discussed the strength of the government's case, he reviewed the corroborating evidence from "government friendly witnesses." (JA at 229-31.) Trial counsel then asked the members, "Who else were you presented with?" (JA at 232.) Trial counsel went on to say that CC even told Appellant's parents – who were "not government friendly witnesses" – about the abuse. (JA at 233.)

While discussing CC's credibility, trial counsel argued that "you have a credible witness," "she was credible," "she's telling the truth," "and you have not been provided with any reasonable explanation as to why the defense wants to get up her and say it's a lie, it's a lie, it's all lies." (JA at 234.) While arguing that CC had no motive to lie, trial counsel stated, "It's not for the faint of heart to testify in court. It is a long, drawn-out difficult experience for CC." (Id.)

Finally, in rebuttal argument, trial counsel argued, as well as demonstrated, to the members how CC could have sustained an injury to her chin while Appellant had a hold of CC's arms. (JA at 251.) Trial counsel stated, "Defense hasn't given you any explanation but think about where an explanation might be of how someone might get that (injury to CC's chin)." (Id.)

Additional context surrounding the specific statements is detailed within the corresponding analysis below.

Trial Defense Counsel's Closing Argument

Trial defense counsel's argument denied the charged offenses occurred, arguing that CC made false allegations of physical abuse: "[CC] made a series of unsupported reports that didn't happen." (JA at 237.) The defense's theory was that the physical abuse did not occur, and CC believed that Appellant "dishonored their marriage because he refused to stop looking at adult images." (Id.) Trial counsel attacked CC's motives. (JA at 240.) CC did not participate in the court-martial process for closure, her participation was "about payback. It's about making him feel the betrayal that she felt." (Id.)

When discussing Specification 2, Appellant pressing his knee on CC's back, trial defense counsel mentioned that Appellant weighed 130 pounds and therefore argued that "holding [CC] up in the air, a foot, for a 15 full seconds. . . [was] not consistent with someone of his size so that's reasonable doubt." (R. at 241.) Again, the defense's theory was that Appellant never abused CC, implying that she lied about the allegations.

Regarding Specification 3, the unlawful bite, trial defense counsel argued that bruising to CC's arm was consistent with working at a warehouse, moving pallets. (JA at 245.) Trial defense counsel also argued that anyone close to CC, such as CayC or AA, did not see any bruising on CC's arm during the month of January 2021. (Id.)

Finally, trial defense counsel argued that the government witnesses were biased towards CC, and that this case "involves strong emotions where you are going to see a lot of bias." (JA at 246.) Both RC and CayC were biased because they love their daughter and sister. (JA at 247.) AA did not like Appellant because of a financial dispute. (Id.) SC and SM were CC's friends who worked together who knew that Appellant was looking at other women, and "they have bias in this case." (Id.) Trial defense counsel concluded his argument by saying, "There was not physical abuse," and CC was looking "for a justification for why things fell apart." (JA at 249.)

Additional relevant portions of trial defense counsel's argument are mentioned in the analysis below.

Findings

The members announced a mixed verdict – finding Appellant guilty of two out of the four assault specifications of the charge. (JA at 254.) Appellant was found guilty of biting CC's arm (Specification 3) and pressing his knee behind her back (Specification 2). The members found Appellant not guilty for offenses that lacked corroborating evidence.

Appellant's Post-trial Declaration

Appellant in his declaration claimed that trial counsel acted out a version of Specification 2 (Appellant pressing his knee on CC's back). (JA at 274.) The demonstration consisted of trial counsel kneeling on both knees in front of the members placing his arms behind his back with his hands mid-waist before leaning forward with his chin also pointed forward out as if he was falling. (Id.) The declaration stated that trial counsel's demonstration was not included in the record and was not what CC testified to. (Id.)[3]

Additional relevant facts are included in the analysis below.

SUMMARY OF THE ARGUMENT

Trial counsel's arguments – which drew no objection at trial – were proper because they were supported by the evidence. Further, his arguments responded to the defense's theory of the case – a proper line of argument. Thus, Appellant fails to meet his burden to establish that trial counsel's alleged improper arguments were plain and obvious error. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). Appellant alleges that trial counsel "wove four separate categories of improper argument throughout the Government's initial and rebuttal argument." (App. Br. at 13.) Specifically, Appellant claims that trial counsel engaged in

[3] At the Air Force Court, the United States contested whether this declaration could be considered under United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020). The United States maintains this position.

improper bolstering, improper vouching, improper use of facts not in evidence, and shifted the burden to the defense. (Id.)

"The purpose of closing argument is to assist the jury in analyzing the evidence, and although a prosecutor may not exceed the evidence presented at trial during her closing argument, she may state conclusions drawn from trial evidence." United States v. Reeves, 742 F.3d 487, 505 (11th Cir. 2014). Trial counsel did not engage in the violations alleged by Appellant, but rather relied on the evidence produced at trial and the military judge's instructions to support his conclusions.

Trial counsel did not improperly bolster the government's case by disparaging the defense. Taken in the proper context, trial counsel's remarks regarding a conspiracy theory did not directly state that the defense had spun a conspiracy theory. What trial counsel meant was that the only argument that the defense would be able to make to explain the evidence was a "conspiracy theory" that all the witnesses, who did not know each other, colluded against Appellant. Trial counsel's comments about a conspiracy theory was about the state of the evidence and the lack of available arguments in Appellant's favor. Thus, trial counsel never actually disparaged trial defense counsel.

Next, trial counsel never vouched for CC's credibility. Trial defense counsel made CC's credibility a central issue. In turn, trial counsel was allowed to argue

the evidence-based reasons why the members should find CC credible. "Prosecutors, as well as defense lawyers, may and must argue as to the credibility of witnesses, and in a case of this kind the issue of credibility is critical. The very nature of closing argument requires a detailed analysis of the testimony of each witness and the inferences to be drawn from the evidence." United States v. Grey Bear, 883 F.2d 1382, 1392 (8th Cir. 2000). Arguing that a witness does not have a reason to lie is proper argument so long as such statement is grounded in evidence. United States v. Eley, 723 F.2d 1522, 1526 (11th Cir. 1984). Trial counsel's arguments outlined the reasons why CC did not have a reason to lie during the court-martial, such as the lack of financial gain for CC and the fact that divorce proceedings were finalized – all conclusions supported by the evidence. (JA at 234.) Nothing trial counsel said could reasonably be interpreted as asking the members to trust trial counsel's judgment on credibility, rather than making their own determination based on the evidence. Thus, trial counsel's arguments about credibility did not amount plain and obvious error.

Nor did trial counsel ever argued facts that were not in evidence. All his arguments were grounded in evidence admitted at trial or inferences reasonably drawn from such facts. R.C.M. 919(b). Trial counsel's demonstration in rebuttal argument showing how CC could have sustained an injury to her chin, was supported by reasonable inferences drawn from testimony that Appellant had a

hold of CC's arms while he pressed his knee against her back. It was fair argument to ask the members to use their common sense to imagine how the assault transpired. Further, this line of argument was also provoked by trial defense counsel's argument, who challenged CC's chin injuries and argued that the assault never happened. United States v. Harrison, 716 F.2d 1050, 1053 (4th Cir 1983) (finding that a prosecutor can argue issues provoked by the defense); (JA at 85, 243, 250-51.) Trial counsel's demonstration of how CC could have sustained an injury to her chin was proper argument.

Appellant alleges that trial counsel once again argued facts not in evidence related to the impact of the investigation and court-martial process had on CC. (App. Br. at 14.) The members heard evidence that CC participated in pretrial interviews and observed her demeanor while testifying. The members, using their common sense and knowledge of human nature and ways of the world, could draw the conclusion from the evidence that the court-martial and investigation process was very hard on CC. Trial counsel arguing about the impact of the court-martial process on CC was not plain and obvious error.

Lastly, trial counsel did not err by shifting the burden of proof when he stated that the defense failed to provide members with a reasonable explanation for the evidence. "[A] comment on the failure of the defense, as opposed to the defendant, to counter or to explain testimony presented or evidence introduced is

not an infringement on the defendant's fifth amendment privilege." Dearden, 546 F.2d at 625. Trial counsel's arguments were always grounded in the lack of evidence supporting the defense's theory of the case. Trial counsel never implied that Appellant had the burden and needed to prove his innocence. Trial counsel's statements were not error, nor did they shift the burden of proof.

Appellant did not suffer prejudice because of trial counsel's closing argument. The members carefully parsed the admitted evidence and convicted Appellant on the basis of the evidence alone, as demonstrated by the mixed findings. *See* United States v. Sewell, 76 M.J. 14, 19 (C.A.A.F. 2017); (JA at 254). The severity of any misconduct was low given that it drew no objection or sua sponte correction from the military judge. And the standard instructions were sufficient to cure any misconduct, and the weight of the evidence supported Appellant's convictions because there was corroborating evidence. United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). Given the strength of the government's corroborating evidence, the military judge's standard instructions, and mixed findings, even if the United States had to meet the more stringent, harmless beyond a reasonable doubt standard, it could do so in this case.

Trial counsel's argument was not plain and obvious error, and this Court can be confident that the members convicted appellant on the basis of the evidence

alone. Thus, Appellant is not entitled to relief, and this Court should deny Appellant's claims.

ARGUMENT

TRIAL COUNSEL DID NOT COMMIT PROSECUTORIAL MISCONDUCT BECAUSE HIS STATEMENTS IN CLOSING ARGUMENT WERE FAIR COMMENTS ON THE EVIDENCE PRESENTED AT TRIAL OR ON THE DEFENSE'S THEORY OF THE CASE. THEY DID NOT AMOUNT TO PLAIN AND OBVIOUS ERROR.

Standard of Review

This Court reviews "prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, [] review[s] for plain error." Voorhees, 79 M.J. at 9 (citing United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018). To establish plain error, the appellant bears the burden of demonstrating: (1) there was error; (2) such error was clear or obvious; and (3) the error resulted in material prejudice to a substantial right. Id.

Law and Analysis

Trial counsel's arguments were proper because his statements were either fair comments on the state of the evidence or made in response to issues raised by the defense. And in any event, trial counsel's argument did not tip the scale in favor of a guilty verdict. The members convicted Appellant on the basis of the

evidence alone and not trial counsel's closing argument as demonstrated by the mixed findings. United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007).

A. Trial counsel did not improperly bolster the government's case.

"[I]t is improper for a trial counsel to attempt to win favor with the members by maligning defense counsel." Voorhees, 79 M.J. at 10. Appellant alleges that trial counsel's statements regarding a "conspiracy theory" and the statement that "the defense's only explanation is that 'it's a lie, it's a lie, it's all lies" improperly bolstered the government's case. (App. Br. at 17.) But trial counsel was not maligning defense counsel as conspiracy theorists. Trial counsel was saying that based on the state of evidence, the only way the defense could explain the evidence was by claiming a conspiracy theory between all the government witnesses who did not know each other. Trial counsel's statements were a comment on the state of the evidence – not a disparagement of defense counsel. In fact, United States v. Nunez, 532 F.3d 645, 654 (7th Cir. 2008) supports the proposition that a prosecutor's comment on the "strength (or lack thereof) of the defense" is permissible and not a personal attack on defense counsel.

Throughout cross-examinations of witnesses, trial defense counsel repeatedly attacked CC's credibility suggesting that she made false allegations of physical abuse. The defense also questioned her motive as a devout Christian in that CC was looking for a reason why her marriage failed and only made an

allegation of physical abuse to justify her divorce. (JA at 175-76.) In particular, the statement that, "it's a lie, it's a lie, it's all lies" was trial counsel's characterization of the theory the defense would have to advance – based on the state of the evidence – in order for Appellant to be acquitted. In other words, the defense would have to say that CC and all the other witnesses were lying. It was not trial counsel saying that the defense was lying. In other words, it was an anticipatory argument – a comment on the state of the evidence – rather than a criticism of the defense team themselves.

In People v. Ford, No. 20CA827, 2023 Colo. App. LEXIS 2226, at *19-20 (Colo. App. 2023), the prosecutor in closing arguments made a similar remark as trial counsel here: "The defense would have you believe that there's this conspiracy, that this tampering, that there's this theory that all of these things were probably messed with." On appeal, when the defendant argued that "conspiracy" was an inflammatory term, the court found that the prosecutor's comment was not improper. Id. at *20. The court explained that when viewed in context, the comments, although possibly inartful, "were a means of focusing the jury's attention on relevant evidence" and were a fair response to the defense's "repeated suggestions at the trial that there might have been evidence tampering." Id.

Similarly, in People v. Denhartog, 452 P.3d 148, 158 (Colo. App. 2019), *abrogated in part on other grounds by* Whiteaker v. People, 547 P.3d 1122 (Colo.

2024), the prosecutor characterized defense counsel's arguments as a "gigantic pot" in which he "threw in" conspiracy theories" to "immobilize" jurors. The appellate court found no error, because, in context, "the prosecutor's comments were a direct response to defense counsel's argument that the officers had conspired to lie and tamper with evidence." Id. at 158. And, according to the court, the comments did nothing more than suggest that the defense's theory of the case "was so unlikely as to strain credulity." Id. Trial counsel's "conspiracy theory" comments here were not nearly as aggressive as the prosecutor's in Denhartog. But in a similar vein, trial counsel's comments were merely (1) responding to the defense's implications that all of the witnesses had lied and (2) urging the members to find the defense's theory of the case to be implausible.

The purpose of closing argument "is to allow counsel to offer ways of viewing the significance of the evidence." Croy v. State, 540 P.3d 217, 226 (Wyo. 2023). Here, trial counsel did just that; he was pointing out the insignificance of the evidence of bias that the defense elicited. In an adversarial proceeding, trial counsel was allowed to vigorously attack and expose flaws the in the defense's case. Rivas, 493 F.3d at 139; Johnson, 587 F.3d at 632. There was no plain and obvious error.

Appellant likens trial counsel here to the trial counsel in Voorhees where disparaging comments were made to bolster the government's case. (App. Br. at

17.) But this case is not Voorhees. In Voorhees, it was plain and obvious error for trial counsel to accuse defense counsel of "misplaced lying" and saying that "defense counsel's imagination is not reasonable doubt" which is a far contrast from what happened here. Trial counsel never accused the trial defense counsel of lying, and Appellant admits as much. (App. Br. at 17.)

In sum, trial counsel never personally attacked the trial defense counsel nor maligned the defense. Trial counsel's statements were proper and certainly not plain or obvious error.

B. Trial counsel did not vouch for CC's credibility.

Trial counsel did not improperly vouch for CC's credibility. Instead he responded to the defense's theory that CC was not a credible witness who, because of her Christian faith, fabricated the assaults to justify leaving her marriage. By doing this, trial counsel referred to the facts established on the record to argue that CC was a credible witness – a proper argument.

When credibility is an issue, counsel may argue that a witness was credible. Grey Bear, 883 F.2d at 1392. What is impermissible is vouching. Vouching for a witness's credibility occurs when a trial counsel "places the prestige of the government behind a witness through personal assurances of the witness's veracity." Fletcher, 62 M.J. at 182 (quoting United States v. Neceochea, 968 F.2d 1273, 1276 (9th Cir. 1994)).

Appellant states that trial counsel improperly vouched for CC's credibility beginning in voir dire. (App. Br. at 18.) To set up the government's position, Appellant alleges that "trial counsel explained that he traveled to try 'specific cases'…to single out [Appellant's] case as one warranting the special attention of this select prosecutor." (Id.) According to Appellant, trial counsel's discussion in voir dire set up the importance of CC's testimony. (Id.) But there was nothing improper about trial counsel's introduction to the members during general voir dire, given that trial counsel did not blatantly single out Appellant's case as one that warrants special attention. Instead, trial counsel introduced himself "as one of the prosecutors on this case. "I'm actually assigned out of Travis Air Force Base but travel around to assist in specific cases." (JA at 51.) Next, trial counsel introduced his co-counsel who was "the local prosecuted assigned. . . at Luke Air Force Base." (Id.) Moreover, trial counsel highlighted that the trial defense counsel had an obligation to zealously represent Appellant and that the prosecutor's role was to zealously represent the United States Air Force. (Id.) Trial counsel's introduction in voir dire is distinguishable from the trial counsel in Voorhees who stated that in his capacity as a senior trial counsel he traveled the world between 200-250 days of the year prosecuting the Air Force's most serious cases and then later said that he did not travel 250 days out of the year to "sell you a story." Voorhees, 79 M.J. at 10, 12. Trial counsel's statements were innocuous

comments describing the prosecution team, and no member would have interpreted them as trial counsel trying to enhance his own credibility with the members.

In voir dire, trial counsel asked questions regarding the credibility of witnesses. Trial counsel correctly pointed out that the government can present evidence supporting a conviction through witness testimony. (JA at 54.) Then trial counsel went on to ask:

> Although in some cases there are multiple witnesses and in many cases, especially domestic violence, there may only be the accused and the victim who witnessed the crime. Would you all agree that sometimes there are only two accounts of a crime?

(JA at 54.) This question was not setting up the arena for improper argument and vouching for CC's credibility but correctly assessed the posture of the case – assaults that occurred between a married couple where there were no third party witnesses to the charged violation. Thus, trial counsel's introduction in voir dire and follow-up questions were not error.

Next Appellant alleges four quotes from the closing argument were improper : 1) "you have a credible witness;" 2) "she was credible," 3) "she's telling the truth," and 4) "you have not been provided with any reasonable explanation as to why the defense wants to get up here and say it's a lie, it's a lie, it's all lies." (JA at 19.) But each, in context, was a proper statement.

First, "you have a credible witness" and "she was credible" were mentioned near the beginning of trial counsel's closing argument when he listed three topics he was going to address: 1) that the allegations "make sense" and "rings true;" 2) the corroboration and the military judge's instructions on the law proved the crimes; 3) "*you have a credible witness*. You have the victim, [CC], who came up here and took the stand and *she was credible*. She doesn't have a reason to lie. She doesn't have a reason to make this up." (JA at 217) (emphasis added).

In context, these statements - "you have a credible witness" and "she was credible" - were proper statements. It flagged for the members that trial counsel would discuss CC's credibility, and *why* the members should believe she was credible – because she had no reason to lie. Credibility is a proper line of argument in cases where credibility is such a central issue, as it was here. "The government may argue that the jury can or should infer from relevant facts that a witness does not have a reason to lie." United States v. Martinez-Larraga, 517 F.3d. 258, 271 (5th Cir. 2008). This is what trial counsel did here. He described why CC had no reason to lie by referring to the evidence admitted at trial, such as that CC did not receive any monetary benefit. He never implied that the members should find CC credible just because the prosecutor was saying so. *See* Eley, 723 F.2d at 1526 ("While a prosecutor may not vouch for the credibility of witnesses based on facts personally known to the prosecutor but not introduced at trial, 'that

does not mean the prosecutor cannot argue that the fair inference from the facts presented is that a witness had no reason to lie.'").

Second, trial counsel said, "she's telling the truth" and "You have not been provided with any reasonable explanation as to why defense just wants to get up here and say it's a lie, it's a lie, it's all lies" in the context of discussing the credibility of witnesses. (JA at 233.) Context matters leading up to how trial counsel argued these two statements. Trial counsel began by referring to the military judge's instructions:

> Now finally we need to talk about the credibility of the witness because this is important. Members, you have the absolute responsibility to determine the credibility of witness. The judge instructed you, you have that duty; that you must consider each witnesses intelligence, ability to observe and accurately remember, their sincerity and their conduct in court, prejudices, and their character for truthfulness, and you have not been provided with any real reason to doubt the credibility of this witness.

(JA at 233.) Next, trial counsel argued reasons why CC did not have a reason to lie:

> *She's telling the truth.* What does she have to gain by not telling the truth? Let's again talk out with this case isn't. This case isn't an ugly, you know, marriage dispute. This case isn't a sexual assault case where you caught me cheating on my boyfriend and now the only thing I can do is claim sexual assault to get out of it. This case isn't "hey, I want child-support for my children or I want custody of my children and the easiest way to do that is to claim physical abuse." There are potential motivations out there for why a victim might make a false claim. *You have not*

> *been provided with any reasonable explanation as to why defense just wants to get up here and say it's a lie, it's a lie, it's all lies.* Think about the benefits for CC of reporting a domestic violence claim. She has to do these investigative interviews which you've heard briefly about from the Office of Special Investigations [OSI]. Yeah, that's really fun to go and put your entire marital life -- your failed marriage to these law enforcement officials. She's had to go through prosecutor interviews, defense interviews, her courtroom testimony in front of you, the direct and cross-examination sitting up here for hours on the stand as we dig through any text messages she might have ever had and confront her on all those things. Members, it's not for the faint of heart to testify in court. It is a long, drawn out, difficult experience for CC. What possible motivation does she have? She's already got the divorce. She has nothing financial to gain from this. There is no benefit. She told you what the only benefit was; it's closure. It's trying to have justice done. Is the concern that he might go out and do this to someone else; that that can happen. He needs to be held accountable. You saw her and you saw her credibility, and you saw the credibility of the other witnesses; those people who received her outcry, who heard her talk about what was going on in her marriage, of those people who saw her bruises.

(R. at 233-35) (emphasis added). Trial counsel outlined reasons why CC did not lie and why she was telling the truth, which is permissible argument. Eley, 723 F.2d at 1526. More so, trial counsel drew reasonable inferences from the record to support these conclusions: CC did not have anything to gain, financial or otherwise, from making the allegations, and it made no sense for her to go through the arduous court-martial process just to advance false allegations. *See* United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013) ("As a zealous advocate for

the government, trial counsel may 'argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.'") And since trial counsel emphasized the military judge's instruction that the members had the "absolute responsibility" to determine the credibility of the witnesses, it is unlikely that the members perceived trial counsel to be saying that they should believe CC just because the prosecution told them to. Trial counsel's statements, in context, were proper especially in light of responding to the defense's theory of the case that constantly attacked CC's credibility and motive to fabricate.

And finally at the end of rebuttal argument trial counsel told the member's that CC was telling the truth after asking the members to believe CC because they had no reason not to:

> The government absolutely asks that you believe the victim in this case because you have no reasonable reason not to. *You know she's telling the truth*. You know her sincerity and you have the evidence to back it up. So, we ask that you do the right thing and hold the accused accountable and find him guilty of all specifications. Thank you.

(JA at 252) (emphasis added). Trial counsel asked the members to find CC credible because the evidence supported such a conclusion. Reeves, 742 F.3d at 505. He did not ask them members to find CC credible just because the prosecution said so or because the prosecution knew something the members did not.

Improper vouching "suggest[s]to a jury that there is additional evidence, not introduced at trial but known to the prosecutor, that supports the witness's credibility." United States v. Newton, 369 F.3d 659, 681 (2d. Cir. 2004). The problem with vouching is that "it may induce the jury to trust the Government's judgement rather than its own view of the evidence." Id. (quoting United States v. Young, 470 U.S. 1, 18-19 (1985)). Trial counsel never implied that he had additional evidence, known only to him, that supported CC's credibility. And nothing trial counsel said would have induced the members to trust trial counsel's judgment rather than their own view of the evidence – especially when trial counsel described the evidence supporting credibility, repeated the military judge's instructions, and told the members that determining the credibility was their "absolute responsibility." (JA at 233.) Trial counsel did not improperly vouch for CC.

Relying on Voorhees, Appellant alleges that trial counsel's alleged improper statements were plain and obvious error. (App. Br. at 19-20.) But this case is not akin to Voorhees where trial counsel bolstered and vouched for the credibility of the witness by stating:

> Technical Sergeant [BR] is an outstanding airman; an outstanding noncommissioned officer in the United States Air Force.

> 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.

79 M.J. at 11-12. Unlike in Voorhees, trial counsel never expressed his personal opinions that CC was an outstanding person, and never implied that CC must be telling the truth because he only prosecutes the most serious cases. Instead, trial counsel argued that CC was credible in response to the defense's theory of the case that attacked CC's credibility throughout Appellant's court-martial. Trial counsel was permissibly "stat[ing] his views of what the evidence show[ed]." Zehrbach, 47 F.3d at 1265 n.11.

In sum, trial counsel never placed the prestige of the government behind CC bolstering her credibility. Trial counsel was allowed to argue why the defense's theory of the case, attacking CC's credibility, was unpersuasive, and why, based on the evidence presented, they should find CC credible. That's what trial counsel did. Trial counsel's statements were proper argument and certainly not plain and obvious error.

C. Trial counsel's arguments were grounded in evidence admitted at trial and reasonable inferences drawn from such evidence.

Appellant argues that trial counsel injected facts not known to the members into his argument on two occasions: 1) when he misrepresented the way the injury to CC's chin occurred in rebuttal argument; and 2) when he gave members

additional evidence about the court-martial process to consider for CC's truthfulness. (App. Br. at 21.)

1. Trial Counsel's demonstration of CC's chin injury (Specification 2), during rebuttal argument, was supported by reasonable inferences drawn from the record.

Trial defense counsel first argued the discrepancies regarding CC's injury to her chin:

> The government has the burden to prove the charge that they've made against [Appellant]. What they are alleging is that [Appellant] injured [CC] using his knee. That's what the charge reads. There is no corroborating evidence of that. As she describes it, she was placed on the ground for minutes with almost all of his entire body weight through his knee onto her already injured back. That was her testimony. If that occurred, there would be some type of record of that injury; a picture of maybe a bruise on her back. She took images and she took her pictures in the bathroom. It wouldn't be that hard to take a picture over your shoulder. Or if she was truly already injured, she would have sought medical attention and then there would be records.

(JA at 243.) It was fair game for trial counsel to comment and even demonstrate how CC could have obtained the injury to her chin to rebut trial defense counsel's argument that Specification 2 never occurred. According to Appellant's declaration, trial counsel demonstrated a sequence of events where trial counsel was on his knees, hands behind his back, sticking his chin out as he was leaning forward. (JA at 274.) This demonstration correlated with the argument seen on page 250-51 of the Joint Appendix.

Trial counsel's rebuttal argument responded directly to the defense's argument challenging how could CC obtain an injury to her chin: "Defense hasn't given you any explanation but think about where an explanation might be of how someone might get that (injury to the chin)." (JA at 251.) Contrary to Appellant's assertions, this demonstration was consistent with CC's description of events in which she described that, "while my right leg was still up, he quickly lifted my arms to where I would lose balance." (JA at 85.) The record showed that CC's arms were not in front of her, that Appellant had a hold of them, leaving CC to lose her balance and hit her knees and chin. Here, trial counsel simply asked the members to use their common sense and knowledge of ways of the world to imagine how the human body could contort in the way CC described. As a result, trial counsel's demonstration was "not an inflammatory hypothetical scenario with no basis in evidence." *Cf.* United States v. Norwood, 81 M.J. 12 (C.A.A.F. 2021) For this reason, Appellant's Norwood-based criticism that trial counsel argued a hypothetical with no basis in evidence is not persuasive. (App. Br. at 22.)

Not only was trial counsel's rebuttal argument drawn from reasonable inferences from the record, but it was also provoked by trial defense counsel's closing argument. "The closing argument of the Prosecutor must be considered in the light of the previous arguments of defense counsel in order to determine whether there was provocation for what the Prosecutor said." Harrison, 716 F.2d

at 1053 (quoting United States v. Hoffa, 349 F.2d 20, 50 (6th Cir. 1965), *aff'd,* 385 U.S. 293 (1966)). Appellant disregards this context in his brief – that trial counsel's rebuttal argument was in response to trial defense counsel's argument. "[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.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting Young, 470 U.S. at 16). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Id. at 238. Thus, when considering trial counsel's statements in context with trial defense counsel's argument, this Court should find that the statements made in rebuttal argument were proper.

2. Trial counsel made reasonable inferences from the record when arguing about the burden the investigative process had on CC.

Appellant argues that no witness discussed the impact of the investigative process on CC, and therefore the following statements had no basis in fact: 1) "It's not for the faint of heart to testify in court. It is a long, drawn out, difficult experience for CC;" 2) "What possible motivation does she have?" and 3) "You saw her and you saw her credibility." (App. Br. at 22-23.) As noted above, this line of argument came when trial counsel argued reasons why CC did not have a reason to lie. It was derived from reasonable inferences drawn from the record. Halpin, 71 M.J. at 479. CC testified that she interviewed with the prosecution and

OSI, and the record demonstrated that it had been about one-year since she reported the incident when she testified at Appellant's court-martial. (JA at 93, 104, 120-21.) Further, the military judge instructed the members that they were "expected to use [their] own common sense and [their] knowledge of human nature and the ways of the world." (JA at 213.) With this instruction in mind, the members, who observed CC's demeanor while she testified, could make the inference that this court-martial process was difficult for CC especially when she testified that she had to participate in law enforcement and pretrial interviews. Trial counsel's argument was not clearly or obviously outside reasonable inferences the members could draw and were not clear or obvious error.

D. Trial counsel's statements never shifted the burden of proof.

The United States does not concede that trial counsel's argument amounted to error let alone constitutional error. Appellant claims that the following statements shifted the burden of proof:

> "You have not been provided with any reasonable explanation as to why defense just wants to get up here and say it's a lie, it's a lie, it's all lies." (App. Br. at 28 citing JA at 234.)
>
> "The defense *needs to get up here and say* that all these people are just lying to you; that it's all one giant conspiracy theory." (App. Br. at 29 citing JA at 235) (emphasis in the original).
>
> "Who else were you presented with?" (App. Br. at 29 citing JA at 232.)

> "Defense hasn't given you any explanation but think about where an explanation might be of how someone might get [purported injury to CC's chin]" (App. Br. at 29-30 citing JA at 251.)

But trial counsel never said that the defense was required to prove anything to negate reasonable doubt. In fact, trial counsel's arguments were in response to trial defense counsel's promises made during opening statements, which stated the following: "Pay attention to the witnesses you will hear from and ask yourself are they unbiased? Are they neutral? What are their motivations for testifying in this case?" and "At the close of this case it will be clear that CC is a young woman whose fairytale marriage did not work out the way that she expected it, and as her marriage failed she started looking for a reason why." (JA at 57-58.)

Trial counsel's line of argument has been upheld by various federal courts. "A prosecutor may comment on the defense's failures, so long as the comment is not 'manifestly intended to call attention to the defendant's failure to testify, or is of such a character that the jury would naturally and necessarily take it be a comment on the failure to testify." United States v Darrell, 659 Fed. App'x. 407, 409 (9th Cir. 2016). Importantly, there is "a distinction between comments about the lack of explanation provided by the defense, and comments about the lack of explanation furnished by the defendant." United States v. Mayan, 17 F.3d 1174, 1185 (9th Cir. 1994). The Fifth Circuit Court of Appeals has long adopted this same premise that a "comment on the failure of the defense, as opposed to the

defendant, to counter or to explain the testimony presented or evidence introduced is not an infringement on the defendant's fifth amendment privilege." Dearden, 546 F.2d at 625; *see also* United States v. Rodriguez-Preciado, 399 F.3d 1118, 1132 (9th Cir. 2005), as amended by 416 F.3d 939 (9th Cir. 2005) (finding no improper argument when the prosecutor said, "the defendant has not addressed what's really going on here," and "[h]e never gave you an explanation for what's really going on here. . . ."); United States v Hernandez, 145 F.3d 1433, 1439 (11th Cir. 1998) (recognizing that statements made by a "prosecutor on the failure by defense counsel, as opposed to the defendant, to counter or explain evidence does not violate a defendant's Fifth Amendment right not to testify"); United States v. Salley, 651 F.3d 159, 165 (1st Cir. 2011) (finding that the prosecutors comment drawing attention to the lack of evidence – "There's been no suggestion that [defendant] didn't know it was there" – was not improper and did not shift the burden of proof); United States v. Thompson, 560 F.3d 745, 750 (8th Cir. 2009) ("A prosecutor is permitted to comment on a defendant's failure to explain or counter the evidence unless the jurors would 'naturally and necessarily' take the prosecutor's comment as a remark on the defendant's decision not to testify.").

The members would not have mistaken trial counsel's statements as burden shifting. Trial counsel's main arguments were that the defense did not have a plausible explanation for why all the government witnesses were lying and that

defense did not have a reasonable explanation for CC's injuries. These were not necessarily things that Appellant could have explained through his own testimony, so the members would not have interpreted the statements as commentary on Appellant's failure to testify.

Moreover, trial defense counsel provoked the arguments made by trial counsel. *See* Harrison, 716 F.2d at 1053 (recognizing that defense counsel can provoke argument that is proper). For example, trial defense counsel throughout the court-martial elicited potential motivations for why the assaults did not occur, such as implying that CC, a devout Christian, made up the assaults to cover up her failed marriage. Thus it was proper for trial counsel to state, "There are potential motivations out there for why a victim might make a false claim. You have not been provided with any reasonable explanation as to why defense just wants to get up here and say it's a lie, it's a lie, it's all lies" (JA at 234.) This was a statement supported by the evidence because CC testified that the physical assaults were not part of the divorce proceedings. (JA at 95.)

Next, read in context, trial counsel's statement "who else were you presented with?" was not a rhetorical question implying that the defense had not presented certain evidence. Instead, it seemed to refer to Appellant's parents, who had exchanged text messages with CC about Appellant's abuse. Trial counsel said:

> Now in addition to those two specifically seeing bruises, these two coworkers, you do have other outcry witnesses. You have outcry witnesses in the form of the victim's father who she told on 2 June that this was happening, that's the reason why she's leaving. It was very clear why between her mind and her father why she was leaving, "because I'm being abused and I need to get out of here," and her father got a plane ticket out there and drove her home. Now it's not just the father. Defense is going to say "hey, these are all *government friendly witnesses*." Who else were you presented with? Before I get to that, let's walk through one little piece I went to mention in regards to [CS] (trial counsel proceeds to walk through corroborating evidence by [CS]).

(JA at 231-32) (emphasis added). Trial counsel went on to reveal "who" else the members were" presented with" soon after: Appellant's parents. (JA at 232-33.) Trial counsel argued that CC had also made prior statements about Appellant's abuse to Appellant's "own parents," saying "again, these are not government friendly witnesses." (Id.) Since trial counsel was commenting on actual evidence presented – not evidence that the defense did not present – there was no plain and obvious error.

Lastly, in rebuttal argument, when trial counsel said, "Defense hasn't given you any explanation but think about where an explanation might be of how someone might get that (injury to chin)," was responding to the defense's argument and did not shift the burden of proof. (JA at 251.) When arguing Specification 2 (Appellant pressing his knee on CC's back), trial defense counsel question how CC could have attained an injury to her chin and argued the lack of injury to her back.

(JA at 243.) This argument provoked trial counsel to demonstrate how CC could have injured her chin while Appellant had a hold of her arms. (JA at 251.) In turn, trial counsel called out trial defense counsel for not having a reasonable explanation of CC's injuries.

Prosecutors have considerable latitude to respond to an argument made by opposing counsel. United States v. Janus Indus., 48 F.3d 1548, 1558 (10th Cir. 1995). Further, "a prosecutor is permitted to present arguments in response to the defense's closing and may even bolster the credibility of witnesses, but only if done specifically to rebut assertions by defense counsel." United States v. Thomas, 12 F.3d 1350, 1367 (5th Cir. 1994). Thus, this Court should consider the context of trial counsel's rebuttal argument in light of trial defense counsel's closing argument that assailed CC's credibility and CC's version of events of how she received injuries to her chin. Trial counsel was merely "attacking and exposing flaws" in trial defense counsel's argument – "a major purpose of closing argument." Rivas, 493 F.3d at 632. In sum, trial counsel's statements were proper and did not shift the burden of proof.

E. Assuming error, Appellant did not suffer prejudice as a result of trial counsel's closing arguments.

In determining whether prejudice exists, military courts balance three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction."

Fletcher, 62 M.J. at 184. To find plain error, trial counsel's arguments must be so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." Schroder, 65 M.J. at 58 (quoting Fletcher, 62 M.J. at 184). This Court should be assured that the members convicted Appellant on the basis of the evidence alone given the mixed findings.

Appellant fails to recognize the importance of the corroborating evidence admitted during his court-martial. Instead Appellant states, "the difference between conviction and acquittal seemed to hang on the small threads of purported corroboration the trial counsel paired with [trial counsel's] improper argument." (App. Br. at 26.) Thus, Appellant claims plain and obvious error, as well as constitutional error, which resulted in prejudice. His claims have no merit.

1. Appellant suffered no prejudice because the members convicted Appellant on the basis of the evidence alone.

Appellant failed to meet his burden of proving that trial counsel's argument resulted in any prejudice. Voorhees, 79 M.J. at 9. The Fletcher factors favor the government. 62 M.J. at 184.

i. The severity of the misconduct was low.

Appellant and his trial defense counsel never objected to any of trial counsel' statements. This lack of a defense objection is "some measure of the minimal impact of a prosecutor's improper comment." United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999) (internal quotations omitted).

The members mixed findings showed that trial counsel errors, if any, did not impact the verdict. The members acquitted Appellant of two specifications, showing that the panel reviewed every offense alleged against Appellant individually, and made their own determinations independent of closing arguments.

ii. The standard instructions were sufficient curative measures.

Trial defense counsel never objected to trial counsel's argument and therefore the military judge and counsel did not take any additional curative measures other than the standard instructions. The military judge instructed the members "that arguments of counsel are not evidence." (JA 214.) Trial counsel emphasized that the military judge's instructions about the reasonable doubt standard, which "is proof that leaves you firmly convinced of the accused's guilt." (JA at 235.) Trial counsel also told the members that they had the "absolute responsibility" to determine the credibility of witnesses in line with the military judge's instructions. (JA at 233.) Even trial defense counsel reiterated that the prosecution had the burden to prove Appellant's crimes beyond a reasonable doubt. (JA at 241.) As a result, the members were well versed on the law, such as that the prosecution has burden of proof, that the members alone determine the credibility of witnesses, and that arguments by counsel are not evidence. While there were no curative measures given the lack of objections, the members, who

were presumed to follow the military judge's instructions, were instructed on the correct law to apply diminishing any impact of any improper argument, however minimal. *See* United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) ("Absent evidence to the contrary, this Court may presume that members follow the military judge's instructions.").

Standard instructions may be sufficient to cure misconduct. In United States v. Miles, 71 M.J. 671, 675 (N.M. Ct. App. 2012), the appellant claimed that the military judge erred in admitting matters in aggravation. The Court of Criminal Appeals noted that the military gave the standard instruction to the members that the appellant should be sentenced for the offenses for which he was found guilty. Id. at 676. The standard instruction to the members was sufficient and no additional curative instruction was warranted. Id. Same can be said here. Given that the severity of misconduct, if any, was low, the standard instruction given by the military judge before closing arguments – that arguments by counsel are not evidence and that members must base the determination of the issues in the case on the evidence – was sufficient to cure any improper statements. This factor favors the government.

iii. Weight of the evidence supported the convictions given the corroborating evidence.

The panel convicted Appellant of the crimes where there was corroborating evidence. In Sewell, 76 M.J. at 19, this Court said that "[t]he panels mixed findings further reassured us that the members weighed the evidence at trial and independently assessed Appellant's guilt without regard to trial counsel's arguments." The Court "presume[d], absent contrary indications, that the panel followed the military judge's instructions that trial counsel's arguments were not evidence and that it must not engage in spillover when determining Appellant's guilt." Id. Same can be said here. Like Sewell, Appellant was acquitted of all specifications for which there were no corroborating evidence. Id.

The panel weighed the evidence at trial to come to an independent determination of the facts, showing that they were firmly convinced of Appellant's guilt. The corroboration supporting Specifications 2 and 3, along with CC's testimony, proved the convictions for assault consummated by a battery beyond a reasonable doubt.

As for Specification 2 (Appellant pressing his knee on CC's back), CC took photos of her injuries consistent with her testimony – despite the minor discrepancy in when she took the photos. (JA at 256-58.) Although the photos of the injuries were taken in the morning (time stamped 10:58 and 11:04 am), and not later in the day as CC initially testified, the photos of the injuries nonetheless

corroborated that on 21 May 2021 Appellant assaulted CC which resulted in injuries to her chin and leg. (JA at 110-11; 256-58.) The pictures still showed the bruising on her knee and chin. (JA at 256-58.) Further, CS explained that she saw CC had a bruise on her chin around middle to the end of May 2021, during the charged timeframe of the assault. (JA at 156.) CC's testimony, photos of the injuries, and witness testimony describing the bruise on CC's chin supported the conviction beyond a reasonable doubt.

As for Specification 3 (Appellant's unlawful bite) which occurred in January of 2021, SM, CC's co-worker, noticed that in early 2021 CC "came [into work] with a few bruises." (JA at 182.) Later in June 2021, CC told SM that Appellant gave her the bruises. (Id.) Not only did SM see bruising on CC's arm, corroborating CC's testimony that Appellant bit her, but also CC told SM about the assault – a prior consistent statement. (Id.) CC told multiple witnesses, including her father and Appellant's father about the abuse. (JA at 187, 262.) Together with CC's credible testimony, the corroborating evidence supported the conviction beyond a reasonable doubt.

Although the defense tried to highlight CC's motive to fabricate the assaults to support the divorce proceedings and to justify to her Christian family why she was getting a divorce, CC testified that the assaults were never mentioned in the

divorce proceedings. (JA at 95.) This nullified any assertion that CC had a motive to fabricate. (Id.)

Appellant repeatedly claims that the corroborating evidence for Specifications 2 and 3 were not strong, and therefore the government had a weak case. (App. Br. at 26.) But throughout Appellant's direct appeal process, neither appellate defense counsel nor Appellant, through United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), raised the issues of factual and legal sufficiency. The evidence as to the two guilty specifications was strong.

The mixed findings undercut Appellant's claims that trial counsel's improper argument tipped the scales in favor of a conviction. If trial counsel's argument was so influential as to induce the members to render a verdict on something other than the evidence, then one would have expected the members to have convicted on all four specifications. But that did not occur. The members found Appellant guilty based on the evidence alone and not trial counsel's argument. The government's case was strong, and this factor favors the government. And under the plain error standard Appellant fails to prevail.

2. Any constitutional error was harmless beyond a reasonable doubt.

"[W]here a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in Chapman v. California, 386 U.S. 18 (1967)." United States v. Tovarchavez,

78 M.J. 458, 460 (C.A.A.F. 2019)[4] (citing United States v. Jones, 78 M.J. 37, 45 (C.A.A.F. 2018)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006) (internal quotations omitted).

A prosecutor's misconduct in attempting to shift the burden of proof must be "so pronounced and persistent that it permeates the entire atmosphere of the trial" to mandate reversal. United States v. Simon, 964 F.2d 1082, 1086 (11th Cir. 1992). In closing arguments, "prosecutors must refrain from making burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence." Id. Notably, "prejudice from the comments of a prosecutor which may result in a shifting of the burden of proof can be cured by a court's instruction regarding the burden of proof." Id. at 1087. Even if trial counsel's statements did constitute burden shifting, they were not so pronounced and persistent to mandate reversal. The members knew that the burden to prove the offenses was on the government because the military judge instructed them that the burden of proof was always on the prosecution and it never shifted to Appellant

[4] The United States continues to maintain that Tovarchavez should be overturned in light of Greer v. United States, 593 U.S. 503, 508 (2021) (Even for constitutional errors "[t]he defendant has the burden of establishing entitlement to relief for plain error."). Unfortunately, word limitations do not permit a full stare decisis analysis in this brief.

to prove his innocence. (JA at 211-12.) *See* Mason, 59 M.J. at 425 (burden shifting was harmless beyond a reasonable doubt because the evidence was overwhelming, and the military judge gave the standard instruction that the burden of proof to establish guilt was with the government and the burden never shifts to the accused to establish innocence). The members here were presumed to have followed these instructions. *See* Taylor, 53 M.J. at 198. Thus, any error was cured by the standard instruction.

The members came to a mixed verdict, demonstrating that they independently looked at the evidence admitted at trial and concluded that Appellant was not guilty beyond a reasonable doubt for two out of the four specifications. As argued above, had trial counsel's argument become so pervasive – shifting the burden to Appellant to prove his innocence – the verdict would have been guilty on all specifications. But that did not occur here. The specifications for which Appellant was found guilty were supported by corroborating evidence. The government's case was strong. Assuming constitutional error, any error was harmless beyond a reasonable doubt because the errors did not contribute to Appellant's convictions. Wolford, 62 M.J. at 420.

In sum, since Appellant has not established that trial counsel's arguments were plain and obvious error, and given that he suffered no prejudice he is not entitled to any relief.

CONCLUSION

The United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Air Force Appellate Defense Division on 8 September 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 12,840 words. This brief complies with the typeface and type style requirements of Rule 37.

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