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**United States Court of Appeals  
for the Armed Forces  
Washington, D.C.**

United States,                      USCA Dkt. No. 25-0273/SF  
  Appellee      Crim.App. No. 40581

v.

**ORDER DENYING PETITION**

Anton  
Soloshenko,  
  Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 10th day of November, 2025,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/      Malcolm H. Squires, Jr.  
  Clerk of the Court

cc:    The Judge Advocate General of the Space Force  
          Appellate Defense Counsel (Payne)  
          Appellate Government Counsel

2a

**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

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**No. ACM 40581**

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**UNITED STATES**  
*Appellee*

**v.**

**Anton SOLOSHENKO**  
Specialist 4 (E-4), U.S. Space Force, *Appellant*

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Appeal from the United States Air Force Trial  
Judiciary

Decided 31 July 2025

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*Military Judge:* Wesley A. Braun.

*Sentence:* Sentence adjudged on 21 September 2023 by GCM convened at Buckley Space Force Base, Colorado. Sentence entered by military judge on 27 October 2023: Dishonorable discharge, hard labor without confinement for 15 days, and reduction to E-3.

*For Appellant:* Major Heather M. Bruha, USAF; William E. Cassara, Esquire.

*For Appellee:* Colonel Steven R. Kaufman, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Mary Ellen Payne, Esquire.

*Before* JOHNSON, MERRIAM, and WARREN,  
*Appellate Military Judges.*

*Judge* MERRIAM delivered the opinion of the court,  
in which Chief Judge JOHNSON and Judge  
WARREN joined.

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**This is an unpublished opinion and, as such,  
does not serve as precedent under AFCCA Rule  
of Practice and Procedure 30.4.**

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MERRIAM, Judge:

A general court-martial consisting of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.<sup>1,2</sup> The members sentenced Appellant to a dishonorable discharge, hard labor without confinement for 15 days, and reduction to E-3. The convening authority took no action on the findings or sentence.

Appellant raised four issues on appeal, which we have rephrased: (1) whether Appellant's convictions are legally and factually sufficient; (2) whether the military judge abused his discretion in admitting

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<sup>1</sup> Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

<sup>2</sup> Appellant was acquitted of one specification of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. A second specification of assault consummated by battery was withdrawn and dismissed with prejudice by the Government prior to arraignment.

statements of the complaining witness under the excited utterance exception to the hearsay rule; (3) whether 18 U.S.C. § 922 is constitutional as applied to Appellant when Appellant was convicted of non-violent offenses; and (4) whether Appellant's constitutional rights were violated by being convicted of offenses by a court-martial panel that was not required to vote unanimously for guilt.<sup>3</sup>

We have carefully considered issue (3) and find it warrants neither discussion nor relief. See *United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)); see also *United States v. Johnson*, \_\_ M.J. \_\_, No. 24-0004, 2025 CAAF LEXIS 499 (C.A.A.F. 24 Jun. 2025) (Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2) (*Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*), does not give this court authority to modify the 18 U.S.C. § 922 indication on an entry of judgment); *United States v. Williams*, 85 M.J. 121, 126 (C.A.A.F. 2024) (whether a conviction triggers 18 U.S.C. § 922 is not part of the findings or sentence upon which Courts of Criminal Appeals have authority to act under Article 66(d)(1)(A), UCMJ (2024 *MCM*)).

As to issue (4), Appellant is not entitled to relief. See *United States v. Anderson*, 83 M.J. 291, 302 (C.A.A.F. 2023) (holding that a military accused does not have a right to a unanimous verdict under the Sixth Amendment,<sup>4</sup> the Fifth Amendment's Due Process Clause, or the Fifth Amendment's component

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<sup>3</sup> Issue (4) was personally raised by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

<sup>4</sup> U.S. CONST. amend. VI.

of equal protection<sup>5</sup>), *cert. denied*, 144 S. Ct. 1003 (2024).

We address issues (1) and (2) below. Finding no error materially prejudicial to Appellant’s substantial rights, we affirm the findings and sentence.

## I. BACKGROUND

### A. Consensual Sexual Relationship Between LH and Appellant

In June 2022, Appellant, then 21 years old, met LH, an 18-year-old civilian, on a dating application and began a short relationship with her. In the following few weeks, they frequently engaged in consensual rough sex. At LH’s request, Appellant intentionally caused LH pain, including by spanking her, because LH enjoyed the sensation of feeling pain during sex.<sup>6</sup> The record indicates sometimes LH would ask Appellant to “do it harder” to cause more pain for her sexual gratification. And LH testified at trial that sex involving pain was “almost the only type of sex” they had. At least once, Appellant left “considerable marks” on LH’s breasts. Approximately 75 percent of their consensual sexual encounters involved Appellant, at LH’s request, enhancing LH’s sexual pleasure and gratification by making it difficult for her to breathe.

When not physically together, LH and Appellant communicated their sexual interests and

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<sup>5</sup> U.S. CONST. amend. V.

<sup>6</sup> We include these personal and intimate details because they are relevant and necessary to analyzing Appellant’s mistake of fact defense, as analyzed in detail *infra*.

fantasies to each other by text message.<sup>7</sup> LH told Appellant he should: (1) have sex with her “dirty, hot, rough, and deep;” (2) spank her because she had been “real bad;” and (3) handcuff or tie her up and “make” her perform sex acts on him, the thought of which she explicitly acknowledged made her sexually aroused.

On 7 July 2022, when Appellant and LH were texting about sexual desires, LH sent Appellant a message saying, “I want you to stop, but I really don’t want [you] to all at the same time.” Later that day they had consensual rough sex, after which LH perceived a shift in Appellant’s mood. Appellant told LH he felt like “a withered husk,” referring to being exhausted and uninterested in continuing to engage in sex with her in the way she desired. Appellant further told LH that sex with her was making him tired and depressed. On 8 July 2022, LH and Appellant again discussed “concerns about [their] sexual compatibility.” Appellant communicated his willingness to continue having sex with LH, but expressed that he could not take LH “home to his mother.” On 9 July 2022, LH sent Appellant a text ending their relationship because in her view they were “not compatible . . . anymore” and she was “just not that into” him.

After the 9 July 2022 text exchange, Appellant and LH did not meet or have sex for several days. In the meantime, LH had sex with another man on 11 July 2022. She also went to see her therapist, who advised her to remain celibate for a period. LH acknowledged she had previously failed to follow other advice from her therapist. At trial, however, LH asserted that on

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<sup>7</sup> All quotes from text messages are in their original form, except where bracketed.

this occasion she intended to make a real change and had resolved to be celibate.

On 19 July 2022, Appellant sent LH text messages saying he missed her and “[t]hings should not have gone the way they did.” LH responded saying, “[N]o they shouldn’t have I miss you too” and “Im [sic] sorry that I said what I did, it wasn’t true and that was sh[\*\*]ty of me.” Appellant and LH then arranged to meet at Appellant’s home that night. LH told Appellant, “I want to make sure this is not like a booty call thing, right[.]” Appellant replied “It’s not.”<sup>8</sup>

### **B. Events Leading to the Article 120, UCMJ, Offense**

On the evening of 19 July 2022, LH arrived at Appellant’s home as planned. According to LH, they first sat on Appellant’s couch and engaged in small talk. Eventually, Appellant started to kiss LH. She told him, “I’m trying to be celibate and not do anything sexual in nature and I just want to let you know this is as far as it’s going to go[,] it’s PG, that’s it.”<sup>9</sup> Appellant responded that was “fine.” LH was a willing and active participant in the kissing because, according to her, “emotions were high” and she believed kissing was not as intimate as sex. They talked for a few more minutes about how their

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<sup>8</sup> At trial, LH clarified on cross-examination, that she considered the term “booty call” to mean being invited for the sole purpose of having sex outside of a relationship, whereas an invitation to come over for the sole purpose of sex during a relationship would not be a “booty call.”

<sup>9</sup> “PG” is apparently a reference to the Motion Picture Association’s movie ratings system suggesting the suitability of films for various audiences. LH testified that to her “PG” meant kissing only.

relationship had previously ended and they apologized for the hurtful things they said to each other.

Appellant then started showing LH some new furniture around his home. She followed him into his bedroom where he showed her new nightstands. LH testified she was more focused on their conversation than the fact they were headed into the bedroom. Appellant and LH started kissing again on Appellant's bed. LH told Appellant, "This is as far as it's ever going to go." Appellant responded that "it was fine." Appellant began kissing LH more aggressively while laying on top of her. He eventually started to, in LH's words, "move his hands to other places that wasn't okay." According to LH, she stopped kissing Appellant back at this point and was "[j]ust kind of was there." Appellant started pushing down on LH's face, causing her to feel like she could not breathe. LH testified that at times she could not talk, but managed to say "no" 20 to 30 times while Appellant was kissing and groping her. LH tried to stop the kissing by putting her hand over his mouth and her mouth, but Appellant moved her hand out of the way. When Appellant started to take off his shirt, LH pulled it back down, saying words to the effect of, "If you take your shirt off, this is going to go to the next place." Nevertheless, Appellant eventually removed his shirt anyway. LH tried to place the shirt between their faces, but Appellant moved it out of the way and resumed kissing her.

Appellant told LH he knew she "wanted it" and either "told" or "asked"<sup>10</sup> LH to take off her clothes. At

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<sup>10</sup> LH used both terms during her testimony on direct examination and neither trial counsel nor trial defense counsel

this point, LH believed Appellant wanted to have sex with her. LH removed her jeans, underwear, shirt, and bra, and testified she did so out of fear that Appellant “would make” the situation “more violent” than “it already was.” At trial, LH testified Appellant was “overpowering” her, she “couldn’t really get away” and she “felt like [she] didn’t have any other choice than to do what he asked” as the situation, in her view, “kept escalating further.”

Appellant did not threaten LH, however. She testified at trial that she clearly recalled removing all her own clothing without Appellant’s assistance, but she could not remember whether Appellant touched her while she did so.

While LH was laying naked in bed, Appellant got up to retrieve a condom from the nightstand. When Appellant returned, he moved LH’s legs apart and penetrated her vulva with his penis. Appellant also bit her neck and one or both of her breasts.<sup>11</sup> LH testified this caused her “extreme pain” and she “made noises [of] pain,” but did not physically resist or tell Appellant to stop penetrating her because she felt “frozen.” LH estimated Appellant’s penetration of her vulva lasted about 15 minutes. From the time Appellant “told” (or “asked”) LH to take her clothes off

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requested clarification. During a cross-examination in which LH regularly challenged and pushed back on the language and premises of trial defense counsel’s questions, she did not challenge trial defense counsel’s multiple questions about the circumstances when Appellant “asked” her to take her clothes off.

<sup>11</sup> LH testified she could not remember whether Appellant bit one or both breasts. The panel acquitted Appellant of a separate charge and specification alleging his biting her breast constituted an assault consummated by a battery in violation of Article 128, UCMJ.

until the penetration was over, she did not say “no” or “stop” or otherwise express verbally that she did not consent to penetration.

Afterwards, according to LH’s testimony, Appellant laid his head on LH’s chest and acted “affectionate” toward her, which she found “highly confusing.” Appellant asked LH how she was feeling. She responded by asking him if he wanted to hear the truth or a lie. After Appellant told her he wanted to hear the truth, she said that she did not feel okay. Appellant responded by telling her she did not need to feel bad about breaking her promise to be celibate because it was “all him.”

### **C. Aftermath**

LH got dressed and laid down on Appellant’s couch. Appellant seemed to detect LH was still bothered by something. He asked her if she was upset because of her intent to remain celibate. LH revealed she had also had sex with another man on 11 July 2022—two days after breaking up with Appellant.

LH remained at Appellant’s apartment for 45 to 60 minutes. She then walked to her car while “processing what happened.” LH then telephoned SS, a close family friend, as she began to grasp the “extent of what happened” and “started putting it together . . . [a]nd realizing how bad it was.” LH was crying during her conversation with SS.

LH then briefly called her sister and her mother before driving to her mother’s home where she started crying again. LH had a contentious relationship with her mother who had recently told LH she could no longer live in her home because she was not following her rules. LH was planning to sleep in her boss’s basement the night the incident occurred, but her

mother permitted her to stay the night at her home. At some point, LH revealed to her mother some details of what had happened.<sup>12</sup> LH's mother told her she needed to go to the hospital if she had been sexually assaulted.

Later that night, Appellant sent LH two text messages to which LH did not respond. First, Appellant wrote, "come back I'm horny." In a separate text, he wrote he was just kidding and wished her a good night. It had been the usual practice for Appellant to engage in "multiple rounds of sex" with LH "almost every time." This time, however, LH did not respond to his request that she return, because, according to her trial testimony, she believed Appellant "had just sexually assaulted" her and she believed "there is no response" to a request to return after such an encounter.

The next day, 20 July 2022, Appellant texted LH, "Good morning. Hope you don't hate me too much." LH again did not respond. LH went to work that day. After she finished her shift, she went to the hospital for a forensic sexual assault exam by a nurse examiner. The nurse examiner took photographs, some depicting marks on LH's neck and breast. LH told the nurse examiner there was no history of Appellant threatening her or inflicting injury on her before the night of the alleged assault. LH told the nurse examiner Appellant had made it difficult for her to breathe during the sexual act on 19 July 2022, but did not reveal to the nurse examiner that Appellant

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<sup>12</sup> The record is unclear exactly what LH told her mother about the sexual assault or when she told her.

had also previously done this at her request in most of their prior consensual sexual encounters.

After LH told her mother that she had reported the sexual assault, visited the hospital, and spoken with the police, her mother rescinded LH's eviction and allowed her to return to staying at home.<sup>13</sup>

#### **D. LH's Testimony at Appellant's Trial by Court-Martial**

LH testified for the Government at Appellant's trial by court-martial. Appellant exercised his right to remain silent and elected not to testify.

On direct examination, LH described Appellant spreading her legs before penetrating her vulva with his penis on the night in question. LH did not allege that Appellant used force to do so. Then, on cross-examination, LH stated for the first time that Appellant had "forced" her legs open.

During cross-examination of LH, trial defense counsel pressed LH as to why she had not previously disclosed this supposed "force" to the sexual assault nurse examiner, two police detectives, or the prosecution team, or why she did not testify about this "force" in her initial direct examination. LH answered, "No one's ever asked."<sup>14</sup> Further, LH admitted that on 4 July 2022 she showed her mother injuries to her

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<sup>13</sup> For reasons not explained in the record and apparently not germane to the case, this arrangement lasted only a few days before LH's mother again told LH she could no longer live in her home.

<sup>14</sup> When asked during further cross-examination to specify whether her use of the word "force" meant she physically resisted Appellant spreading her legs, LH answered, "I froze so, I just froze, and I just laid there, and he opened them."

breasts and complained Appellant caused them, then on the two subsequent days communicated to Appellant by text her desire for rough sex.

During another part of cross-examination, LH acknowledged that she never revealed her history of consensual “rough sex” with Appellant to the nurse examiner or police investigators, and did not disclose it to the prosecution team until two days before trial. This late disclosure happened after the Defense questioned LH about certain text messages between her and Appellant showing the consensual nature of their prior sexual relations. In particular, on cross-examination, when trial defense counsel sought to establish that LH had deleted a supposedly exculpatory message from Appellant, LH claimed she never received such a message. LH testified she had not blocked incoming messages from Appellant on her phone, then moments later testified that she did not know whether she had blocked him, then shortly thereafter testified she had temporarily blocked him, then unblocked him at police direction. When trial defense counsel confronted LH about her changed testimony, LH responded, “I had forgot because there was a lot of instructions specifically about blocking and unblocking.”

## **II. DISCUSSION**

### **A. Legal and Factual Sufficiency**

Appellant challenges the legal and factual sufficiency of the sole conviction for sexual assault. Appellant asserts legal and factual insufficiency of both the Government’s proof regarding the essential elements of the offense of sexual assault and Appellant’s mistake of fact defense.

## **1. Law**

### ***a. Legal Sufficiency***

We review issues of legal sufficiency de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). “Our assessment of legal sufficiency is limited to the evidence produced at trial.” *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)).

“The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (citation omitted). “[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, “[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction.” *King*, 78 M.J. at 221 (alteration in original) (citation omitted). “This deferential standard impinges upon the factfinder’s discretion only to the extent necessary to guarantee the fundamental protection of due process of law.” *United States v. Mendoza*, 85 M.J. 213, 227 (C.A.A.F. 2024) (internal quotation marks and citation omitted).

### ***b. Factual Sufficiency***

We are neither required nor empowered to review the factual sufficiency of the evidence unless an appellant both (1) asserts an assignment of error and (2) shows a specific deficiency in the proof. *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024).

The current version of Article 66(d)(1)(B), UCMJ, FACTUAL SUFFICIENCY REVIEW, states:

(i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon a request of the accused if the accused makes a specific showing of a deficiency of proof.

(ii) After an accused has made a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

(iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1)(B) (2024 *MCM*).

“[T]he requirement of ‘appropriate deference’ when a [Court of Criminal Appeals] ‘weigh[s] the evidence and determine[s] controverted questions of fact’ . . . depend[s] on the nature of the evidence at issue.” *Harvey*, 85 M.J. at 130 (second and third alteration in original). It is within this court’s discretion to determine what level of deference is appropriate. *Id.* at 131.

“[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial.” *Id.* at 131 (internal quotation marks omitted).

For this court “to be ‘clearly convinced that the finding of guilty was against the weight of the evidence,’ two requirements must be met.” *Id.* at 132. First, we must decide that evidence, as we weigh it, “does not prove that the appellant is guilty beyond a reasonable doubt.” *Id.* Second, we “must be clearly convinced of the correctness of this decision.” *Id.*<sup>15</sup>

### ***c. Sexual Assault***

As charged, the elements for sexual assault are: (1) Appellant committed a sexual act upon LH by penetrating LH’s vulva with Appellant’s penis; and (2) Appellant did so without LH’s consent. *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 60.b.(2)(d). As relevant here, a “[s]exual act” is defined as “the penetration, however slight, of the penis into the vulva or anus or mouth.” *MCM*, pt. IV, ¶ 60.a.(g)(1)(A). “Consent” is defined as “a freely given

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<sup>15</sup> We note a perplexing interaction between the two parts of this standard. To find the evidence proves Appellant’s guilt beyond a reasonable doubt, we must be “firmly convinced” of Appellant’s guilt. *See, e.g., Military Judge’s Benchbook*, Dept. of the Army Pamphlet 27-9 at 1825 (29 Feb 2020); *United States v. McClour*, 76 M.J. 23 (C.A.A.F. 2017) (noting the *Benchbook* instruction, including the “firmly convinced” standard). So, it appears that for us to take action under the new Article 66(d)(1)(B), UCMJ, standard as interpreted by our superior court in *Harvey*, we must be “clearly convinced” that we are *not* “firmly convinced” of Appellant’s guilt.

agreement to the conduct at issue by a competent person.” *MCM*, pt. IV, ¶ 60.a.(g)(7)(A).

“An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent.” *MCM*, pt. IV, ¶ 60.a.(g)(7)(A). “Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent.” *Id.*

“All the surrounding circumstances are to be considered in determining whether a person gave consent.” *MCM*, pt. IV, ¶ 60.a.(g)(7)(C). “A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.” *MCM*, pt. IV, ¶ 60.a.(g)(7)(A). “The burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent.” *United States v. McDonald*, 78 M.J. 376, 381 (C.A.A.F. 2019).

#### ***d. Mistake of Fact***

“[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense.” Rule for Courts-Martial (R.C.M.) 916(j)(1). If the mistake goes to an element requiring general intent, it “must have existed in the mind of the accused and must have been reasonable under all the circumstances.” *Id.* Article 120(f), UCMJ, 10 U.S.C. § 920(f), makes clear an accused may raise any applicable defenses under the Rules for Courts-Martial to a charge of violating that Article. Therefore, an honest and reasonable mistake that the victim consented to the charged sexual

assault is an affirmative defense to the charged offense. *See, e.g., McDonald*, 78 M.J. at 379 (considering the defense of mistake of fact to a charge of sexual assault).

While the quantity of evidence required to raise the mistake of fact defense is low, the record must contain at least some evidence supporting both the subjective “honest” and the objective “reasonable” mistaken belief. *See United States v. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017) (citation omitted) (“[W]hile [the a]ppellant’s statement may constitute a scintilla of evidence about his ‘honest belief,’ . . . there is not an iota of evidence that such a belief was reasonable.”); *see also United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995) (citation omitted) (“The testimony relied on by appellant tended to show objective circumstances upon which a reasonable person might rely to infer consent. However, they provided no insight as to whether appellant actually or subjectively did infer consent based on these circumstances.”).

In a sexual assault case, it is an affirmative defense to the charged offense that the accused had an honest and reasonable mistake of fact that the victim consented to the charged sexual act. *See, e.g., McDonald*, 78 M.J. at 379. A reasonable mistake of fact cannot be based upon the negligent failure by an Appellant to discover the true facts. *See United States v. Lee*, No. ACM 39531 (f rev), 2020 CCA LEXIS 61, at \*22 (A.F. Ct. Crim. App. 26 Feb. 2020) (unpub. op.) (citing *McDonald*, 78 M.J. at 379) (“[I]n this case, as in *McDonald*, the military judge properly instructed the members that any mistake of fact as to [the victim’s] consent must have been non-negligent.”). Negligence, in turn, is the absence of due care. When

determining what is reasonable, “[d]ue care’ is ‘such care as would be exercised by an ordinarily prudent [person] when sober.’” *United States v. Harrington*, No. ACM 39825, 2021 CCA LEXIS 524, at \*17 (A.F. Ct. Crim. App. 14 Oct. 2021) (unpub. op.) (quoting *United States v. Bragg*, 4 C.M.R. 778, 782 (A.F.C.M.R. 1952); then citing Restatement (Second) of Torts § 283C cmt. d (Am. Law Inst. 1965) (if a drunken person’s “conduct is not that of a reasonable man who is sober, his voluntary intoxication does not excuse” conduct that would otherwise be negligent)), *rev’d on other grounds*, 83 M.J. 408 (C.A.A.F. 2023); *see also United States v. Moore*, No. ACM S32477, 2018 CCA LEXIS 560, at \*12 (A.F. Ct. Crim App. 11 Dec. 2018) (unpub. op.) (citation omitted) (“This defense has two elements: one subjective and one objective. For the subjective element, the ignorance or mistake must have existed in Appellant’s mind. For the objective test, the ignorance or mistake must be reasonable under all the circumstances as assessed by an ordinary, prudent, sober adult.”). The Government bears the burden to prove beyond a reasonable doubt that the accused did not form a reasonable belief that he had obtained consent. R.C.M. 916(b)(1); *see McDonald*, 78 M.J. at 381.

## **2. Analysis**

### ***a. Legal Sufficiency***

The evidence introduced by the Government at trial meets our standard of review for legal sufficiency. LH testified that Appellant penetrated her vagina with his penis and did so without her consent. She further testified that prior to the penetration she explicitly expressed her lack of consent to Appellant’s escalation of physical contact beyond kissing. She told

him she intended to remain celibate, that kissing was “as far as it’s going to go,” and that their activities would remain “PG.” She subsequently testified that while Appellant was kissing her in an increasingly insistent and aggressive manner, “[she] said no probably about 20 to 30 times” with “no exaggeration there.” LH further testified that prior to penetration she attempted to prevent Appellant from removing his shirt and placed her hand between his mouth and her own mouth in an attempt to prevent further unwanted kissing and otherwise resist Appellant’s advances. Viewing the evidence in the light most favorable to the Prosecution, *Robinson*, 77 M.J. at 297–98, and drawing every reasonable inference from the evidence of record in favor of the Prosecution, *Barner*, 56 M.J. at 134, we conclude a rational trier of fact could have found the essential elements of the crime and the Government’s refutation of Appellant’s mistake of fact defense beyond a reasonable doubt.

***b. Factual Sufficiency***

On appeal, Appellant claims two specific deficiencies of proof. First, Appellant argues the Government did not prove the elements of the offense of sexual assault beyond a reasonable doubt at his court-martial, where establishing Appellant’s guilt depended heavily on the court members crediting LH’s testimony as truthful. According to Appellant, LH was an “unreliable and dishonest witness” who had “multiple motives to fabricate” and, therefore, a conviction mainly supported by her testimony was factually insufficient. Second, Appellant argues the Government did not disprove Appellant’s mistake of fact defense beyond a reasonable doubt. Specifically, Appellant contends LH’s “words and conduct during the sexual assignation, coupled with Appellant’s

knowledge of LH's preference for rough sex led Appellant to honestly believe that she consented to vaginal intercourse."

***i) Appellant's Contention that Evidence of Offense was Insufficient***

Appellant's assignments of error include the requisite specific showing of a deficiency of proof under each theory to merit our review. See Article 66(d)(1)(B), UCMJ (2024 *MCM*). Therefore, we proceed to weigh the evidence and determine controverted questions of fact. We may dismiss, set aside, or modify the finding, or affirm a lesser finding only if, after weighing all the evidence, we are clearly convinced that the Government did not prove beyond a reasonable doubt that (1) Appellant committed a sexual act upon LH by penetrating LH's vulva with his penis; and (2) Appellant did so without LH's consent. See *MCM*, pt. IV, ¶ 60.b.(2)(d); Article 66(d)(1)(B)(iii), UCMJ (2024 *MCM*).

In assessing the weight of the evidence, we must focus on the issue of LH's credibility, as her testimony was the lynchpin of the Government's case at trial. Understanding we were not present for the witness testimony at trial, we give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Article 66(d)(1)(B), UCMJ (2024 *MCM*). In this case, we give greater deference to the factfinder regarding witness testimony than we do to other forms of evidence that we can review in the same way as the factfinders did. This factor weighs in favor of finding a factually sufficient conviction.

We find LH's testimony credible. In making this finding, we give substantial weight to certain

compelling pieces of evidence that support the veracity of her testimony. Notably, the trial evidence included the text LH sent to Appellant hours before their meet-up on 19 July 2022 in which she told Appellant, “I want to make sure this is not a booty call thing[.]” This statement corroborates her testimony that she did not want to engage in consensual sex with Appellant that night. The evidence also included a text message Appellant sent to LH the next day in which he told her, “Hope you don’t hate me too much.” This tends to show Appellant’s consciousness of guilt.

Further, LH’s testimony regarding what happened did not include embellishments or allegations of extreme physical force, use of weapons, or even verbal threats, nor did it include allegations of intoxication or other drugs, details she might have concocted had she been manufacturing her allegation. Additionally, she testified to some non-self-serving details that added to—not detracted from—her credibility, such as taking off her own clothes, laying in the bed while Appellant retrieved a condom rather than trying to leave, and not saying “no” or physically resisting after she removed her clothes.

Appellant has proffered several reasons to doubt LH’s veracity as a witness. These do not firmly or clearly convince us the Government failed to prove its case beyond a reasonable doubt.

Appellant suggests LH had two motives to lie about whether her sexual activity with Appellant on 19 July 2022 was consensual. Specifically, Appellant contends LH fabricated the sexual assault allegation because she felt shame and humiliation from the way Appellant viewed her and their relationship when they had consensual “rough sex.” Appellant also

suggests LH felt similar shame for her inability to follow her therapist's advice to stop engaging in self-destructive behavior and remain celibate. Appellant also maintains LH lied about the consensual nature of his sexual activity with Appellant to curry favor with her mother, thereby allowing LH to return to her mother's house after her mother had ejected her.

In the court's view, while embarrassment may have led LH to initially be less than forthcoming with investigators regarding the nature of her prior consensual rough sex with Appellant, she ultimately testified to those things at trial, including revealing details that likely caused her additional embarrassment. Moreover, LH's failure to disclose the details of their prior consensual rough sex strongly suggests she understood the difference between consensual sexual activity and sexual assault. In any event, if embarrassment and shame were the motive to lie, as Appellant claims, more embarrassment at trial seems an unlikely course of action.

Regarding LH's relationship with her mother, we note that LH's call to her mother was neither her first (SS) nor second (sister) call after she left Appellant's apartment. We cannot say with certainty that LH did not engage in attention-seeking, favor-seeking, or deceptive behavior toward her mother. However, we are not persuaded that the nature of their relationship motivated LH's initial report and continued persistence through the trial alleging Appellant sexually assaulted her. We similarly do not believe that because LH achieved some measure of reconciliation with her mother following reporting the sexual assault necessarily means she was lying about

the details of the assault itself.<sup>16</sup> Moreover, no evidence was introduced that this asserted motive to lie still existed in September 2023 when LH testified at trial.

Appellant also points to examples of instances in which LH acted deceptively outside of court to support the proposition she also deceived the court members on the witness stand. Appellant suggests LH was deceptive toward her mother, to whom she showed marks and bruises, but failed to divulge the context of the consensual, rough-sex-focused relationship with Appellant in which the marks occurred. Appellant also notes LH failed to disclose the nature of her consensual sexual relationship with Appellant (to include infliction of pain, being tied up, and restricted breathing) when talking to SS, the sexual assault nurse examiner, the investigating detectives, or her counsel until two days prior to trial. In the court's view, it is understandable that LH did not want to speak of these things out of embarrassment and concern that her allegations of sexual assault would be taken less seriously. This does not necessarily mean she was lying about the sexual assault, however. Moreover, it suggests LH clearly distinguished between consensual rough sex with Appellant and the sexual assault.

Appellant argues LH's testimony cannot be trusted because some of it contradicted her prior statements about relevant matters. Appellant also contends portions of LH's testimony were internally

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<sup>16</sup> This reconciliation was apparently short-lived, as LH admitted her mother had again told her she could no longer live at her home by the time LH was interviewed by the police investigators a couple months later.

inconsistent. Appellant further argues the various “memory lapses” indicate LH was unbelievable. Specifically, Appellant notes LH could remember certain details from the night in question, but not others, including whether Appellant bit one or both breasts or what Appellant’s response was to her revelation that she had had sex with another man two days after she broke up with Appellant. Appellant contends these memory lapses were “convenient” to avoid embarrassment and humiliation.

That said, although we may be less able to determine the credibility of a witness’s testimony regarding certain facts because we were not present for her testimony and able to observe her demeanor, we are more easily able to evaluate internal inconsistencies in a witness’s testimony or inconsistencies to which a witness might admit on the record because we have the advantage of a verbatim transcript with which to clearly and concretely compare them.

We find LH’s testimony was sufficiently credible that we are not clearly convinced that the finding of guilty was against the weight of the evidence.

### **ii) Mistake of Fact**

An honest and reasonable mistake that LH consented to Appellant’s penetration of her vulva with his penis is an affirmative defense to sexual assault. *McDonald*, 78 M.J. at 379. At Appellant’s court-martial, he clearly raised mistake of fact as an affirmative defense. He claimed, through counsel, to have had an honest belief (subjective test) that he had obtained LH’s consent to the charged sexual acts and that such a belief was reasonable (objective test). Therefore, the Government had the burden to prove

beyond a reasonable doubt that the defense did not exist. More specifically, the Government needed to prove beyond a reasonable doubt that Appellant's mistake was not honest or not reasonable.

This court, in reviewing Appellant's conviction on appeal, must weigh the trial evidence and decide whether we are clearly convinced that the Government failed its burden on both prongs. If the Government met its burden on either prong, the mistake of fact defense does not exculpate Appellant.

We find the trial evidence showed that Appellant had an honest, though mistaken, belief that LH consented to sexual intercourse to raise the defense of mistake. While each piece of evidence of Appellant's honest mistake might be insufficient in isolation, when aggregated they suggest Appellant held an honest belief LH consented to his penetrating her vulva with his penis. The following evidence demonstrated Appellant's perspective (listed in order of occurrence surrounding the night in question):

- Appellant told LH "I know you want it" prior to penetrating her.
- LH acknowledged that when Appellant told her to remove her clothes, telling her, "I know you want it," she did so without Appellant's participation. From the time Appellant told LH to remove her clothes, LH never again said "no" or engaged in any physical resistance, including during the entire time he penetrated her.
- While engaging in the charged penetration, Appellant engaged in other sex-related acts that were

consistent with how LH had asked him to pleasure her during their prior consensual sexual practice, including inflicting pain and making it difficult for her to breathe.

- After finishing, Appellant laid his head on LH's chest and asked her how she was feeling. During this time, Appellant was "very affectionate" toward LH, which LH admitted was "highly confusing," because from her perspective Appellant had just sexually assaulted her.
- LH testified Appellant could tell LH was not happy after the penetration concluded. In this context, Appellant told her she should not feel bad about failing in her plan to remain celibate because the fact they had sex was "on him."
- After LH left Appellant's home, Appellant texted her, telling her, "[C]ome back I'm horny[.]"

Taken together, these acts and comments suggest Appellant subjectively believed LH consented to sexual intercourse. Our review of the record has revealed little evidence that provides insight into Appellant's mind that suggests Appellant's mistake as to LH's consent was not honest. We conclude the Government did not prove beyond a reasonable doubt that Appellant did not honestly believe LH consented to his penetration of her vulva with his penis.

Turning to the objective prong of the mistake of fact defense, the question here is whether an

“ordinary, prudent, sober adult,” under all the circumstances known to Appellant at the time, would reasonably believe Appellant had obtained LH’s consent to the penetration.

We find LH’s words and conduct leading up to and during the charged act, coupled with LH’s prior expressed sexual preference and the nature of their prior consensual sexual activity, actually would lead a reasonable person to conclude LH was not consenting to the sexual act of penetration of her vulva.

By itself, a potential sexual partner’s removal of their own clothes might suggest consent to sexual activity that follows. In this instance, however, LH’s removal of her clothes did not occur in a vacuum. In particular, LH verbally communicated her nonconsent to Appellant in numerous ways. Before she removed her clothes, LH told Appellant: (1) she did not want to have sex with him (by text before she arrived at his home); (2) she intended to remain celibate (while talking with Appellant on his couch); (3) things would remain “PG” (while kissing on the bed); (4) kissing was “as far as it’s going to go.” Most importantly, LH told Appellant “no” at least 20 times as he kissed her with increasing urgency and while he was lying on top of her and groping her on his bed.

Furthermore, LH physically communicated her nonconsent. Though she had initially been kissing Appellant back, once he started groping her body with his hands, she stopped kissing him back. Moreover, LH demonstrated her nonconsent to sexual intercourse by attempting to physically resist, placing her hand over Appellant’s mouth and her own mouth to prevent continued kissing, then attempting to prevent him from taking off his shirt.

The reasonableness of Appellant’s interpretation that he had obtained LH’s consent also includes Appellant’s knowledge of his own acts. Appellant physically overcame LH’s resistance by continuing to kiss and grope her while she said “no” at least 20 to 30 times, moved her hand away from his mouth and hers in order to keep kissing her, removed his shirt when she attempted to prevent him from doing so while she expressed she knew what his removing his shirt meant regarding sexual activity, and kept kissing LH long after she had stopped kissing him back.

“Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent.” *MCM*, pt. IV, ¶ 60.a.(g)(7)(A). LH’s sustained verbal and physical expressions of nonconsent did not convert her ultimate submission, manifested by removing her clothes, into consent. Under these circumstances, in light of numerous verbal and physical indications of nonconsent, a reasonable person would not assume that a person complying with a directive to take off their clothes implicitly constituted consent.

Appellant’s contention that LH’s enjoyment of rough sex and the nature of their prior sexual acts together rendered his mistake as to LH’s consent reasonable is similarly unavailing. Appellant’s argument amounts to suggesting that because LH liked consensual rough sex, a reasonable person could mistakenly think her actions during the charged act constituted consent.<sup>17</sup> This contention ignores how

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<sup>17</sup> Engaging in consensual acts of “rough sex”—even sex like that Appellant and LH had engaged in that involved pretend nonconsensual sex acts, consensual bondage, consensual infliction of pain, and consensual breathing restriction—does not license subsequent nonconsensual sexual activity. However, we

different the circumstances surrounding the charged act were from LH's prior communication and actions surrounding their prior consensual sexual behavior. Specifically, their prior sexual encounters had involved LH communicating what she wanted him to do in an explicit and detailed way, including her asking him to do things like restrict her breathing or inflict greater pain. Simply stated, she regularly told Appellant exactly what she wanted. During the sexual assault, LH engaged in no such communication, instead lying silent. Further, by all indications in the record, during their prior consensual sexual encounters, LH was an active and enthusiastic participant. During the sexual assault, LH lay passively while being penetrated. Moreover, though it is clear that during their brief romantic relationship LH enjoyed engaging in rough sex with Appellant, including being tied up, having her breathing restricted, and having pain inflicted through acts like spanking, there is no evidence in the record that their rough sex had included Appellant overcoming LH's feigned physical resistance, or her pretending to not want sex by repeatedly telling him "no" and physically resisting him when she really wanted sex.<sup>18</sup> In short,

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acknowledge such consensual behavior might, in some circumstances, increase the possibility that participants in such acts later might misperceive another participant's consent. Stated differently, in some circumstances, feigned nonconsent may make the line between consent or nonconsent in subsequent situations harder to discern and render misunderstanding regarding consent more likely. The circumstances of this case, however, clearly point in a different direction.

<sup>18</sup> The record is ambiguous regarding the context and meaning of two statements LH apparently made during her brief relationship with Appellant: (1) "I want you to stop, but I really don't want [you] to all at the same time;" and (2) "if you keep

LH's behavior before and during the sexual assault were nothing like those of their prior sexual activity. LH's sexual preferences and the nature of their prior activity did not render reasonable Appellant's mistake of fact as to her consent. If anything, LH's behavior before and during the sexual assault was such a departure from prior activity that knowledge of her preferences and prior sexual activity would lead a reasonable person to conclude she was not consenting.

For Appellant's factual insufficiency claim regarding the mistake of fact defense to prevail, we must be clearly convinced by the evidence, as we have weighed it, that the Government did not disprove the mistake of fact defense beyond a reasonable doubt. *Harvey*, 85 M.J. at 132. Though the mistake of fact defense was clearly raised by the evidence, we are not so convinced.

### **iii) Factual Sufficiency Conclusion**

We have carefully considered Appellant's claims of factual insufficiency. Because we are not clearly convinced it was against the weight of the evidence, we are powerless to disturb the findings of guilty. Article 66(d)(1)(B), UCMJ (2024 *MCM*).

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doing this, you're going to make me want it." The former statement was made by text, though it is unclear whether that referred to something he was doing at present or fantasizing about something that might occur when they were next together. Regarding the latter statement, neither trial counsel nor trial defense counsel asked LH to elaborate regarding when or how that statement was communicated or what "this" and "it" meant.

## **B. Admission of LH's Statements to SS as an Excited Utterance**

Appellant argues the military judge abused his discretion and committed prejudicial error in allowing SS to testify about her out-of-court phone conversation with LH approximately one hour after the charged sexual assault. Appellant maintains the military judge should have sustained his objection to such testimony as hearsay, see Mil. R. Evid. 801–02, rather than allow the Prosecution to offer it pursuant to the hearsay exception for excited utterances, *see* Mil. R. Evid. 803(2). We agree.

### **1. Additional Background**

At trial, trial defense counsel timely objected to SS's testimony on the grounds of hearsay. The military judge did not excuse the members or elicit from SS what her testimony would be. Instead, the military judge heard brief arguments by counsel and cited the legal standard for the admission of excited utterance evidence as set forth in *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), and *United States v. Donaldson*, 58 M.J. 477 (C.A.A.F. 2003). The military judge stated, in pertinent part:

While the court does not have the benefit of the subject matter of the statement, the court, based upon the context of previous evidence admitted before this forum, believes that the statements are – occurred approximately an hour after the event.

They were, as the court understands, about the incident that happened an hour earlier. And, therefore, the court does find that there is a sufficient

nexus here and foundation laid to find that this hearsay statement does fall within the exception of an excited utterance; and, therefore, is going to overrule the objection.

In reaching his ruling, the military judge did not articulate any other specific findings of fact regarding: (1) whether the statement was “spontaneous, excited or impulsive rather than the product of reflection and deliberation;” (2) what event prompted the utterance and whether that event was sufficiently “startling” for the purpose of the excited utterance exception; or (3) whether the declarant, LH, was “under the stress of excitement caused by the event.” Mil. R. Evid. 803(2); *Arnold*, 25 M.J. at 132 (citations omitted). Similarly, though the military judge listed the “*Donaldson* factors” (see below), and clearly considered the one-hour lapse in time, he did not enter into the record his findings regarding several of the *Donaldson* factors, including whether the statement was made in response to an inquiry, the age of declarant, the physical and mental condition of the declarant, characteristics of the events, or the subject matter of the statement, the content of which the military judge explicitly acknowledged he was unaware.

After overruling the Defense’s hearsay objection, SS testified:

She called me very upset and said that she had just left [Appellant’s] home and that she had sex with him, but she did not want to in the least. She was pushing him off of her and saying no as many times as she could get out. She

was very clear about that, and she was very upset over it.

## 2. Law

We review a military judge’s decision to admit or exclude evidence for an abuse of discretion. *United States v. Smith*, 83 M.J. 350, 355 (C.A.A.F. 2023) (citation omitted). “An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact.” *Id.* (quoting *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003)). “[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted. *Id.* (alteration in original) (quoting *United States v. Finch*, 79 M.J. 389, 397 (C.A.A.F. 2020)).

Mil. R. Evid. 803(2) provides that an “excited utterance,” defined as a “statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused,” is an exception to the general prohibition on hearsay evidence. See Mil. R. Evid. 801, 802; *United States v. Bowen*, 76 M.J. 83, 87–88 (C.A.A.F. 2017). “[T]o qualify as an excited utterance: (1) the statement must be ‘spontaneous, excited or impulsive rather than the product of reflection and deliberation’; (2) the event prompting the utterance must be ‘startling’; and (3) the declarant must be ‘under the stress of excitement caused by the event.’” *United States v. Henry*, 81 M.J. 91, 96 (C.A.A.F. 2021) (quoting *Arnold*, 25 M.J. at 132).

“The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met.” *Id.* (citations omitted). “The guarantee of trustworthiness of an excited utterance

is that the statement was made while the declarant was still in a state of nervous excitement caused by a startling event.” *United States v. Chandler*, 39 M.J. 119, 123 (C.M.A. 1994) (citation omitted). “As a general proposition, where a statement relating to a startling event does not immediately follow that event, there is a strong presumption against admissibility under [Mil. R. Evid.] 803(2).” *Donaldson*, 58 M.J. at 484 (citation omitted).

In determining whether a declarant was under the stress of a startling event at the time of his or her statement, courts have looked to a number of factors. These may include: “the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement.”

*Id.* at 483 (quoting *Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999)) (additional citation omitted).

“A finding or sentence . . . may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.” Article 59(a), UCMJ, 10 U.S.C. § 859(a). Whether an error is harmless is a question of law we review de novo. *Bowen*, 76 M.J. at 87 (quoting *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003)). “For nonconstitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings.” *Id.* (quoting *McCollum*, 58

M.J. at 342). “We evaluate the harmlessness of an evidentiary ruling by weighing: ‘(1) the strength of the Government’s case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.’” *Id.* at 89 (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

### **3. Analysis**

#### ***a. Abuse of Discretion***

As a preliminary matter, we find that deference to the military judge’s evidentiary ruling is not “clearly warranted” because he did not “place[ ] on the record his analysis and application of the law to the facts.” *Smith*, 83 M.J. at 355. Although the military judge referenced *Arnold* and *Donaldson*, he neither stated nor applied the three prongs of the “*Arnold* test” on the record. The military judge also did not indicate the burden or standard of proof he was applying.

The essential question remains whether a preponderance of the evidence supported admitting LH’s statement to SS as an excited utterance under the three-part “*Arnold* test” as reiterated by our superior court in *Henry*. 81 M.J. at 96. According to this test, we must decide whether the event prompting the utterance was “startling.” *Henry*, 81 M.J. at 96 (quoting *Arnold*, 25 M.J. at 132). The Government contends the startling event was LH being sexually assaulted by Appellant approximately one hour before she made the statements to SS. According to the Government, LH “was curled up in a ball while he callously spoke to her, and . . . once she was over her ‘shock’ enough to leave Appellant’s presence and residence, [LH] was ‘crying screaming’ as soon as she could speak with another human being.”

Neither the parties nor the military judge argued or considered on the record, however, whether LH's delayed realization of what had occurred itself constituted the startling event and we offer no opinion regarding that possibility. We assume without deciding that such an event was startling. However, we find the preponderance of the evidence does not support the other two prongs of the *Arnold* test.

In particular, we find LH's statements to SS were not "spontaneous, excited or impulsive rather than the product of reflection and deliberation." *Arnold*, 25 M.J. at 132. Even if we accept LH's and SS's testimony that LH was emotional and crying when making the statements to SS, we cannot discount that LH had the presence of mind to describe her encounter with Appellant without revealing their history of rough sex. This weighs in favor of us finding LH spoke after due reflection and deliberation rather than spontaneously and impulsively. In fact, according to LH's own testimony, the statements occurred *after* she was "processing what happened." Further, LH testified it was not until LH called SS that she "started putting it together" (what happened) and "realizing how bad it was." LH also acknowledged the "emotionals [sic] didn't all the way kick in" until *after* she left Appellant's apartment and *after* she was "processing." As we have recently noted, one's emotion at the time of making the statement is not dispositive regarding whether the statements are "spontaneous, excited, or impulsive, rather than the product of reflection or deliberation." *See, e.g., United States v. Doroteo*, No. ACM 40363, 2025 CCA LEXIS 49, at \*65 n.19 (A.F. Ct. Crim. App. 7 Feb. 2025) (unpub. op.). LH's emotion at the time of her statements to SS did not demonstrate she was "still in a state of nervous

excitement caused by a startling event,” *Chandler*, 39 M.J. at 123 (emphasis added). By her own explanation, she did not become emotional or begin crying until *after* she reflected on (“process[ed]”) what had happened.

Second, applying the *Donaldson* factors, we conclude LH’s statement to SS was not “under the stress of excitement caused by the event.” The military judge’s analysis of the admissibility of LH’s statement to SS focused entirely on the fact that LH’s statement occurred “about an hour” after the precipitating startling event. Although the military judge correctly understood that the amount of time between the event and the utterance is not dispositive, “where a statement relating to a startling event does not immediately follow that event, there is a strong presumption against admissibility under [Mil. R. Evid.] 803(2).” *Donaldson*, 58 M.J. at 484. Accordingly, we apply the criteria our superior court has identified to determine whether a declarant was under the stress of the startling event at the time of the statement.

In this case, “the lapse of time between the startling event and the statement” was significant, not only because it was an hour, but because of what occurred during that hour. According to LH’s testimony, after the sexual assault concluded and before she made the statement to SS about what happened, the following occurred: (1) LH put on her clothes and continued to lie in Appellant’s bed; (2) Appellant laid his head on her chest and was affectionate toward her while they talked; (3) LH curled up in a ball on Appellant’s couch; (4) Appellant noticed LH seemed upset about something and told her she should not feel bad about breaking her

intention to remain celibate because it was “all him;” (5) LH revealed to Appellant that she had had sex with another man a week earlier, two days after she and Appellant broke up on 9 July 2022, and Appellant responded to this news in some way; (6) Appellant used his phone to order food that was delivered before LH left Appellant’s apartment; (7) after 45 minutes to an hour during which she was sometimes talking with Appellant and sometimes alone, LH left Appellant’s apartment; and (8) as LH left Appellant’s apartment she was “processing what happened” and the “emotionals [sic] didn’t all the way kick in until after [she] left.” LH’s statements about the startling event did not immediately follow the event, and the circumstances of what occurred during the one-hour lapse of time did not overcome the “strong presumption against admissibility under [Mil. R. Evid.] 803(2).” *Donaldson*, 58 M.J. at 484. To the contrary, what occurred between the startling event and LH’s retelling of it to SS weighs significantly against admissibility, especially in light of the underlying premise of excited utterances, which is that “[t]he guarantee of trustworthiness of an excited utterance is that the statement was made while the declarant was still in a state of nervous excitement caused by a startling event.” *Chandler*, 39 M.J. at 123 (citation omitted).

Though not clear from the record, it appears at least some of LH’s statement to SS that “Appellant had sex with her but she did not want to in the least” was not made in response to an inquiry. However, because of the events detailed above, including the fact LH spent time “processing” what happened prior to making the utterances, we find the fact LH reported the alleged assault to SS rather than responding to an

inquiry about it weighs neither in favor of, nor against admissibility, under the excited utterance exception.

As our superior court has observed, in “cases in which the declarant is young, particularly where the statement was made during the child’s first opportunity alone with a trusted adult,” courts have been more flexible regarding the presumption that statements not made “immediately” after the startling event are inadmissible. *Donaldson*, 58 M.J. at 484 (citations omitted). The cases *Donaldson* cited for this proposition all involved minors, and usually very young children. *See id.* However, here LH was an adult at the time of the incident and there is no basis to conclude LH’s age made her more or less susceptible to an increased or prolonged state of excitement thus making her declaration more or less trustworthy.

Nothing in the record indicates LH was significantly affected by any physical or mental condition at the time of the startling event or declaration that would have made her more or less susceptible to excitement (generally), heightened excitement, or prolonged excitement. LH testified that she had not been using alcohol or drugs during the incident or when making the utterances to SS. On balance, this factor does not weigh in either direction.

Likewise, we find the characteristics of the event do not particularly favor or disfavor the admissibility of the statement. Being sexually assaulted could certainly be startling and lead to excitement, and, according to both LH and SS, LH was emotional when she made the declaration to SS. However, considering the intervening events discussed above between the event and the declaration, the characteristics of the

event point in neither direction regarding admissibility.

The subject matter of the statement ultimately elicited from SS was directly related to the startling event alleged. While Appellant contends LH's dishonesty to SS regarding the nature of LH's consensual sexual relationship vitiated the reliability of the declaration at issue here, we find that the close nexus between the statement and its subject weighs in favor of admissibility.

Considered together, we find the *Donaldson* factors weigh against admission of LH's statement to SS. We conclude that the evidence regarding the circumstances of the startling event, the statements, and the intervening events do not support the underlying assumption of the excited utterance exception to the prohibition on hearsay. With two of three elements of the *Arnold* test not met, we find the military judge abused his discretion when he admitted LH's statement to SS as an excited utterance.

### ***b. Prejudice***

“We evaluate the harmlessness of an evidentiary ruling by weighing: ‘(1) the strength of the Government’s case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.’” *Bowen*, 76 M.J. at 89 (quoting *Kerr*, 51 M.J. at 405).

Although legally and factually sufficient, the Government's overall case was not particularly strong, suggesting, under the “every little bit helps” theory, that the erroneously admitted statement was important. Where there is little evidence other than that offered by the complaining witness, “the credibility of the complaining witness is of central

importance.” See *United States v. Warda*, 84 M.J. 83, 94 (C.A.A.F. 2023) (citation omitted); see also *United States v. Jasper*, 72 M.J. 276, 281 (C.A.A.F. 2013) (concluding where the victim’s testimony was critical to the Government’s case and the defense theory was that she fabricated at least some allegations against the accused, “the credibility of the putative victim [wa]s of paramount importance”). The Government’s case was arguably strongest regarding the elements of its *prima facie* case, especially LH’s lack of consent. But LH’s testimony was the crux of the Government’s case, and her credibility was arguably damaged by multiple lines of inquiry during cross-examination, as detailed in our discussion of factual sufficiency above. Accordingly, the erroneously admitted statement somewhat supported the strongest aspect of the Government’s case.

The Government’s case was weakest where the Appellant’s case was strongest—Appellant’s mistake of fact defense. Importantly, LH’s statement to SS did not address or substantially affect that defense. Thus, the statement bolstered the part of the Government’s case that was strongest even without the statement and did little to counter the strongest aspect of Appellant’s case. Accordingly, regarding the relative strength of the Government’s and Appellant’s cases, we find admission of the statement to have positively, but marginally, impacted the strength of the Government’s case and negatively, but marginally, impacted Appellant’s case.

Addressing the materiality and quality of the erroneously admitted statement requires further inquiry into the statement’s role in the Government’s case. The Government offered sufficient evidence to make its *prima facie*, legally sufficient, case without

the erroneously admitted statement. Importantly, this is not a case where the excited utterance was the only evidence from an alleged victim who was not testifying at trial. *See, e.g., Doroteo*, unpub. op. at \*70–71 (the alleged victim did not testify regarding assault). Admitting LH’s statements to SS did not reveal significant information otherwise unavailable to the court-martial because when the statements were offered, LH had already testified about the sexual assault in much greater detail than her declaration to SS subsequently conveyed. SS was the only witness the Government called other than LH.<sup>19</sup>

Although offered and admitted for the truth of the matter asserted (the truth of the sexual assault), the primary value of LH’s utterance to the Government’s case was in bolstering LH’s testimony regarding the sexual assault against challenges to LH’s credibility and related defense assertions of motives for LH to lie. The Government called SS as a witness to verify LH’s claim that she reported the offense to others and to at least imply that, because LH reported the event not long after the alleged assault, her report must have been true. The statement thus provided some value to the Government’s case.

In closing argument, trial counsel commented briefly on LH’s statement to SS, referencing the

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<sup>19</sup> The Government’s documentary evidence on findings was similarly slim. The text messages between the parties supported both parties’ theories of the case and the photographs from the sexual assault nurse’s examination were, without more details regarding the extent and nature of the apparently minor injuries depicted, of marginal support to the Government’s case. Indeed, the panel acquitted Appellant of the offense related to the biting that was alleged to have caused the injuries supposedly depicted in the photographs.

military judge's instructions to consider "the extent to which each witness is either supported or contradicted by other evidence . . ." Trial counsel told the members:

You heard testimony from [LH]; but what else supports that testimony? You heard from [SS who] . . . spoke to [LH] after she left [Appellant's] apartment. She testified to how [LH] was over the phone. She was upset. She was crying. [SS] admitted to you that she couldn't recall – [SS] could not recall everything that [LH] said, but, she knew one thing was clear, [LH] went over to the accused's home and he had sex with her and she did not want to. No consent. Evidence that is supported by other evidence.

We recognize that LH's statement to SS may have somewhat boosted LH's credibility in the abstract. But the statement and its timing did little to disprove the Defense's specific theories of LH's motives to lie—that she was lying to her mother about the assault to regain her mother's favor and permission to live at her home or that LH felt shame brought on by Appellant's reaction to her revelation that she had sex with another man. Trial defense counsel successfully brought out the fact that LH did not disclose the full details of her relationship with Appellant to SS, perhaps further diminishing the impact of the statement. Moreover, the statement did nothing to disprove Appellant's mistake of fact defense. Accordingly, we find the erroneously admitted statement to be only marginally material.

Similarly, the quality of the erroneously admitted evidence was marginal. SS acknowledged she did not remember everything LH said in the phone call. SS's recounting of LH's statement to her included a detail—that LH was “pushing [Appellant] off of her” during the alleged sexual assault—that LH disclaimed at trial. Finally, the statement contained little detail regarding the sexual assault itself.

Thus, we find LH's statements to SS did not have a substantial influence on the findings and Appellant was not prejudiced by their erroneous admission.

### III. CONCLUSION

The findings as entered are correct in law and fact. Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2024 MCM). In addition, the sentence is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and the sentence are **AFFIRMED**.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE

Clerk of the Court



**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

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**No. ACM 24001**

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**UNITED STATES**  
*Appellee*

**v.**

**Luis A. TORRES GONZALEZ**  
Master Sergeant (E-7), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial  
Judiciary<sup>1</sup>

Decided 29 August 2025

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*Military Judge:* Charles E. Wiedie.

*Sentence:* Sentence adjudged 30 June 2023 by SpCM convened at MacDill Air Force Base, Florida. Sentence entered by military judge on 17 July 2023: Confinement for 3 days, reduction to E-6, and a reprimand.

*For Appellant:* Captain Michael J. Bruzik, USAF.

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<sup>1</sup> Appellant appeals his conviction under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A) (*Manual for Courts-Martial, United States* (2024 ed.)).

*For Appellee:* Colonel Steven R. Kaufman, USAF; Lieutenant Colonel J. Pete Ferrell, USAF; Major Vanessa Bairos, USAF; Major Brittany M. Speirs, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, KEARLEY, and MCCALL,  
*Appellate Military Judges.*

Judge KEARLEY delivered the opinion of the court, in which Chief Judge JOHNSON and Judge MCCALL joined.

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**This is an unpublished opinion and, as such,  
does not serve as precedent under AFCCA Rule  
of Practice and Procedure 30.4.**

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KEARLEY, Judge:

A special court-martial composed of officer members convicted Appellant, contrary to his pleas, of one charge and specification of wrongful use of a controlled substance (cocaine) in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a;<sup>2</sup> and one charge and specification of failure to obey a lawful general regulation, on divers occasions, by wrongfully using delta-8 tetrahydrocannabinol (Delta-8 THC), in violation of Article 92, UCMJ, 10 U.S.C. § 892. The members sentenced Appellant to confinement for three days, reduction to the grade of E-6, and a reprimand. The convening authority took no action on the findings or

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<sup>2</sup> Unless otherwise noted, all references in this opinion to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

sentence; however, the convening authority provided language for the reprimand.<sup>3</sup>

Appellant raises four issues on appeal, which we have reworded: (1) whether Appellant's finding of guilty for failure to obey a lawful general regulation by wrongfully using delta-8-tetrahydrocannabinol was factually and legally sufficient; (2) whether Appellant is due relief because of the Government's post-trial delay; (3) whether Appellant was deprived of his constitutional right to a unanimous verdict; and (4) whether Appellant's finding of guilty for unlawful use of cocaine was factually and legally sufficient.<sup>4</sup>

As to issue (3) Appellant is not entitled to relief. *See United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023) (holding that a military accused does not have a right to a unanimous verdict under the Sixth Amendment,<sup>5</sup> the Fifth Amendment's due process clause, or the Fifth Amendment's component of equal protection<sup>6</sup>), *cert. denied*, 144 S. Ct. 1003 (2024).

In regard to issue (1) we agree with Appellant and set aside his finding of guilty for failure to obey a lawful general order. As to the remaining assignments of error, we find no error that materially prejudiced Appellant's rights. We affirm the remaining findings of guilty and sentence, as reassessed.

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<sup>3</sup> Appellant requested deferment of reduction in grade until entry of judgment, which the convening authority denied.

<sup>4</sup> Issue (4) was personally raised by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

<sup>5</sup> U.S. CONST. amend. VI.

<sup>6</sup> U.S. CONST. amend. V.

## I. BACKGROUND

At the time of his court-martial, Appellant was a Master Sergeant with nearly 20 years of service. He was experiencing sleep issues, chronic pain, and back issues, which he claimed were exacerbated by numerous deployments and surgeries. One night he went to dinner at a restaurant with his wife, daughter, and some friends. He went into the bathroom of the restaurant, where he heard some sniffing noises from a stall that sounded like someone was using cocaine. Appellant asked the person if he could have some and the person provided him with a bag and a straw. Appellant inhaled cocaine through the straw and his nostrils and returned to his family and friends at the restaurant.<sup>7</sup>

Two days later Appellant was selected for a random urinalysis at MacDill Air Force Base. Several weeks later, Appellant's sample came back positive for the metabolite for cocaine. Appellant was brought into the local office of Air Force Office of Special Investigations (OSI) for an interview. Appellant acknowledged his rights and provided a statement to the investigators where he told them he used cocaine in the bathroom at the restaurant. The investigators asked Appellant if he used any other drugs. Appellant said he did not. Appellant consented to a phone search. The investigators looked at the websites Appellant had recently viewed. One of the searches on Google displayed the query, "how do I beat a marijuana test." The investigators asked Appellant about this Internet search as they had not discussed

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<sup>7</sup> This description of events is based on Appellant's confession to Air Force Office of Special Investigations investigators and his testimony.

marijuana. Appellant claimed he only typed in “drug test” and clicked on the first web result that popped up, which was a marijuana test.

After completing his interview, Appellant provided another urine sample as part of a reinspection pursuant to *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990). This test came back positive for Delta-8 tetrahydrocannabinol (hereinafter, Delta-8 THC). Appellant was brought to OSI for a second interview after his Delta-8 THC urinalysis results. In this interview, Appellant stated that the positive result may have come from using orange gummies that a friend gave him to help him sleep. He stated he ate the gummies for two weeks prior to the second urinalysis. During this time, Appellant was on leave, and claimed he believed the gummies contained cannabidiol (CBD) and were a “[m]elatonin type medicine” to help him sleep. He also stated that he did not know there was a connection between CBD and Delta-8 THC.

Appellant testified at his trial on the merits, along with several other witnesses who testified on Appellant’s behalf. Both Appellant and the witnesses shared that Appellant seemed to suffer physical and mental trauma after he volunteered for a particular deployment. Appellant described witnessing disturbing images related to an aircraft returning from the withdrawal of American military forces from Afghanistan. He also described other deployments where he witnessed seeing the remains of service members being transported back from Iraq and Afghanistan. Appellant also testified about his back injury, multiple back surgeries, and the resulting surgical complications. He highlighted the near constant pain he has been in for the last 10 years. He also described being unable to fall asleep and told the

members he had been diagnosed with several mental health conditions.

## II. DISCUSSION

### A. Legal and Factual Sufficiency

Appellant argues that his finding of guilty for use of Delta-8 THC was factually and legally insufficient because, in part, the regulation that Appellant was convicted of violating was obsolete. The Government agrees that Appellant's finding of guilty for this offense was legally insufficient and the conviction should be set aside and dismissed with prejudice. We agree.

Additionally, Appellant argues that the finding of guilty for unlawful use of cocaine was factually and legally insufficient. We disagree with Appellant's arguments and find the conviction for unlawful use of cocaine to be legally and factually sufficient.

#### 1. Additional Background

##### *a. Failure to obey a lawful general regulation*

The Government charged Appellant with failing to obey Department of the Air Force Manual (DAFMAN) 44-197, Guidance Memorandum, dated 16 August 2021, paragraph 1.2.2.1, on divers occasions, by wrongfully using Delta-8 tetrahydrocannabinol, a synthetic tetrahydrocannabinol. The memorandum indicated that it "becomes void after one year has elapsed from the date of this Memorandum, or upon publication of an Interim Change or rewrite of DAFMAN 44-197, whichever is earlier."

The Government charged Appellant with committing the alleged offense "on divers occasions

between on or about 1 September 2022 and on or about 14 September 2022.”

***b. Unlawful Use of Cocaine***

The Government charged Appellant with wrongfully using cocaine. Appellant tested positive for cocaine at 220 nanograms per milliliter. The Department of Defense legal cutoff for cocaine is 100 nanograms per milliliter. Following a rights advisement, Appellant confessed that he had ingested three “bumps” of cocaine while in the restroom of a restaurant near Tampa, Florida. Appellant admitted to law enforcement that he knew the consumption of cocaine was illegal and no one tricked, threatened, or coerced him into using cocaine.

During trial, Appellant testified that he ingested cocaine. Appellant also testified that his use of cocaine was “an attempt to take [his] life” and that he “wanted to overdose.” Appellant testified that while he was ingesting the cocaine, he did not consciously think about whether using it was illegal.

**2. Law**

We review issues of legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). We review questions of factual sufficiency when an appellant asserts an assignment of error and shows a specific deficiency in proof. *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024) (citing Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B)). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)).

“The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (citation omitted). “[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, “[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted). “This deferential standard impinges upon the factfinder’s discretion only to the extent necessary to guarantee the fundamental protection of due process of law.” *United States v. Mendoza*, 85 M.J. 213, 217 (C.A.A.F. 2024) (internal quotation marks and citation omitted).

The factual sufficiency standard in the current version of Article 66(d)(1)(B), UCMJ, Factual Sufficiency Review, states:

(i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency of proof.

(ii) After an accused has made a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

(iii) If, as a result of the review conducted under clause (ii), *the Court is clearly convinced that the finding of guilty was against the weight of the evidence*, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1)(B), *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*) (emphasis added).

“[T]he requirement of ‘appropriate deference’ when a [Court of Criminal Appeals (CCA)] ‘weigh[s] the evidence and determine[s] controverted questions of fact’ . . . depend[s] on the nature of the evidence at issue.” *Harvey*, 85 M.J. at 130 (third and fourth alterations in original). It is within this court’s discretion to determine what level of deference is appropriate. *Id.*

“[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial.” *Id.* at 131 (internal quotation marks omitted).

For this court “to be ‘clearly convinced that the finding of guilty was against the weight of the evidence,’ two requirements must be met.” *Id.* at 132. First, we must decide that evidence, as we weighed it, “does not prove that the appellant is guilty beyond a reasonable doubt.” *Id.* Second, we “must be clearly convinced of the correctness of this decision.” *Id.*

Military jurisprudence has long held that “direct evidence of a crime or its elements is not required for

a finding of guilty; circumstantial evidence may suffice.” *United States v. Hart*, 25 M.J. 143, 147 (C.M.A. 1987) (citation omitted).

In order to convict Appellant of failure to obey a lawful general regulation, as alleged in the Specification of Charge II, the Government was required to prove: (1) that there was in effect a certain lawful general regulation, to wit: Department of the Air Force Manual 44-197, Guidance Memorandum, dated 16 August 2021, paragraph 1.2.2.1; (2) that Appellant had a duty to obey such regulation; and (3) that on divers occasions between on or about 1 September 2022 and 14 September 2022, within the continental United States, Appellant failed to obey this lawful general regulation by wrongfully using Delta-8 tetrahydrocannabinol, a synthetic tetrahydrocannabinol. *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 18.b.(1).

In order to convict Appellant of wrongful use of cocaine, a Schedule I controlled substance, as alleged in the Specification of Charge I, the Government was required to prove: (1) within the continental United States, on or about 12 August 2022, Appellant used a controlled substance (cocaine); and (2) the use by Appellant was wrongful. The term “wrongful” means without legal justification or authorization. *See MCM*, pt. IV, ¶ 50.c.(5). A “controlled substance” means any substance that is included in Schedules I through V established by the Controlled Substances Act of 1970 (21 U.S.C. § 812). *MCM*, pt. IV, ¶ 50.c.(1).

### **3. Analysis**

#### ***a. Failure to obey a lawful general regulation***

Appellant argues that the regulation he was convicted of violating was obsolete. We agree.<sup>8</sup> The first element of Article 92(1), UCMJ, required the Government to prove the guidance memorandum was in effect at the time of the alleged misconduct. The Government provided excerpts from the guidance memorandum which stated, “This memorandum becomes void after one year has elapsed from the date of this Memorandum, or upon publication of an Interim Change or rewrite of DAFMAN 44-197, whichever is earlier.” The date of the memorandum as reflected in both the Prosecution Exhibit related to the memorandum and the charging language on the specification was 16 August 2021, which meant the guidance memorandum, absent an Interim Change or DAFMAN 44-197 rewrite, became void on 16 August 2022. The Government charged Appellant with committing the alleged offense “on divers occasions between on or about 1 September 2022 and on or about 14 September 2022.” The “guidance memorandum” was not in effect at the time Appellant used Delta-8 THC. As a result, we set aside the findings of guilty to Charge II and its Specification and dismiss Charge II and its Specification with prejudice. *See United States v. Henderson*, No. ACM 40419, 2025 CCA LEXIS 172, at \*18 (A.F. Ct. Crim. App. 18 Apr. 2025) (unpub. op.) (setting aside a finding of guilty to the failure to obey a lawful regulation because the Government failed to prove beyond a reasonable doubt that the appellant’s

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<sup>8</sup> Appellant separately argues his conviction for failing to obey a lawful regulation was legally and factually insufficient because the Government did not prove the required facts. Since we agree with Appellant’s argument on the first basis, we do not consider Appellant’s additional arguments on this issue.

misconduct occurred when the lawful general regulation concerned was in effect).

***b. Unlawful use of cocaine***

Appellant claims he raised a “specific deficiency in proof” triggering a factual sufficiency review of the findings under Article 66, UCMJ, by challenging whether the Government proved his unlawful act of using cocaine was voluntary. Appellant claims that the evidence “adduced at trial shows [he] was in a state of extreme physical and mental pain that compromised his decision-making capacity” and “undermin[ed] the notion that he purposely engaged in criminal behavior by knowingly consuming cocaine.”

We find the Government provided sufficient evidence for all elements of the offense of wrongful use of cocaine through witness testimony, physical evidence, and Appellant’s own testimony. This evidence included a positive urinalysis result, Appellant’s interview with law enforcement, and his signed written statement. Viewing the evidence in the light most favorable to the Government, we find that a rational trier of fact could have found the essential elements of wrongful use of cocaine beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. Therefore, we find Appellant’s convictions legally sufficient.

As to the factual sufficiency of the specifications, we assume without deciding that Appellant properly made a request for a factual sufficiency review by asserting a specific showing of a deficiency of proof as required under Article 66(d)(1)(B)(i), UCMJ. However, having given appropriate deference to the fact that the members saw and heard the witnesses

and other evidence, we are not clearly convinced that Appellant's conviction for wrongful use of cocaine is against the weight of the evidence. Thus, the finding for this offense is factually sufficient.

## **B. Post-Trial Delay**

Appellant seeks relief due to, what he characterizes as, the Government's "excessive delay" in processing his court-martial after the military judge signed the entry of judgment. Appellant claims that this delay was due to the Government's 81-day delay in informing Appellant of his right to appeal and the 129-day delay in delivering a complete record of trial after his case was docketed with this court. Appellant asks us to provide relief by setting aside his reduction in rank. We find no relief is warranted.

### **1. Additional Background**

Appellant was sentenced on 30 June 2023. The military judge signed the entry of judgment on 13 July 2023. On 19 September 2023, the Government provided Appellant with a summarized transcript within a record of trial and a letter advising him of his right to file for appeal before this court within 90 days pursuant to Article 66, UCMJ, 10 U.S.C. § 866(c)(1)(A).

On 12 December 2023, Appellant filed his notice of appeal. Later that same day, on 12 December 2023, this court docketed his case and ordered the Government to "forward a copy of the record of trial to the court forthwith," as it had not been received yet. The record of trial, with a verbatim transcript, was provided to this court on 19 April 2024.

Subsequently, Appellant requested and received ten enlargements of time. Appellant ultimately

submitted his brief on 28 April 2025. On 28 May 2025, the Government submitted its answer to Appellant's assignments of error. On 4 June 2025, Appellant filed his reply brief.

## 2. Law

On 23 December 2022, Congress amended Articles 66 and 69, UCMJ, 10 U.S.C. §§ 866, 869. *See* The National Defense Authorization Act for Fiscal Year 2023 (FY23 NDAA), Pub. L. No. 117–263, § 544, 136 Stat. 2395, 2582–84 (23 Dec. 2022). As amended, Article 66(b)(1)(A), UCMJ, expanded CCA jurisdiction to any judgment of a special or general court-martial, irrespective of sentence, that included a finding of guilty. 10 U.S.C. § 866(b)(1)(A) *MCM* (2024 ed.).

We review de novo whether an appellant is entitled to relief for post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

In *Moreno*, the United States Court of Appeals for the Armed Forces (CAAF) identified thresholds for facially unreasonable delay during three particular segments of the post-trial and appellate process. 63 M.J. at 141–43 (citations omitted). Specifically, our superior court established a presumption of facially unreasonable delay where: (1) the convening authority did not take action within 120 days of the completion of trial, (2) the record was not docketed with the CCA within 30 days of the convening authority's action, or (3) the CCA did not render a decision within 18 months of docketing. *Id.* at 142.

In *Livak*, this court recognized that “the specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new

procedural rules.” 80 M.J. at 633. Accordingly, this court established an aggregated sentence-to-docketing 150-day threshold for facially unreasonable delay in cases that were referred to trial on or after 1 January 2019. *Id.* (citation omitted).

However, in light of subsequent statutory changes, this court recently found the 150-day threshold established in *Livak* does not apply to direct appeals, such as Appellant’s, that are submitted under the amended Article 66(b)(1)(A), UCMJ, effective 23 December 2023. See *United States v. Boren*, No. ACM 40296 (f rev), 2025 CCA LEXIS 103, at \*47 (A.F. Ct. Crim. App. 19 Mar. 2025) (unpub. op.). This court noted, “[t]hese statutory changes substantially altered the sequence of post-trial events in such [direct appeal] cases” as compared to the mandatory review cases our superior court contemplated in *Moreno*. *Id.* at 47–48. Therefore, although we acknowledge appellants in such cases still enjoy constitutional due process rights to timely post-trial review, we decline to establish a new specific timeframe for a facially unreasonable delay from sentence-to-docketing in direct appeal cases.

Even without a specific timeframe, we can determine if there is a case-specific facially unreasonable delay. See *United States v. Gray*, 2025 CCA LEXIS 122, at \*15–17 (A.F. Ct. Crim. App. 24 Mar. 2025) (unpub. op.) (recognizing it is possible an appellant could demonstrate a case-specific facially unreasonable delay outside of *Livak* and *Moreno* that would trigger a *Barker*<sup>9</sup> due process analysis), *rev.*

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<sup>9</sup> *Barker v. Wingo*, 407 U.S. 514 (1972).

*denied*, 2025 CAAF LEXIS 498 (C.A.A.F. 24 Jun. 2025).

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice [to the appellant].” *Moreno*, 63 M.J. at 135 (citations omitted). In *Barker*, the Supreme Court also identified three types of cognizable prejudice for purposes of an appellant’s due process right to timely post-trial review: (1) oppressive incarceration; (2) “particularized anxiety and concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;” and (3) impairment of the appellant’s grounds for appeal or ability to present a defense at a rehearing. *See id.* at 138–40 (citations omitted). “Of those, the most serious is the last [type], because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Barker*, 407 U.S. at 532.

Additionally, where an appellant has not shown prejudice from the delay, we cannot find a due process violation unless the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Independent of any due process violation, this court may provide appropriate relief where there is “excessive delay in the processing of the court-martial after the judgment was entered into the record.” *United States v. Valentin-Andino*, 85 M.J. 361, 364 (C.A.A.F. 2025) (citing Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2)). If a CCA decides relief is

warranted for excessive post-trial delay under Article 66(d)(2), UCMJ, “that relief must be ‘appropriate,’ meaning it must be suitable considering the facts and circumstances surrounding that case.” *Id.* at 367. “This does not require a [CCA] to provide relief that is objectively meaningful, and it does not obligate a [CCA] to explain its reasoning regarding the relief it does provide.” *Id.*

### 3. Analysis

Appellant argues he was subject to excessive delay in two instances. First, Appellant argues that the 81-day delay between sentencing and the Government providing notice to Appellant of his right to appeal was too great. Second, Appellant argues that the delay of 129 days between this court docketing the case and our receipt of the record of trial with a verbatim transcript was excessive.

We begin our analysis by restating that we decline to establish a new specific timeframe for a presumptive facially unreasonable delay to cover the period from sentence-to-docketing in direct appeal cases. *See Boren*, unpub. op. at \*47 (explaining that the new procedures applicable to direct appeals give appellants significant control over what post-conviction review process they elect to seek as part of their right to appellate review). However, in regard to Appellant’s complaints, we considered Appellant’s due process rights to speedy appellate review without presuming a facially unreasonable delay to determine whether Appellant demonstrated a case-specific facially unreasonable delay that would trigger a *Barker* due process analysis. *See Gray*, unpub. op. at \*16 (finding no prejudice to appellant from delay, this court determined it could not find a due process

violation unless the delay was so egregious that it adversely affected the public's perception of the fairness and integrity of the military justice system).

***a. Post-Trial Delay***

***i) Delay in Notice to Appeal***

We find that the 81-day delay between sentencing and the Government's notice to Appellant of his right to appeal is not excessive under the circumstances. The court reporter's chronology in the record shows that 52 days elapsed from sentencing to the court reporter sending the summarized transcript and documents to the legal office. The legal office forwarded the record of trial to the numbered Air Force legal office (18 AF/JA) within 23 days, and five of those days included a mandatory evacuation due to Hurricane Idalia. 18 AF/JA mailed out the Notice of Right to Submit Direct Appeal to Appellant one day after it received the record of trial. Given the various steps involved and the evacuation, 81 days is not excessive. *See Gray*, 2025 CCA LEXIS 122 at \*12–13 (finding a 125-day delay between sentencing and appellant being notified of his right to file a direct appeal not to be excessive).

***ii) Delay in Receiving Verbatim Transcript***

Next, turning to Appellant's second instance of delay, we do not find the 129 days between docketing with this court and our receipt of a record of trial with a verbatim transcript to be an unreasonable delay. Appellant filed his notice of appeal on 12 December 2023, and this court docketed his case the same day. In this court's docketing order, the court ordered the Government to "forward a copy of the record of trial to the court forthwith." A verbatim transcript had not

been prepared because prior to Appellant's filing of his notice of appeal, the Government was not required to prepare a verbatim transcript in this case according to guidance in paragraph 11.1.1.1 of DAFMAN 51-203, or Rule for Courts-Martial 1114.

This court received a record of trial on 19 April 2024, with a verbatim transcript. Acknowledging the time it takes to create a verbatim transcript and conduct the necessary routing and certifications, under the circumstances, we do not find a facially unreasonable delay, thus a *Barker* due process analysis does not apply.

***iii) Relief in Absence of Due Process Violation***

Recognizing our authority under Article 66(d)(2), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation as to Appellant's notice of his right to appeal and this court's receipt of a record of trial with a verbatim transcript. We have carefully considered Appellant's argument that he has suffered harm by the delay as he was "unable to exercise his right to appellate review" and we find that, under the circumstances, he is not entitled to relief.

***b. Appellate Delay***

Over 18 months have elapsed since Appellant's record of trial was originally docketed with this court. Therefore, under *Moreno* there is a facially unreasonable delay, although we note the 18-month threshold has been exceeded by a little over two months. Accordingly, we have considered the *Barker* factors and find no due process violation. Appellant has not specifically alleged cognizable prejudice from

appellate delay, and we do not find any. The delay has not resulted in oppressive incarceration. We do not perceive any particularized anxiety or concern caused by the appellate delay—indeed, Appellant sought an additional 374 days of delay through ten enlargements of time. Moreover, as with the pre-docketing post-trial delay, our review has not occasioned any potential rehearing, nor do we perceive any particular reason why any further appeal might be impaired.

Absent prejudice, we similarly find the post-docketing delay involved in Appellant’s case has not been so egregious as to adversely affect the public perception of the military justice system. The majority of the delay was the result of Appellant’s requests for enlargements of time in which to file the assignments of error. We find no egregious delay and no violation of Appellant’s due process rights. *See Toohey*, 63 M.J. at 362; nor do we find any relief warranted in the absence of a due process violation. *See* 10 U.S.C. § 866(d)(2).

### **C. Sentence Reassessment**

Having set aside the findings of guilty as to Charge II and its Specification, alleging failure to obey a lawful general regulation, we have considered whether we can reliably reassess Appellant’s sentence in light of the non-exclusive factors identified in *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). We find that we can. In this case, several of the factors weigh in favor of reassessment over remand: the penalty landscape has not dramatically changed; the remaining offenses capture the gravamen of the criminal misconduct; and the

remaining offenses are of a type the judges on this court are familiar with. *See id.*

By dismissing Charge II and its Specification, Appellant's criminal convictions were reduced by half; however, he was convicted of wrongful use of cocaine, and a reduction in one grade is in no way excessive for that offense. Therefore, a sentence no greater than the court-martial would have imposed for the remaining offense is reducing the three days of confinement to no confinement and setting aside the reprimand.

### III. CONCLUSION

The findings of guilty as to Charge II and its Specification are **SET ASIDE**. Charge II and its Specification are **DISMISSED WITH PREJUDICE**. We affirm only so much of the sentence that provides for reduction to the grade of E-6. The remaining findings, as entered, are correct in law and fact. Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2024 *MCM*). In addition, the sentence, as reassessed, is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings of guilty as to Charge I and its Specification, and the sentence, as reassessed, are **AFFIRMED**.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court

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**United States Court of Appeals  
for the Armed Forces  
Washington, D.C.**

United States,                      USCA Dkt. No. 26-0035/AF  
Appellee                      Crim.App. No. 40588

v.

**ORDER DENYING PETITION**

Dominic C.  
Haymond, II,  
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 6th day of January, 2026,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/       Malcolm H. Squires, Jr.  
Clerk of the Court

cc:    The Judge Advocate General of the Air Force  
Appellate Defense Counsel (Johnson)  
Appellate Government Counsel (Payne)

**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

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**No. ACM 40588**

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**UNITED STATES**  
*Appellee*

**v.**

**Dominic C. HAYMOND II**  
*Airman (E-2), U.S. Air Force, Appellant*

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Appeal from the United States Air Force Trial  
Judiciary

Decided 23 September 2025

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*Military Judge:* Joshua D. Rosen.

*Sentence:* Sentence adjudged 27 October 2023 by GCM convened at Robbins Air Force Base, Georgia. Sentence entered by military judge on 30 November 2023: Dishonorable discharge, confinement for 1 year and 8 months, total forfeiture of all pay and allowances for 20 months,<sup>1</sup> reduction to E-1, and a reprimand.

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<sup>1</sup> At trial, the military judge announced a sentence of “total forfeiture of all pay and allowances for a period of 20 months.” However, the entry of judgment (EoJ) reflects the sentence as “Forfeitures of Pay and/or Allowances: Total, per month for 20

*For Appellant:* Major Frederick J. Johnson, USAF.

*For Appellee:* Colonel G. Matt Osborn, USAF; Colonel Matthew D. Talcott, USAF; Lieutenant Colonel J. Pete Ferrell, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Major Tyler L. Washburn, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before GRUEN, PERCLE, and MORGAN, *Appellate Military Judges*.

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**This is an unpublished opinion and, as such,  
does not serve as precedent under AFCCA Rule  
of Practice and Procedure 30.4.**

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PER CURIAM:

A panel of officer and enlisted members sitting as a general court-martial convicted Appellant of one specification of sexual assault under the theory Appellant committed a sexual act upon CB when Appellant knew or reasonably should have known CB was asleep, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.<sup>2,3</sup> The

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months.” Appellant did not allege error with this discrepancy, and even if we were to assume error, we find no prejudice.

<sup>2</sup> Unless otherwise noted, all references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

<sup>3</sup> Of the sole Charge, the members acquitted Appellant of two specifications of sexual assault in violation of Article 120, UCMJ (Specifications 1 and 3). Also, the military judge granted the unopposed motion pursuant to R.C.M. 917 for a finding of not guilty for Specification 2 of the Charge which alleged sexual

military judge sentenced Appellant to a dishonorable discharge, confinement for one year and eight months, total forfeitures of all pay and allowances for a period of 20 months, reduction to the grade of E-1, and a reprimand. Appellant requested the convening authority defer his reduction in grade until the date of the entry of judgment, and the convening authority denied this request. The convening authority took no action on the findings or the sentence.

Appellant raises three issues on appeal: (1) whether Appellant's constitutional rights were violated when he was convicted of an offense without a unanimous verdict; (2) whether the Government can prove 18 U.S.C. § 922 is constitutional as applied to Appellant when he was convicted of offenses that do not fall within the nation's historical tradition of firearm regulation; and (3) whether Appellant's conviction is factually sufficient "because the evidence upon which they are based is not credible."<sup>4</sup> We consider two additional issues: (4) whether Appellant is entitled to relief for a presumptively unreasonable post-trial delay of over 18 months between docketing and our decision in this case, and (5) whether the entry of judgment needs to be modified.

As to issue (1), Appellant is not entitled to relief. *See United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023) (holding that a military accused does not have a right to a unanimous verdict under the Sixth

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assault in violation of Article 120, UCMJ. All the specifications of sexual assault involved the same victim, his then-fiancée, CB.

<sup>4</sup> Issue 3 was personally raised by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Amendment,<sup>5</sup> the Fifth Amendment’s due process clause, and the Fifth Amendment’s component of equal protection<sup>6</sup>), *cert. denied*, 144 S. Ct. 1003 (2024).

As to issue (2), we have carefully considered Appellant’s allegation of error and conclude it warrants neither discussion nor relief. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)); *see also United States v. Johnson*, \_\_\_ M.J. \_\_\_, No. 24-0004, 2025 CAAF LEXIS 499, at \*13–14 (C.A.A.F. 24 Jun. 2025) (holding Courts of Criminal Appeals lack “authority to modify the [18 U.S.C.] § 922 indication” in the entry of judgment).

As to issue (3), Appellant claims his conviction is factually insufficient “because the evidence upon which they are based is not credible.” Evidence adduced at trial included that on one evening between 1 February 2022 and 15 March 2022, Appellant was on a date with his then-fiancée, CB.<sup>7</sup> At the end of the evening CB was feeling unwell so she went to sleep in a shared hotel room with Appellant. After a time when CB slept and Appellant did not, Appellant decided he wanted to penetrate CB’s vagina with his penis while CB was asleep, when Appellant knew or reasonably should have known she was asleep. During an Office of Special Investigations (OSI) interview, Appellant initially denied any sexual contact with CB while she was asleep, but later Appellant admitted he “got horny again I guess” and “and I know [CB] wasn’t at all aware of anything that was going on” and he “did

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<sup>5</sup> U.S. CONST. amend. VI.

<sup>6</sup> U.S. CONST. amend. V.

<sup>7</sup> At the time of the allegations, CB was an active duty Airman.

penetrate [CB]” for about “30 seconds” while she was “asleep” or “confused” about what was happening. CB testified she was feverish and “[woke] up with [Appellant’s] penis inside [her] vagina.” After they were no longer dating, CB called Appellant and told him she could “not stop thinking about what happened to [her] when [she] was sleeping.” Appellant apologized to CB and “begged her not to tell anyone.” Assuming without deciding that Appellant’s claim of deficiency is sufficient for our review, the finding of guilty was not against the weight of the evidence, and therefore, is factually sufficient. *See United States v. Harvey*, 85 M.J. 127, 130–31 (C.A.A.F. 2024); Article 66(d), UCMJ, 10 U.S.C. § 866(d) (*Manual for Courts-Martial, United States* (2024 ed.) (2024 MCM)).

Although not raised by Appellant, we note there was a presumptively unreasonable post-trial delay of over 18 months between docketing and our decision in this case. *See United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006) (establishing that a delay greater than 18 months in the review of a case by a Court of Criminal Appeals is presumptively unreasonable). Appellant submitted his initial assignments of error on 22 May 2025 (over 14 months after docketing). Although the time from docketing to issuing this opinion exceeded 18 months, Appellant made no specific assertion of the right to timely appellate review, and we find no particularized prejudice. *See id.* at 135–36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Furthermore, the delay is not so egregious as to adversely affect the public’s perception of the fairness and integrity of the military justice system. *See United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F.

2006). Having considered the totality of the circumstances and the entire record, accordingly, there is no due process violation. *See United States v. Arriaga*, 70 M.J. 51, 56 (C.A.A.F. 2011) (citing *Moreno*, 63 M.J. at 135). We also decline to exercise our power under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2) (2024 *MCM*), to grant Appellant relief for the post-trial delay in this case. *See United States v. Valentin-Andino*, 85 M.J. 361, 364–67 (C.A.A.F. 2025).

Also not raised by Appellant, we address the language in the findings portion of the entry of judgment (EoJ).<sup>8</sup> At the close of the Government’s case-in-chief, Appellant made an unopposed motion pursuant to Rule for Courts-Martial (R.C.M.) 917 for a finding of not guilty for Specification 2 of the Charge. The military judge granted this motion. However, the EoJ only reflects a finding of “NG” to Specification 2, instead of a finding of “NG *pursuant to R.C.M. 917*.” Accordingly, we find this portion of the EoJ as drafted lacks the particularity necessary to distinguish the members’ finding with that of the military judge. Therefore, we hereby modify the EoJ in our decretal paragraph below by adding the emphasized language to the finding of Specification 2 of the Charge. *See* R.C.M. 1111(c)(2) (2024 *MCM*); Article 66(d)(2), UCMJ (2024 *MCM*).

We modify the entry of judgment by adding the words “pursuant to R.C.M. 917” after “NG” under “F” for Finding for Specification 2 of the Charge. The findings as entered and modified are correct in law and fact. Article 66(d)(1), UCMJ (2024 *MCM*). In addition, the sentence is correct in law and fact, and

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<sup>8</sup> We find this error did not materially prejudice Appellant’s substantial rights.

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no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. § 859(a), 866(d). Accordingly, the findings and the sentence are **AFFIRMED**.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court

**United States Court of Appeals  
for the Armed Forces  
Washington, D.C.**

United States,                      USCA Dkt. No. 26-0044/AF  
Appellee                      Crim.App. No. 40608

v.

**ORDER DENYING PETITION**

Dyllin V.E.  
Roberts,  
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 23rd day of January, 2026,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/        Malcolm H. Squires, Jr.  
Clerk of the Court

cc:    The Judge Advocate General of the Space Force  
Appellate Defense Counsel (Sullivan)  
Appellate Government Counsel (Payne)

**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

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**No. ACM 40608**

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**UNITED STATES**  
*Appellee*

**v.**

**Dyllin V.E. ROBERTS**

Senior Airman (E-4), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial  
Judiciary

Decided 30 September 2025

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*Military Judge:* Matthew P. Stoffel (pretrial), Mark F. Rosenow (arraignment and motions), Bradley J. Palmer (trial).

*Sentence:* Sentence adjudged 15 October 2023 by GCM convened at Joint Base Andrews, Maryland, Kadena Air Base, Japan, and Barksdale Air Force Base, Louisiana. Sentence entered by military judge on 21 December 2023: Dishonorable discharge, confinement for 14 years, reduction to E-1, and a reprimand.

*For Appellant:* Major Samantha P. Golseth, USAF; Captain Samantha M. Castanien, USAF; Dwight H. Sullivan, Esquire.

*For Appellee:* Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel J. Pete Ferrell, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Captain Heather R. Bezold, USAF; Mary Ellen Payne, Esquire.

Before DOUGLAS, MASON, and KUBLER, *Appellate Military Judges.*

Judge MASON delivered the opinion of the court, in which Senior Judge DOUGLAS and Judge KUBLER joined.

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**This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.**

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MASON, Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of four specifications of sexual abuse of a child and two specifications of sexual assault of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b, as well as one specification of attempting to make an indecent recording, in violation of Article 80, UCMJ, 10 U.S.C. § 880.<sup>1</sup> Appellant elected sentencing by military judge. The military judge sentenced Appellant to a dishonorable discharge, confinement for 14 years, reduction to the grade of E-1, and a reprimand. Post-trial, Appellant requested a deferment of the reduction in grade until the entry of judgment (EoJ)

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<sup>1</sup> Unless otherwise noted, all references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

and a waiver of the automatic forfeitures for a period of six months. The convening authority took no action on the findings or sentence but granted both deferment requests.

Appellant raises 13 issues on appeal, which we have reworded: (1) whether the Government's failure to docket the case within 150 days of the EoJ warrants relief; (2) whether Appellant's sentence for sexual assault of a child is inappropriately severe; (3) whether the EoJ erroneously cites the Article of which Appellant was found guilty and thus, requires correction; (4) whether Appellant was entitled to a unanimous verdict; (5) whether the military judge erred in admitting HC's prior statements to investigators because a third party was present in the interview room; (6) whether the military judge erred in admitting a note from Appellant to HC and permitting trial counsel to argue that it constituted proof of consciousness of guilt; (7) whether the military judge erred by admitting evidence derived from DNA swabs from Appellant because of a "compromised" chain-of-custody; (8) whether the military judge erred by admitting unreliable testimony concerning a witness's experiment with attempting to take photographs of a rainstorm and extrapolation of his findings to a photograph of a bathroom shower; (9) whether the military judge erred by declining to ask a member's question concerning the definition of sexual gratification; (10) whether Appellant's convictions are legally and factually insufficient because HC's inconsistencies render her testimony unreliable; (11) whether Appellant's convictions are legally and factually insufficient because they were influenced by "implausible" DNA evidence; (12) whether the

military judge erred by declining to ask a member's question concerning HC's return to Appellant's apartment after reporting the alleged offenses; and (13) whether Appellant's sentence that included confinement for 14 years is inappropriately severe when compared to sentences from other comparable, or even more serious, offenses.<sup>2</sup>

In our initial review, we noted that the military judge omitted nearly all of the section of the standard instructions from the *Military Judges' Benchbook* entitled, "Closing Substantive Instructions on Findings," including the required instruction that the members may only consider matters properly before the court-martial. Dept. of the Army Pamphlet 27-9 at 67 (29 Feb. 2020). As a result, we specified the following issue and ordered briefing from the parties: whether the military judge's failure to include the required instruction pursuant to Rule for Courts-Martial (R.C.M.) 920(e)(4) that the members may only consider matters properly before the court-martial resulted in prejudicial error. Commendably, Appellant's counsel correctly concedes that the issue was waived and that we do not have authority in this particular case to pierce that waiver. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020); *United States v. George*, No. ACM 40397, 2024 CCA LEXIS 224, at \*2–3 (A.F. Ct. Crim. App. 7 Jun. 2024) (unpub. op.) (noting that this court no longer has the ability to pierce waiver with regard to findings "to address what would otherwise be prejudicial error"). Thus, Appellant is not entitled to relief.

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<sup>2</sup> Appellant raises issues (5) through (13) in accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

With regards to issue (3), Appellant asserts that the EoJ erroneously reflects that Appellant was found guilty of the completed offense of making an indecent recording in violation of Article 120c, UCMJ, and that it should reflect that he was found guilty of the offense of attempting to make an indecent recording in violation of Article 80, UCMJ. Appellee concurs and urges us to exercise our power pursuant to R.C.M 1111(c)(2) to correct the error. We agree that we can and should correct the error. We take corrective action in our decretal paragraph.

We have carefully considered issue (4) and find it does not require discussion or relief. *See United States v. Anderson*, 83 M.J. 291, 302 (C.A.A.F. 2023). We have also carefully considered issues (5) through (12) and find that they do not warrant discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). We address issue (13) in conjunction with issue (2) below. Regarding the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the modified findings and sentence.

## I. BACKGROUND

In December 2020, Appellant was stationed at Kadena Air Base, Japan. He had a 12-year-old daughter, HC. HC had generally grown up without her mother and was taken care of mostly by her great-grandparents as she was born when Appellant was 16 years old. But in December 2020, HC moved to Japan to live with her father, Appellant.

Within a short time of HC moving in with him, Appellant began sexually abusing HC. This sexual abuse began with touching of her breasts and progressed into touching of HC's vagina. This

molestation continued from February 2021 to July 2021. Appellant engaged in this conduct approximately three to four times per week lasting from 30 to 45 minutes per incident.

On 25 July 2021, while abusing HC, Appellant rubbed the outside of her vagina and put his fingers inside her labia. Distraught, HC retreated to her room, curled up in a ball, and cried. The next day, HC shared with a friend what Appellant was doing to her. That friend told her parents. The parents came to pick up HC and reported the abuse to the authorities. An investigation ensued and the case was referred to trial by court-martial.

## II. DISCUSSION

### A. Sentence Comparison and Appropriateness

#### 1. Law

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). “We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant’s record of service, and all matters contained in the record . . .” *United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (citations omitted). We must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001). While we have significant discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010).

When conducting our review, we not only consider the appropriateness of the entire sentence, but also

“must consider the appropriateness of each segment of a segmented sentence.” *United States v. Flores*, 84 M.J 277, 281 (C.A.A.F. 2024).

Courts of Criminal Appeals (CCAs) are “not required . . . to engage in sentence comparison with specific [other] cases ‘except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.’” *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)) (additional citation omitted). Cases are “closely related” when, for example, they involve “co[-]actors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared.” *Id.* “[A]n appellant bears the burden of demonstrating that any cited cases are ‘closely related’ to his or her case and that the sentences are highly disparate.” *Id.*

A CCA is not required to compare an appellant’s case to non-closely related cases. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001) (citations omitted). “The appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases.” *United States v. LeBlanc*, 74 M.J. 650, 659 (A.F. Ct. Crim. App. 2015) (en banc) (citing *Ballard*, 20 M.J. at 283).

## **2. Analysis**

Appellant, through counsel, challenges the appropriateness of his sentence and, personally, urges us to compare his sentence to other cases. In support of his sentence comparison request, he cites to four other cases involving, according to him, “unrelated”

cases where those appellants were convicted of, according to him, “comparable or more aggravated offenses” but were sentenced to less confinement. While we acknowledge that we could compare Appellant’s sentence to other cases, we decline to do so here. Appellant has not shown that the cited cases are closely related. Further, a sentence appropriateness determination does not require reference to the alleged disparate sentences in those cases.

The question before us is straightforward. Is Appellant’s sentence, particularly the confinement term of 14 years, inappropriately severe considering all the matters of record *in this case*? We conclude the sentence is appropriate.

Appellant took in his daughter, who had not been previously living with him, and moved with her to another country. Shortly after arriving and before she could establish many significant relationships for support, he began sexually abusing her. His criminal conduct repeated for months with the duration of each session becoming increasingly oppressive. This conduct continued until HC finally reported the molestation to her friend. The record makes clear that the reason this conduct stopped was because of the friend’s parents’ intervention.

Appellant’s sexual abuse left long-lasting impacts on HC, physical and psychological. She suffered from panic attacks, anxiety, facial and finger twitching, and bed wetting. The depths of the psychological impact were manifested by HC’s depression that culminated in her carving the word “worthless” into her own skin.

In the presentencing proceedings, Dr. GH, a forensic psychologist, testified that studies indicate that similarly situated victims have an increased risk of displaying behavior disorders and dysfunction, higher incident rates of juvenile delinquency, academic difficulties, and substance abuse.

During these proceedings, Appellant presented testimony from Dr. JM, a forensic psychologist, who opined Appellant's rehabilitative potential was high and likelihood of recidivism was low. Additionally, Appellant presented a photographic biography and an unsworn statement.

We have assessed the appropriateness of Appellant's sentence, considered this particular appellant, the nature and seriousness of the offenses, his record of service, and all matters contained in the record. As a whole, Appellant's sentence is not inappropriately severe. We have also evaluated each segment of Appellant's sentence and find that none of the segments are inappropriately severe.

## **B. Post-Trial Delay**

### **1. Additional Background**

Appellant was sentenced on 15 October 2023 following a seven-day, fully litigated general court-martial. The transcription for the case consisted of over 1,600 pages and was completed on 14 February 2024. On 24 April 2024 the 11-volume record of trial was sent to the Air Force Military Justice Policy Division. On 7 May 2024, the case was docketed with this court, 205 days after Appellant was sentenced.

In response to Appellant's allegation of error for post-trial delay, Appellee moved to attach a chronology from the case paralegal providing details

as to the processing of the record of trial. We granted that motion to attach and consider it here. *See United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020).

## 2. Law

“Due process entitles convicted service members to a timely review and appeal of court-martial convictions.” *United States v. Moreno*, 63 M.J. 129, 132 (C.A.A.F. 2006) (citation omitted). Whether an appellant has been deprived of his due process right to speedy post-trial and appellate review, and whether constitutional error is harmless beyond a reasonable doubt, are questions of law we review de novo. *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (citation omitted); *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011) (citing *Moreno*, 63 M.J. at 135).

A presumption of unreasonable delay arises when the case is docketed more than 150 days from an appellant being sentenced. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citation omitted). A presumptively unreasonable delay triggers an analysis of the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice.” *Moreno*, 63 M.J. at 135 (additional citations omitted).

“We analyze each factor and make a determination as to whether that factor favors the Government or the appellant.” *Id.* at 136 (citation omitted). Then, we balance our analysis of the factors to determine whether a due process violation occurred. *Id.* (citing *Barker*, 407 U.S. at 533) (“Courts must still engage in a difficult and sensitive balancing process.”). “No single factor is required for finding a due process

violation and the absence of a given factor will not prevent such a finding.” *Id.* (citation omitted). However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

A CCA may provide appropriate relief for excessive post-trial delay even in the absence of a due process violation. Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). Appropriate relief is not necessarily synonymous with meaningful relief. *United States v. Valentin-Andino*, 85 M.J. 361, 366 (C.A.A.F. 2025).

Additionally, “although it is within a [CCA’s] discretion to place its reasoning about Article 66(d)(2)[, UCMJ,] relief on the record, it is not required to do so.” *Id.* at 367 (citing *United States v. Winckelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013)).

### **3. Analysis**

As Appellant and Appellee agree, the record of trial for this case was not docketed with the court within 150 days from sentencing and therefore, the 205 days it took in this case presents a facially unreasonable delay. We analyze the *Barker* factors to determine whether a due process violation occurred.

The particularly long transcription of the proceedings in this case took 121 days. This timeframe, in this particular case, is not surprising or unreasonable. The Government took an additional 84 days from completion of the transcript to when this court docketed the case. The chronology provided by the case paralegal gives insight into what was happening with the processing but provides little

justification for the delay in this time period. For example, the record spent weeks “with leadership for review.” Moreover, there appears to have been a scanning issue regarding some of the exhibits. Notably, these issues were encountered after the transcription was completed. In other words, tasks that easily could have been completed while the transcription was being prepared were left for completion until after the transcription was done. This is not a “best practice” that often results in unnecessary delays in post-trial processing. However, it is not our job to prescribe best practices. Rather, we apply the law and provide relief where warranted.

Here, the length of delay is presumptively unreasonable, but not particularly egregious in the context of the length and complexity of this case. The reasons for the delay weigh in favor of Appellant, but only slightly. The record does not reflect and Appellant does not contend that he demanded speedy appellate review. Nor does Appellant assert that he was prejudiced in a particular way. In his brief, he states that he “does not allege that the delay thus far has violated his constitutional due process right to timely appeal.” We agree. That he did not demand speedy review or show prejudice weigh in favor of the Government. Evaluating all of the factors, we do not find a due process violation.

Appellant urges us to utilize our statutory authority to grant relief for the post-trial delay. We also conclude there is no basis for relief under Article 66(d)(2), UCMJ, in the absence of a due process violation. Considering all the facts and circumstances of Appellant’s case, we decline to exercise our Article 66(d), UCMJ, 10 U.S.C. § 866(d), authority to grant relief.

### III. CONCLUSION

The entry of judgment is modified by excepting “Art 120c” from the “Arraigned Offense(s)” for Charge II and substituting therefore “Art 120c (amended after arraignment to delete ‘120c’ and replace it with ‘80’).” The findings are correct in law. *Manual for Courts-Martial, United States* (2024 ed.). In addition, the sentence is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and the sentence are **AFFIRMED**.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court

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**UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

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**UNITED STATES**  
Appellee

v.

**John P. MATTI, Airman First Class**  
United States Air Force, Appellant

**No. 25-0148**  
Crim. App. No. 22072

Argued November 18, 2025—Decided February 17,  
2026

Military Judge: Elijah F. Brown

For Appellant: *Major Nicole J. Herbers* (argued); *Megan P. Marinos*, Esq.

For Appellee: *Major Vanessa Bairos* (argued); *Colonel Matthew D. Talcott* and *Mary Ellen Payne*, Esq. (on brief); *Lieutenant Colonel Catherine K. M. Wray*.

Judge MAGGS delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, Judge HARDY, and Judge JOHNSON joined.

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Judge MAGGS delivered the opinion of the Court.

A special court-martial found Appellant guilty, contrary to his pleas, of two specifications of assault consummated by a battery against his wife in

violation of Article 128(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928(a)(3) (2018).

On appeal to the United States Air Force Court of Criminal Appeals (AFCCA), Appellant asserted that trial counsel made numerous improper statements during his argument on findings and rebuttal. *United States v. Matti*, No. ACM 22072, 2025 CCA LEXIS 72, at \*18, 2025 WL 687025, at \*6 (A.F. Ct. Crim. App. Feb. 28, 2025) (unpublished). The AFCCA reviewed this issue for plain error because Appellant had not objected to trial counsel’s arguments at trial. *Id.*, 2025 WL 687025, at \*6. Finding no plain error with respect to trial counsel’s arguments, and no relief warranted on the basis of Appellant’s other assertions of error, the AFCCA affirmed the findings and sentence. *Id.* at \*54, 2025 WL 687025, at \*18. One judge dissented, concluding that trial counsel had engaged in misconduct amounting to plain error. *Id.*, 2025 WL 687025, at \*18 (Gruen, J., dissenting). The AFCCA did not address its jurisdiction in its opinion, but a footnote to the case heading indicates that Appellant was appealing under Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A) (2024). *Id.* at n.1, 2025 WL 687025, at n.1.

This Court specified one issue and granted one issue for review. The specified issue is “[w]hether the [AFCCA] lacked jurisdiction to review Appellant’s case.” The granted issue is “[w]hether 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.”

We hold that the AFCCA properly exercised jurisdiction based on this Court’s recent decision in

*United States v. Folts*, 86 M.J. 84 (C.A.A.F. 2025). We further hold that even though trial counsel made numerous improper comments in his argument on findings and rebuttal, these errors were harmless. We therefore affirm the decision of the AFCCA.

Despite finding no prejudicial error in this case, we are troubled by the recurring instances of improper argument at courts-martial. An Appendix to this opinion provides a non-exhaustive list of commonly violated restrictions on arguments. The Court recommends that military judges and counsel study this Appendix carefully. The Court further encourages military judges to ask counsel whether they have read and understood the Appendix before they proceed to argument.

## **I. Background**

The convening authority referred four specifications of assault consummated by a battery to the special court-martial. The court-martial found Appellant guilty of Specifications 2 and 3, and not guilty of Specifications 1 and 4. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of \$1,222 pay per month for two months, and seventy-five days of confinement for Specification 2 and fourteen days confinement for Specification 3 of the charge. The military judge ordered that the sentences of confinement run concurrently.

### **A. The Specifications and the Evidence**

At the time of the alleged misconduct, C.C. was Appellant's wife. Specification 2 alleged that Appellant, "on or about 21 May 2021, unlawfully pressed his knee on [C.C.'s] back, the spouse of the accused." In support of this allegation, C.C. testified

that the incident occurred after she questioned Appellant about a picture of a woman on Appellant's phone. She testified that Appellant grabbed her arms and caused her to fall off a bar stool. She further testified that she hit her knee and chin on a hardwood floor. And she testified that while she was on the ground:

He put his knee onto my back, in between my shoulder blades, and I was screaming "let go of me," and he said "no." I said "you're hurting me," and he said "I don't care." I said "you're hurting me. You're hurting me. You're hurting me," and I tried to kick my left leg out from under me so I could kind of roll out. At this point I was on my stomach and I said "let go of me, you're hurting me," and he said "if you wouldn't have resisted, this wouldn't have happened."

After the incident, C.C. took pictures of bruises on her legs and chin, which were admitted into evidence.

C.C.'s friend and coworker, C.S., testified that she worked with C.C. between April and June 2021, and that C.C. "came into work with a bruise on her chin once." C.S. also testified that C.C. visited her house on May 21, 2021, and told her that Appellant had physically abused her. On cross-examination, C.S. testified that C.C. was upset with her husband because he was looking at images of other women.

Specification 3 alleged that Appellant, "between on or about 1 January 2021 and on or about 31 January 2021, unlawfully bit[ C.C.]'s arm, the spouse of the accused, with his mouth." C.C. testified that Appellant bit her forearm after she questioned him

about a comment that he made regarding a woman they saw on television. She further testified that the bite was not playful, that it was “pretty painful,” that it made her cry, and that it left a bruise lasting for one to two weeks. C.C.’s friend and coworker, S.M., testified that she noticed that C.C. “came [into work] with a few bruises” in January 2021.

Specifications 1 and 4, of which Appellant was found not guilty, alleged that Appellant unlawfully placed his forearm on his wife’s neck and that he unlawfully pulled his wife’s hair. These specifications were supported by C.C.’s testimony. They were not supported by photographs or the testimony of other witnesses.

### **B. Arguments on Findings**

As is typical, after the close of evidence, trial counsel made the opening argument on findings, trial defense counsel made a reply, and trial counsel made a rebuttal. In his reply, trial defense counsel concisely summarized the defense theory of the case as follows:

Members[,] this case is about a relationship that unraveled leading to unfounded allegations. That’s what we’re here for today. We’re not here because physical abuse occurred. We’re here because Ms. [C.C.] believes that [Appellant] dishonored their marriage because he refused to stop looking at adult images. We’re here because that soured their relationship and when it hit a tipping point, she made a series of unsupported reports that didn’t happen. That’s why we’re here today.

Trial defense counsel argued that C.C. had a motive of “payback” because of her feeling of betrayal. He further argued that C.S. and S.M., the two corroborating witnesses who testified that they saw C.C.’s bruises, were biased because they were C.C.’s friends.

Trial counsel anticipated this defense theory in his opening argument and also responded to it in his rebuttal. In so doing, trial counsel made numerous statements that are the subject of this appeal. For example, as described more fully below, trial counsel asserted that C.C. was “telling the truth” and was “a credible witness.” Trial counsel also asserted that trial defense counsel could rely on nothing but “conspiracy theories” to impeach the testimony of C.S. and S.M. Similar statements are quoted in the discussion below.

Trial defense counsel made no objection to trial counsel’s argument on findings or rebuttal. The military judge did not intervene in the argument or undertake any tailored curative measures. The military judge, however, did provide standard instructions informing the members that “[y]ou have the duty to determine the believability of the witnesses” and that “arguments of counsel are not evidence.”

### **C. Review of the Findings and Sentence**

The military judge sentenced Appellant on June 23, 2022. The convening authority took no action on the findings and sentence. The military judge entered judgment on July 28, 2022. Under the version of Article 66, UCMJ, in force at that time, Appellant had no right to appeal directly to the AFCCA because he had not received a punitive discharge and had not

received a sentence of confinement for more than six months. Article 66(b)(1)(A), (3), 10 U.S.C. § 866(b)(1)(A), (3) (2018). An attorney in the Office of the Judge Advocate General of the Air Force therefore reviewed the court-martial pursuant to Article 65(d), UCMJ, 10 U.S.C. § 865(d) (2018), and concluded that there was no error.

On December 23, 2022, Congress enacted the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022). This law amended Article 66(b)(1)(A), UCMJ, allowing direct appeals from any judgment of a court-martial that includes a finding of guilty. 10 U.S.C. § 866(b)(1)(A) (2024). On May 31, 2023, the Government notified Appellant of his right to submit a direct appeal. Appellant filed a notice of direct appeal on August 11, 2023. The AFCCA considered the case, and as described above, affirmed the findings and sentence. Appellant subsequently petitioned this Court for review asserting jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2024).

We specified the jurisdictional issue and granted the assigned issue quoted above.

## **II. Jurisdiction**

In its answer to Appellant's petition for review the Government asserted that Appellant's case was final after he received a review under Article 65(d), UCMJ. Accordingly, the Government argued that the subsequent amendment of Article 66(b), UCMJ, did not apply to his case. As a result, the Government asserted that the AFCCA lacked jurisdiction and that this Court should grant review and vacate the AFCCA's decision. This Court, however, rejected the

reasoning behind these arguments in *Folts*. 86 M.J. at 88. Following *Folts*, we now hold that the AFCCA had jurisdiction in this case and that we also have jurisdiction.<sup>1</sup>

### III. Improper Argument

Rule for Courts-Martial (R.C.M.) 919(a) (2019 ed.) grants trial counsel permission to open the argument on findings, grants defense counsel permission to reply, and grants trial counsel permission to reply in rebuttal. R.C.M. 919(b) then addresses the proper content of arguments with this statement: “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.” This case, like many before it, requires us to address the issue of what constitutes improper argument.

#### A. Standards of Review

Whether a statement made during an argument on findings or sentencing is improper is a question of law that this Court reviews de novo. *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014).

“Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute forfeiture of the objection.” R.C.M. 919(c). When an objection is forfeited, this Court reviews the assertion of improper comment only for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019). Plain error has occurred when (1) there was an error, (2) the error was clear or obvious,

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<sup>1</sup> In its brief on the merits in this appeal, the Government no longer contests the AFCCA’s jurisdiction.

and (3) the error caused material prejudice to a substantial right of the accused. *Id.*

Under plain error review, the appellant generally has the burden of proving material prejudice. *Id.* But when an improper argument violates a constitutional right, the government has the burden of proving that the error was harmless beyond a reasonable doubt. *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019).<sup>2</sup> For example, a “comment by the prosecution on the accused’s silence,” violates an accused’s Fifth Amendment right to not testify. *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (internal quotation marks omitted) (quoting *Griffin v. California*, 380 U.S. 609, 615 (1965)). Thus, “[i]t is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense.” *Id.* (alteration in original) (internal quotation marks omitted) (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990)).

### **B. Appellant’s Assertions of Improper Argument**

Appellant has asserted that trial defense counsel made nearly two dozen improper arguments. We have grouped the challenged comments into five categories that we discuss below.

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<sup>2</sup> The Government asks this Court to overrule *Tovarchavez* in the light of the Supreme Court’s decision in *Greer v. United States*, 593 U.S. 503, 508 (2021) (reviewing a nonstructural constitutional error for plain error under Fed. R. Crim. P. 52(b) without requiring the government to prove that the error was harmless beyond a reasonable doubt). We decline to consider the

## 1. Improper Vouching

“Argument may include comment about the testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence.” R.C.M. 919 Discussion. But trial counsel may not “vouch[]” for the credibility of witnesses. *Voorhees*, 79 M.J. at 12. Vouching “occurs when the trial counsel ‘plac[es] the prestige of the government behind a witness through personal assurances of the witness’s veracity.’” *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005) (alteration in original) (quoting *United States v. Necochea*, 986 F.2d 1273, 1276 (9th Cir. 1993)). For example, in *Fletcher*, trial counsel improperly vouched for an expert witness by asserting: “It’s very apparent from talking to Doctor Jain that he is the best possible person in the whole country to come speak to us about this.” *Id.* (internal quotation marks omitted).

Appellant argues that trial counsel in this case crossed the line from permissible commentary into improper vouching when he made the statements such as:

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issue in this case because we do not find any constitutional error to have occurred.

“[Y]ou have a credible witness. You have the victim, [C.C.], who came up here and took the stand and she was credible.”

“[Y]ou have not been provided with any real reason to doubt the credibility of this witness. She’s telling the truth. What does she have to gain by not telling the truth?”

“You know she’s telling the truth.”

Appellant asserts that in making these comments, trial counsel put the prestige of the Government behind C.C. and asserted his personal view that she was credible. The Government responds that the quoted statements were not improper, arguing that credibility is a fair subject to discuss and that the Government merely “flagged for the members that trial counsel would discuss [C.C.]’s credibility” and would explain “*why* the members should believe she was credible.”

In addressing this issue, we recognize that trial counsel can address the issue of credibility with arguments that rely on the evidence. In *Fletcher*, for example, the Court held that it was not improper for “trial counsel to comment on [a witness’s] conflicting testimony” as a ground for doubting the witness’s testimony. 62 M.J. at 183. Similarly, in this case, trial counsel did not act improperly when he asked the members, in assessing C.C.’s credibility, to “[t]hink about” whether there were any “benefits for [C.C.] of reporting a domestic violence claim.”

Nonetheless, we hold that the three statements quoted above were not fair commentary but instead were instances of improper vouching. Trial counsel did not limit himself to commenting on the evidence relevant to issues of credibility. On the contrary, trial counsel directly told members that a witness was credible. The quoted comments were clear and obvious errors under *Voorhees*.

## **2. Disparaging the Defense**

Trial counsel may respond to a defense theory with arguments based on evidence, but trial counsel cannot use disparaging language, instead of reasoned

arguments, to make the defense case “seem fantastical.” *Voorhees*, 79 M.J. at 10. For example, in *Voorhees*, the Court held that trial counsel clearly and obviously crossed the line by saying “defense counsel’s imagination is not reasonable doubt.” *Id.* (internal quotation marks omitted). Similarly, in *Fletcher*, the Court held that it was improper for trial counsel to disparage a defense counsel’s argument as a “phony distraction” and to call the defense case “that thing they tried to perpetrate on you.” 62 M.J. at 182 (internal quotation marks omitted).

In this case, Appellant argues that trial counsel also crossed the line by repeatedly accusing the defense of relying on “conspiracy theories,” citing the following statements:

“Members, the defense can get up here and come up with any conspiracy theories they want, but that is not reasonable.”

“Think about this, this grand conspiracy theory, when you have two different witnesses—what are the chances?”

“The defense needs to get up here and say that all of these people are just lying to you; that it’s all one giant conspiracy theory.”

“Members, what they’re going to do with that is trying to tell you that if there’s any doubt at all, if there’s any conspiracy theory they can sell then you need to find him not guilty.”

“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.”

Appellant contends that when someone uses the term “conspiracy theory” to describe an argument, the term implies the argument “is false, and that people who believe it are irrational.” Appellant asserts that trial counsel’s repeated use of the term therefore served only to “equate the defense with a fantastical theory” in violation of *Voorhees*. The Government responds that trial counsel did not use the term “conspiracy theory” to disparage the defense. Instead, the Government argues, it employed the term to explain 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.”

We are persuaded that trial counsel’s comments were improper under *Voorhees*. In common parlance, a conspiracy theory is “a theory that explains an event or set of circumstances as the result of a secret plot by usually powerful conspirators.” *Conspiracy Theory*, *Merriam-Webster Unabridged Dictionary*, <https://unabridged.merriam-webster.com/unabridged/“conspiracy%20theory”> (last visited Feb. 6, 2026); *see also* 1 *Shorter Oxford English Dictionary* 495 (5th ed. 2002) (defining a “conspiracy theory” as “a belief that some powerful covert agency (typically political in motivation and oppressive in intent) is responsible for an unexplained event”). In the context of this case, where there were no powerful conspirators, the words “conspiracy theory” could serve only to disparage the defense without adding

any argument that could not be made without using such a loaded term. We hold that the quoted statements were clear and obvious errors under *Voorhees*.

### 3. Personal Opinions

This Court has held that “[i]t is improper for a trial counsel to interject herself into the proceedings by expressing a ‘personal belief or opinion as to the truth or falsity of any testimony or evidence.’” *Fletcher*, 62 M.J. at 179 (quoting *United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980)). For example, in *Fletcher*, trial counsel improperly expressed a personal opinion by saying “it’s so clear from the urinalyses that [the accused] was doing it over and over” and the accused “clearly is a weekend cocaine user.” *Id.* at 180 (internal quotation marks omitted). Expressing personal opinions is improper because the members may view the opinions as evidence and, if these opinions come from a representative of the government, the members may give them great weight. *Id.*

Appellant argues that trial counsel violated the prohibition against expressing personal opinions with statements such as:

“The allegations that you have, the narrative that you’ve been told, what’s happened in the marriage between these two people makes sense. It rings true. There are no big missing pieces here.”

“None of it [i.e., the defense theory that all the witnesses are lying] makes sense.”

Appellant asserts that trial counsel made these statements in an attempt to influence the members with the prestige of the Government and his own view of C.C.'s testimony. The Government disagrees, asserting that trial counsel "never implied that the members should find [C.C.] credible just because the prosecutor was saying so."

We hold that the quoted statements were improper. Trial counsel can ask the members to reject a defense theory or believe a witness based on reasoned arguments but cannot express opinions about the evidence. Trial counsel violated this rule in the quoted statements because he stated that testimony "rings true" and that disbelieving the witnesses would not "make[] sense." Based on this Court's decision in *Fletcher* regarding similar language, these statements were clear and obvious errors.

#### 4. Burden Shifting

"The Due Process Clause of the Fifth Amendment to the Constitution requires the [g]overnment to prove the defendant's guilt beyond a reasonable doubt." *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995) (citing *In re Winship*, 397 U.S. 358, 363-64 (1970)). Trial counsel therefore may not make comments during argument that have the effect of "switch[ing] the burden of proof" from the government to the accused. *United States v. Vasquez*, 48 M.J. 426, 430 (C.A.A.F. 1998). Trial counsel sometimes violates this prohibition by "comment[ing] on the failure of the defense to produce evidence." *United States v. Taylor*, 47 M.J. 322, 324 (C.A.A.F. 1997) (citations omitted). For example, in *Carter*, trial counsel used the words "uncontroverted" and "uncontradicted" eleven times.

61 M.J. at 34 (internal quotation marks omitted). The Court held that, in so doing, “trial counsel improperly implied that [the accused] had an obligation to produce evidence to contradict the [g]overnment’s witness” and that this implication “essentially shifted the burden of proof to [the accused] to establish his innocence” in violation of the Fifth Amendment. *Id.*

Our cases, however, have recognized that “the [g]overnment is permitted to make ‘a fair response’ to claims made by the defense, even when a Fifth Amendment right is at stake.” *United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (quoting *United States v. Robinson*, 485 U.S. 25, 32 (1988)). “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 (citation omitted). Accordingly, a “prosecutorial comment must be examined in light of its context within the entire court-martial.” *Id.*

Appellant argues the Government effectively shifted the burden of proof with the following statements:

“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.”

“The defense needs to get up here and say that all of these people are just lying to you.”

“What you have not been given is any reasonable explanation for where this came from, what these are about.”

“Defense hasn’t given you any explanation but think about where an explanation might be of how someone might get that [bruise].”

Appellant contends that when viewed in context, trial counsel’s assertion that the defense did not provide any explanation other than that the witnesses were lying was implicitly a criticism of Appellant for not providing his own testimony. The Government responds that trial counsel’s arguments addressed the defense’s theory of the case without implying that Appellant had the burden of proving his innocence.

As explained above, under plain error review, any error must be clear or obvious to warrant relief. In the quoted statements above, trial counsel referred not to the absence of testimony or evidence, but to the absence of “explanation[s].” The Government offers a plausible interpretation that trial counsel’s remarks were addressing a logical problem with trial defense counsel’s theory rather than implicitly attempting to shift the burden to the defense to provide evidence. That said, this Court concurs with the AFCCA’s observation that “trial counsel’s use of the phrase ‘needs to’—viewed in isolation—may appear particularly ill-advised. However, viewed in context, it is neither plain nor obvious trial counsel was shifting the burden of proof.” *Matti*, 2025 CCA LEXIS 72, at \*21 n.9, 2025 WL 687025, at \*6 n.9. This conclusion is reinforced by the fact that defense counsel did not object to the quoted statements during the court-martial. “The absence of objection tends to indicate that the defense did not regard the prosecutor’s argument as egregiously improper and is a persuasive inducement to an appellate court to evaluate the prosecutor’s argument in the same light as the defense

probably considered it at the trial.” *United States v. Wood*, 18 C.M.A. 291, 293, 40 C.M.R. 3, 5 (1969).

### **5. Additional Grounds Asserted by Appellant**

We have addressed above the most serious contentions raised by Appellant in this appeal. We have also considered all the other allegations of error that Appellant has made in his thorough briefs. Without addressing each one individually, we determine that no other plain and obvious errors occurred.

### **C. Prejudice**

We turn now to the issue of whether Appellant can demonstrate that the errors above caused prejudice. This Court held in *Fletcher* that when determining whether improper arguments were harmless, “the best approach involves a balancing of 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.” 62 M.J. at 184.

Having considered all the indicators of severity announced in *Fletcher* and other relevant factors, we assess the misconduct to be moderate.<sup>3</sup> Most

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<sup>3</sup> In *Fletcher*, this Court stated:

Indicators of severity include (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.

significantly, the misconduct was not trivial because the improper comments were numerous and they were aimed directly at the defense theory of the case, namely, that C.C. and the corroborating witnesses should not be believed. But the misconduct was also not severe because even though trial counsel made multiple improper comments, these comments were largely repetitive and they made up but a small part of an otherwise proper argument.

Specific curative measures were absent, but we do not give this factor great weight. With respect to disparaging the defense argument as a conspiracy theory, “both defense counsel and the military judge failed to recognize [this error], indicating that neither saw the need for remedial measures at all.” *United States v. Short*, 77 M.J. 148, 151 (C.A.A.F. 2018). In addition, we note that the military judge instructed the members that “you have the duty to determine the believability of the witnesses” and that “arguments of counsel are not evidence.” Although standard instructions such as these do not always suffice to cure improper arguments, *see, e.g., Fletcher*, 62 M.J. at 185, these instructions likely lessened the impact of trial counsel’s vouching for the witnesses and expressing personal opinions.

Finally, the weight of the evidence supports the Government’s position that the errors caused no material prejudice. Most of the Government’s improper arguments sought to convince the members that C.C. was a credible witness. But this effort was not entirely successful. The members found Appellant not guilty of the two specifications supported only by C.C.’s testimony. The members, on the other hand,

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62 M.J. at 184.

found Appellant guilty of Specifications 2 and 3, which were supported both by C.C.'s testimony and by corroborating evidence. "The panel's mixed findings further reassure us that the members weighed the evidence at trial and independently assessed Appellant's guilt without regard to trial counsel's arguments." *United States v. Sewell*, 76 M.J. 14, 19 (C.A.A.F. 2017).

For these reasons, we conclude the improper arguments by trial counsel did not cause material prejudice and therefore were not plain error.

#### **IV. Future Preventative Measures**

Following the many rules that govern trials by courtmartial is difficult. Even the most conscientious counsel and experienced military judges may fall into error. Congress has recognized this problem by requiring the Judge Advocate General of each service to provide annually an explanation of measures implemented "to ensure the ability of judge advocates" both to "participate competently as trial counsel and defense counsel" and to "preside as military judges." Article 146a(b)(4)(A)(i)-(ii), UCMJ, 10 U.S.C. § 946a(b)(4)(A)(i)-(ii) (2024).

Numerous cases coming before this Court, however, reveal that the efforts to educate counsel about improper arguments have not been sufficient to eliminate them from courts-martial. For example, although this Court has held repeatedly that trial counsel may not vouch for witnesses, express personal opinions, and so forth, errors continue to occur. These continued mistakes risk harm to the accused and reflect poorly on the military justice system.

Accordingly, to help counsel and military judges to learn and follow the applicable rules, the Court has

prepared the Appendix to this opinion. The Appendix contains a non-exhaustive listing of various categories of improper argument and other prosecutorial misconduct. We urge all counsel and military judges to read the Appendix and the cited cases.

We also encourage military trial judges to assist in the effort to rid improper argument from trials. The *Military Judges' Benchbook* provides that “the judge should conduct formal or informal training sessions for counsel to improve the quality of military justice.” Dep’t of the Army, Pam. 27-9, Legal Services, Military Judges’ Benchbook ch. 1, para. 1-1.a.(1)(c) (2025). Consistent with this sensible provision, it would be appropriate for the military judge, in either a conference under R.C.M. 802 or in a session under Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2024), to ask counsel for each side whether they have read the Appendix and to remind counsel of their duties to follow the rules.

## **V. Conclusion**

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

## APPENDIX

Because of the persistent problem of trial counsel using improper arguments during courts-martial, the Court offers the following non-exhaustive compendium of instances when this Court has identified areas of concern. Perhaps it will provide some helpful guidance regarding the types of improper argument that trial counsel must avoid, that defense counsel should consider objecting to, and that military judges ought to monitor.

### **Improper Arguments in General**

1. *Expressing Personal Beliefs and Opinions*. “It is improper for a trial counsel to interject herself into the proceedings by expressing a ‘personal belief or opinion as to the truth or falsity of any testimony or evidence.’” *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980)). This is because “‘when the prosecutor conveys to the [members] his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be.’” *Id.* at 180-81 (quoting *United States v. Modica*, 663 F.2d 1173, 1178-79 (2d Cir. 1981)).

2. *Engaging in Improper Vouching*. Vouching may “occur[] when the trial counsel ‘plac[es] the prestige of the government behind a witness through personal assurances of the witness’s veracity,’” including “the use of personal pronouns in connection with assertions that a witness was correct or to be believed.” *Id.* at 180 (second alteration in original) (quoting *United States v. Necochea*, 986 F.2d 1273, 1276 (9th Cir. 1993)); *see also United States v. Voorhees*, 79 M.J. 5, 12 (C.A.A.F. 2019); *Horn*, 9 M.J. at 429-30 (improper to use phrase “I think” when

“analyzing the evidence of record . . . and in suggesting what weight ought to be given by the court to various evidence” as such “opinions are merely a form of unsworn, unchecked testimony and tend to exploit the influence of his office” (citation modified); *United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977) (describing the following as “impermissible argument”: “‘I think that having listened to all of the evidence in this case, there is very little doubt, in fact in my mind there is no doubt whatsoever, that the man sitting over there at the defendant’s table . . . was in fact the individual who was involved in this matter as a principal.’”).

3. *Offering Personal Views*. Trial counsel cannot make “‘substantive commentary on the truth or falsity of testimony or evidence’” or “‘comment[] on the defendant’s guilt and offer[] unsolicited personal views on the evidence.’” *Fletcher*, 62 M.J. at 180 (first quoting *United States v. Washington*, 263 F. Supp. 2d 413, 431 (D. Conn. 2003); and then quoting *United States v. Young*, 470 U.S. 1, 7 (1985)). Such comments “may confuse the [members] and lead them to believe that the issue is whether or not the prosecutor is truthful instead of whether the evidence is to be believed.” *Id.* at 181 (citing *Modica*, 663 F.2d at 1181).

4. *Referring to Matters Outside the Record*. When trial counsel departs from record evidence, “an accused’s right of confrontation [is] abridged, and the opportunity to impeach the source [is] denied.” *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983). This misconduct manifests in a variety of scenarios. See, e.g., *United States v. Norwood*, 81 M.J. 12, 21 (C.A.A.F. 2021) (“Arguing an inflammatory hypothetical scenario with no basis in evidence amounts to improper argument . . . .”); *Clifton*, 15 M.J.

at 30 (critiquing “discours[ing] on the practices and fantasies of rapists, and . . . the attitudes of unrelated rape victims”).

5. *Commenting on the Accused’s Invocation of Constitutional Rights*. “[I]t is improper for a prosecutor to ask the court members to infer guilt because an accused has exercised his constitutional rights.” *United States v. Carpenter*, 51 M.J. 393, 393 (C.A.A.F. 1999).

6. *Referring to an Accused’s Right to Silence*. Trial counsel may not comment on an accused’s exercise of the right to silence because silence cannot be used as evidence of guilt. *United States v. Clark*, 69 M.J. 438, 445-46 (C.A.A.F. 2011); Rule for Courts-Martial (R.C.M.) 919(b) Discussion; *see also Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (*Miranda*\* warnings imply “that silence will carry no penalty”); *United States v. Carter*, 61 M.J. 30, 32, 34 (C.A.A.F. 2005) (repeated references to “ ‘uncontroverted evidence’ ” of guilt throughout closing argument was error where comments were not “tailored to the defense credibility argument”); *United States v. Alameda*, 57 M.J. 190, 198-99 (C.A.A.F. 2002) (concluding trial counsel’s argument that lack of response between apprehension and *Miranda* reflected consciousness of guilt violated Military Rule of Evidence (M.R.E.) 304).

7. *Commenting on Invocation of the Right to Counsel*. “By arguing that the accused’s invocation of his right to counsel was substantive evidence of his guilt, the statement violated [a]ppellant’s Fifth Amendment rights, M.R.E. 301(f)(3), and [R.C.M.] 919 . . . .” *United States v. Moran*, 65 M.J. 178, 186-87 (C.A.A.F. 2007). This is because “to many, even to those who ought [to] know better, the invocation by a

suspect of his constitutional and statutory rights to silence and to counsel equates to a conclusion of guilt that a truly innocent accused has nothing to hide behind assertion of these privileges.” *United States v. Moore*, 1 M.J. 390, 391 (C.M.A. 1976).

8. *Commenting on Failure to Testify*. “It is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense.” *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990); *see also Clifton*, 15 M.J. at 30-31; *United States v. Webb*, 38 M.J. 62, 65-66 (C.M.A. 1993).

9. *Using the Providence Inquiry to Prove Other Offenses*. Trial counsel cannot use an accused’s “guilty plea and providence inquiry to bolster the [g]overnment’s argument that [the accused] was guilty” because, otherwise, it will “compel an accused to incriminate herself in the separate criminal proceeding.” *United States v. Leipert*, 85 M.J. 35, 42 (C.A.A.F. 2024) (citation modified).

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\* *Miranda v. Arizona*, 384 U.S. 436 (1966).

10. *Shifting the Burden to the Accused*. “The Due Process Clause of the Fifth Amendment to the Constitution requires the [g]overnment to prove the defendant’s guilt beyond a reasonable doubt.” *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995) (citing *In re Winship*, 397 U.S. 358, 363-64 (1970)). Therefore, it is impermissible for trial counsel to “switch[] the burden of proof” in findings argument. *United States v. Vasquez*, 48 M.J. 426, 430 (C.A.A.F. 1998). For instance, “[t]his Court generally has not permitted a trial counsel to comment on the failure of

the defense to produce evidence.” *United States v. Taylor*, 47 M.J. 322, 324 (C.A.A.F. 1997).

11. *Making Personal Attacks*. It is error to make arguments that “unduly . . . inflame the passions or prejudices of the court members.” *Clifton*, 15 M.J. at 30; R.C.M. 919(b) Discussion.

12. *Attacking Counsel*. It is “plainly improper” to “encourage[] the members to decide the case based on the personal qualities of counsel” and “attempt to win favor with the members by maligning defense counsel.” *Fletcher*, 62 M.J. at 181-83. This risks “turning the trial into a ‘popularity contest’ and influencing the members such that they may not [be] able to objectively weigh the evidence.” *Voorhees*, 79 M.J. at 10 (quoting *Fletcher*, 62 M.J. at 181). An example of this type of improper arguments occurred in *United States v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018) (accusing “defense counsel of not believing [the accused’s] version of events”).

13. *Attacking the Accused*. “Disparaging comments are . . . improper when they are directed to the [accused] himself. For example, . . . calling the accused a liar is a ‘dangerous practice that should be avoided.’” *Fletcher*, 62 M.J. at 182 (quoting *Clifton*, 15 M.J. at 30 n.5); see also *Voorhees*, 79 M.J. at 11. Examples of improper disparagement include the following: *Andrews*, 77 M.J. at 402 (references to accused as a liar and “ ‘Don Juan’ ”); *Knickerbocker*, 2 M.J. at 129 (characterizing the accused’s testimony as a “ ‘fairy tale,’ ” “ ‘imaginative,’ ” and “ ‘foolishness’ ”).

14. *Disparaging the Defense Theory*. While trial counsel may make reasoned arguments based on the evidence, trial counsel may not use disparaging

language to make “the defense theory of the case seem fantastical.” *Voorhees*, 79 M.J. at 10.

15. *Public Reaction*. Trial counsel may not “appeal to a court-martial to predicate its verdict upon the probable effect of its action on relations between the military and the civilian community.” *United States v. Cook*, 11 C.M.A. 99, 103, 28 C.M.R. 323, 327 (1959).

### **Misstating the Facts or the Law**

16. *Misstating the Facts*. “[I]t is a fundamental tenet of the law that attorney[s] may not make material misstatements of fact in summation,” *United States v. Andrews*, No. NMCCA 201600208, 2017 CCA LEXIS 283, at \*16, 2017 WL 1506072, at \*7 (N-M. Ct. Crim. App. Apr. 27, 2017) (unpublished) (second alteration in original) (quoting *Davis v. Zant*, 36 F.3d 1538, 1548 n.15 (11th Cir. 1994)).

17. *Misstating the Law*. Misstating legal principles during argument is improper. *Andrews*, 77 M.J. at 402 (misstatement of “the law when [counsel] analogized consenting to sex to enlisting in the Navy or having plastic surgery”).

### **Miscellaneous**

18. *Associating the Accused With Other Offensive Conduct or Persons*. “It is also improper to associate the accused with other offensive conduct or persons, without justification of evidence in the record.” *United States v. Nelson*, 1 M.J. 235, 238 (C.M.A. 1975) (error to liken defense witness tactics to those employed by Hitler).

19. *Citing Other Cases*. “It is unquestionably improper for counsel to argue facts of other cases to a court-martial,” *United States v. Bouie*, 9 C.M.A. 228, 233, 26 C.M.R. 8, 13 (1958), or appellate opinions with facts

that “closely parallel the facts” of the case being tried, *United States v. McCauley*, 9 C.M.A. 65, 66, 25 C.M.R. 327, 328 (1958); *see also Fletcher*, 62 M.J. at 183-84 (referring to Jesse Jackson, Jerry Falwell, Jim Bakker, Dennis Quaid, Matthew Perry and Robert Downey Jr. “improperly invited comparison to other cases, the facts of which were not admitted into evidence and which bore no similarity to the [accused’s] case”).

20. *Citing Excluded Evidence*. The practice of citing excluded evidence is “grossly improper,” *Clifton*, 15 M.J. at 30, because, as mentioned, trial counsel should limit their findings argument to the record evidence and the reasonable inferences fairly derived therefrom, *United States v. Bodoh*, 78 M.J. 231, 237 (C.A.A.F. 2019).

21. *Citing Command Policy Directives*. “ ‘A policy directive . . . must not be used as leverage to compel a certain result in the trial itself.’ ” *United States v. Pope*, 63 M.J. 68, 75 (C.A.A.F. 2006) (quoting *United States v. Fowle*, 7 C.M.A. 349, 351, 22 C.M.R. 139, 141 (1956)). Using a command policy in argument “brings the commander into the deliberation room.” *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983). This raises “the spectre of command influence.” *Id.* Similarly, during sentencing, “[t]rial counsel may not in argument purport to speak for the convening authority or any other higher authority.” R.C.M. 1001(h).

22. *Diverting Members From the Evidence*. Trial counsel cannot “ ‘divert’ a [panel] from the evidence in the case by predicting ‘the consequences of the [panel]’s verdict.’ ” *United States v. Causey*, 37 M.J. 308, 310-11 (C.M.A. 1993) (citation omitted) (holding

it “inappropriate” to argue that “the innocent-ingestion defense should be rejected to discourage other soldiers from raising it” and “improper to prey upon the personal interests of the court members as members of the military community and their concerns about the impact this defense may have on them in that role”).

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**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

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**No. ACM 22072**

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**UNITED STATES**  
*Appellee*

**v.**

**John P. MATTI**

Airman First Class (E-3), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial  
Judiciary

Decided 28 February 2025

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*Military Judge:* Elijah F. Brown.

*Sentence:* Sentence adjudged 23 June 2022 by SpCM convened at Luke Air Force Base, Arizona. Sentence entered by military judge on 28 July 2022: Confinement for 75 days, forfeiture of \$1,222.00 pay per month for two months, reduction to E-1, and a reprimand.

*For Appellant:* Major Nicole J. Herbers, USAF.

*For Appellee:* Major Vanessa Bairos, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, GRUEN, and WARREN,  
*Appellate Military Judges.*

Chief Judge JOHNSON delivered the opinion of the court, in which Judge WARREN joined. Judge GRUEN filed a separate dissenting opinion.

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**This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.**

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JOHNSON, Chief Judge:

Appellant pleaded not guilty to four specifications of assault consummated by battery on his spouse (CC), in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.<sup>1</sup> A special court-martial composed of officer and enlisted members found Appellant guilty of the charge and two specifications, and not guilty of two specifications. Appellant elected to be sentenced by the military judge, who imposed confinement for 75 days, forfeiture of \$1,222.00 pay per month for two months, reduction to the grade of E-1, and a reprimand. Appellant did not request any deferments of confinement, forfeitures, or reduction in grade. The convening authority took no action on the findings or sentence.

Appellant raises six issues on appeal: (1) whether trial counsel engaged in prosecutorial misconduct during his findings argument and rebuttal; (2) whether it was plain error for the military judge to

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<sup>1</sup> Unless otherwise noted, all references in this opinion to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2019 ed.).

admit lay witness testimony regarding bruising or, in the alternative, whether Appellant received ineffective assistance of counsel when trial defense counsel failed to object to lay witness testimony regarding bruising; (3) whether the military judge abused his discretion in allowing a witness to testify to certain uncharged bad acts allegedly committed by Appellant; (4) whether the military judge abused his discretion in denying a defense request for an alibi instruction; (5) whether Appellant received ineffective assistance of counsel when trial defense counsel failed to seek assistance from an expert to explain whether the documented injuries were consistent with the alleged crimes; and (6) whether Appellant's conviction and sentence should be set aside because Appellant was entitled to a unanimous verdict.<sup>2</sup> In addition, although not raised as an assignment of error, we consider (7) whether Appellant is entitled to relief for unreasonable appellate delay. We have carefully considered issue (6) and find it does not warrant discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *see also United States v. Anderson*, 83 M.J. 291, 302 (C.A.A.F. 2023) (holding an accused servicemember does not have a constitutional right to a unanimous court-martial verdict), *cert. denied*, 114 S. Ct. 1003 (2024). As to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

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<sup>2</sup> Appellant personally raises issues (3), (4), (5), and (6) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

## I. Background<sup>3</sup>

CC met Appellant when they were both living in Missouri, before Appellant joined the Air Force. They began dating in December 2019. In March 2020, Appellant departed Missouri to attend Air Force basic training, followed by technical training. Appellant and CC married while they were apart in order for Appellant to arrange for them to live together off base once he reached his permanent duty station at Luke Air Force Base (AFB), Arizona.

CC moved to Arizona to live with Appellant in late August or early September 2020. Although CC initially enjoyed living with Appellant, they began to argue frequently. In approximately the beginning of October 2020, Appellant and CC took in a roommate, Airman First Class (A1C) AA, in order to save money. At trial, A1C AA testified that beginning approximately a week after he moved in, he observed Appellant and CC would argue “nonstop” on a daily basis; the arguments he observed were usually about financial issues and Appellant usually initiated them. According to CC, another point of friction between Appellant and CC was Appellant’s viewing of adult websites and other media, and particularly Appellant communicating with other women through such sites and media. CC testified the arguments became worse after A1C AA moved out in January 2021.

In January 2021, Appellant and CC were watching television together; Appellant was lying against CC, who had her arm across his chest. Appellant made a comment that a woman on television had large

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<sup>3</sup> Unless otherwise indicated, the following background is drawn from CC’s trial testimony.

breasts. In response, CC asked Appellant why he was with her if he wanted someone with large breasts. Appellant then leaned over and bit CC on the forearm. The bite was painful and left a bruise that lasted for one or two weeks. CC began to cry and asked Appellant why he bit her. Appellant said he bit her because he “wanted to,” and told her if she was going to cry she “needed to go in the room.” CC then went into another room.

At the time, CC had a job working overnight shifts in a department store. Her work included moving boxes and merchandise around the store. SM, who worked with CC at the store between November 2020 and January 2021, testified that in “early 2021” CC came to work with “a few bruises.” On cross-examination, trial defense counsel asked SM, “You’re not exactly sure when in that period [that SM and CC worked together] you saw [the bruises]?” SM replied, “Just throughout periodically. Like she always wore a jacket so it was really when she wasn’t wearing long sleeves and you could catch glimpses of it.”<sup>4</sup> SM testified that at the time she saw the bruises, SM and CC “discussed . . . a little bit” whether the bruises were the result of physical abuse, but at that point CC denied it. However, several months later in June 2021—after CC had moved out of Appellant’s house—CC told SM that Appellant had caused the bruises.

CC’s sister testified that CC visited her around 8 May 2021. During the visit, CC told her sister that CC and Appellant “were having some issues and arguing

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<sup>4</sup> SM’s testimony that she saw the bruise or bruises when CC’s arms were not covered by long sleeves thus implied the bruise or bruises were on CC’s arm. SM was not asked and did not testify whether the bruises appeared to be bite marks.

a lot.” CC then told her sister that if the sister “knew everything that had been going on that [she] wouldn’t let [CC] [go] back home” to Arizona.

On 21 May 2021, Appellant was using CC’s phone and accessed her account to an online retailer to order supplies for his car-detailing business. When Appellant refused to return the phone to CC and went into the garage, CC picked up Appellant’s phone in the kitchen and looked at it. She saw Appellant was following a woman on Snapchat who had posted images of herself wearing lingerie. When Appellant returned to the kitchen, CC showed him his phone and asked him, “[D]o you think she’s cute?” Appellant responded, “okay, that’s it,” walked to where CC was sitting on a stool, and grabbed her wrists from behind. Appellant lifted CC’s arms, forcing her off of the stool. CC told Appellant to let go and that he was hurting her, but he refused. CC tried to kick at Appellant with her leg, but Appellant raised her arms further, causing her to fall onto her knee and then onto her chin, which “hurt pretty bad.” Appellant then put his knee on CC’s back between her shoulder blades with most but not all of his body weight. CC screamed at Appellant to let go of her and that he was hurting her, but he refused. Appellant then told CC, “[I]f you wouldn’t have resisted, this wouldn’t have happened.” CC then lay and waited for what she estimated to be a minute before Appellant got off her.

CC testified this incident occurred in the afternoon, before her work shift started at 1430 or 1500. At the time, CC no longer worked at the department store and was working for another company located approximately 20 to 25 minutes away from their house. CC went to work at the usual time that day, finishing her shift just after 1900. After

work, CC went to the home of a coworker, CS, before returning home around 2200. CC testified that after she returned home she used her phone to photograph bruises on her leg and chin that resulted from the earlier incident with Appellant; the bruises lasted for approximately two weeks.<sup>5</sup>

CC's co-worker CS testified at trial that CC came to work with a bruise on her chin in mid- or late-May 2021. CS also testified CC came to CS's home on 21 May 2021, which was the only time CC came to her house. CS further testified that around that time, CC told CS that Appellant physically abused CC.

At trial, the Government introduced photographs CC took of her leg and chin on 21 May 2021. Contrary to CC's testimony, the time stamps indicate the photographs were taken at 1058 and 1104 on that date.

CC moved out of the house on 11 June 2021 and went to Florida, where her parents lived. Approximately two weeks later, CC reported Appellant's physical abuse of her to law enforcement. Appellant and CC were divorced on 28 December 2021.

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<sup>5</sup> CC testified regarding two other charged instances of assault consummated by battery Appellant allegedly committed against CC in January or February 2021. The court members found Appellant not guilty of those alleged offenses, the details of which are unnecessary for this opinion.

## II. DISCUSSION

### A. Trial Counsel Findings Argument

#### 1. Additional Background

Trial counsel began his argument on findings by commenting on the statements CC made to her sister around 8 May 2021, and by arguing that Appellant’s motive was to use physical force to control CC when she confronted him about his apparent interest in other women. Trial counsel then told the court members he wanted them to consider “three specific areas,” including: (1) that the “allegations” and “narrative [they have] been told” through the evidence “makes sense” and “rings true;” (2) that the evidence satisfies the elements of the offenses; and (3) that “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 any reason to make this up.”

Trial counsel then reviewed the evidence at some length, arguing that CC’s testimony was significantly corroborated and presented a narrative that “makes sense” and met the elements of the charged offenses. At one point, while addressing the elements of the offenses, trial counsel stated: “in talking about these [elements], starting actually from the bottom, that she was the spouse, that of course is not at issue. There has been no evidence provided that she wasn’t [the spouse] and they talked about the fact that they were married.”

At the conclusion of the argument, trial counsel returned to the subject of CC’s credibility:

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 witness[']s 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. She's telling the truth. What does she have to gain by not telling the truth? Let's again talk [about what] 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 [D]efense 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<sup>[6]</sup> claim. She has to do these

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<sup>6</sup> Appellant does not include trial counsel's reference to "domestic violence" in his assignments of error. Article 128b, UCMJ, 10 U.S.C. § 928b, exists as a separate offense of "Domestic Violence,"

investigative interviews which you've heard briefly about from the [Air Force] Office of Special Investigations. Yeah, that's really fun to go and put your entire marital life -- your failed marriage to these law enforcement officials. She's had to go through prosecutor interviews, defense interviews, her courtroom testimony in front of you, the direct and cross-examination sitting up here for hours on the stand as we dig through any

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distinct from assaults under Article 128, UCMJ. Appellant was charged with assault consummated by battery in violation of Article 128, UCMJ, rather than domestic violence in violation of Article 128b, UCMJ. Trial counsel evidently referred to "domestic violence" consistent with a lay person's understanding of the term as "violent or abusive behavior directed by one family or household member against another." MERRIAM-WEBSTER, *Domestic Violence*, <https://www.merriam-webster.com/dictionary/domestic%20violence> (last visited 21 Feb. 2025). Although trial counsel's reference to "domestic violence" was potentially objectionable, we do not find a *clear or obvious* error in light of the common definition of the term. See *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (holding that absent objection, alleged errors in trial counsel's argument are reviewed for plain error); *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (setting forth the criteria for plain error review). Assuming *arguendo* the reference to "domestic violence" was a plain or obvious error, we find Appellant was not unfairly prejudiced and Appellant was convicted on the basis of the evidence alone. See *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021). Court members are presumed to follow the military judge's instructions in the absence of evidence to the contrary. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). In this case, the court members were instructed on the elements of assault consummated by a battery in violation of Article 128, UCMJ, the offenses of which Appellant was convicted.

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. [It i]s 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. The [D]efense needs to get up here and say that all of these people are just lying to you; that it's all one giant conspiracy theory. None of it makes sense. Members, what they're going to do with that is trying to tell you that if there's any doubt at all, if there's any conspiracy theory they can sell then you need to find him not guilty. That is not true. The judge instructed you on the reasonable doubt standard and what that means, and you will have these instructions so read over them carefully. . . . The [D]efense 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, how [CC] months before reporting this was getting bruises just to show people and they just happen to all notice and have concern that she was being physically abused, that she was laying little breadcrumbs talking to all sorts of different people, [CS], her dad, her sister, later [Appellant's] parents, and all of this was a[ ]part of an elaborate scheme that I'm going to be prepared after I leave you to potentially report you for a crime, a crime that I have nothing to gain from. Is that a doubt? Is that an explanation? Maybe. Is it reasonable; absolutely not. Members, you absolutely should be firmly convinced that you know what's happened here, that this is the case of a woman who has endured multiple abuses, physical control from her husband, and he absolutely must be held accountable for what he's done, which is why the Government asks that you find him guilty of all specifications.

Trial counsel began his rebuttal argument for findings by stating, "Panel members, I'm not going to walk through all of the misstatements of fact but I trust that you've heard the facts and you know them and you will respond to them appropriately." He then addressed the evidence of the bruises CC photographed on her leg and chin on 21 May 2021:

The bruises that you have on her knee and on her chin, on 21 May 2021, all the [D]efense has given you is that the time is wrong; that she was off by a couple of

hours of when this might have happened. As she thought it might have been around noon, it turns out it was closer to 1000. What you have not been given is any reasonable explanation for where this came from, what these are about. And specifically what I want you to focus on is the chin because the knee, sure, although you've been given no reasonable explanation, people get bruises on their knees. People fall down and they hit their knee, but what about the chin. Why does she have an injury on her knee and her chin? I really truly challenge you to think about that. Defense hasn't given you any explanation but think about where an explanation might be of how someone might get that. The knee again is common. People might fall to the ground and they might hit their knee on the ground as she did. But what happens after that? You fall on your hands. You don't fall on your chin. How does someone fall on their chin next -- when they've got their hands pulled behind their back. That chin which you have a picture of, and you have the witness [CS] saying she saw it -- 21 May 2021 she came over her house for the first time. She needed to be there. She didn't want to go home. She didn't want to be alone. What does she see? She sees the bruise on her and she hears about the abuse. You have absolutely no reasonable explanation and no reasonable doubt as

to what happened there. What you have is someone who more than a year later was off by a couple of hours of when this happened.

Trial counsel then responded to trial defense counsel's reference to a statement CC made during an interview with trial counsel to the effect that Appellant "took away [her] dream of being a wife and having a family, so it's only fair that now he loses his dream of being a pilot." Trial counsel argued:

For a woman who has been abused over the course of many months, how is she supposed to feel? How is a victim supposed to feel when she's asked by the Legal Office about what sort of outcome she might want from this. Is she supposed to say no accountability; nothing should happen to him? Those are the words of the victim. Those are the words of someone who has been abused over the course of many months and did lose her marriage because of this, and told countless people that that's why she lost her marriage, because of the abuse. What is the first thing that she tells her parents-in-law? "I feel I need to be completely honest with you about why I left." She had suffered abuse multiple times physically from him. So, yes, he did take away her dreams of becoming a wife and [a] mother and having a family, and yes she does feel hurt, and yes she does want him to be held accountable and you should hold him accountable. The [G]overnment 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.

Trial defense counsel did not object to any portion of trial counsel's findings argument or rebuttal.

## 2. Law

"We review prosecutorial misconduct and improper argument de novo and where . . . no objection is made, we review for plain error." *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citation omitted).

"[T]rial counsel may 'argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.'" *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). "A prosecutorial comment must be examined in light of its context within the entire court-martial." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (citation omitted). "[I]t 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) (citations omitted). "[T]he Government is permitted to make 'a fair response' to claims made by the defense," even when constitutional rights are at stake. *United States*

*v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (citations omitted).

“The Due Process Clause of the Fifth Amendment to the Constitution<sup>[7]</sup> requires the Government to prove a defendant’s guilt beyond a reasonable doubt.” *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995) (citing *In re Winship*, 397 U.S. 358, 363–64 (1970)). For trial counsel to suggest the accused has any burden to produce evidence demonstrating his innocence is “an error of constitutional dimension.” *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004) (citation omitted).

“[I]t is . . . improper for a trial counsel to attempt to win favor with the members by maligning defense counsel,’ including accusing the defense counsel of fabrication.” *Voorhees*, 79 M.J. at 10 (quoting *United States v. Fletcher*, 62 M.J. 175, 181–82 (C.A.A.F. 2005)).

“[I]mproper vouching occurs when the trial counsel ‘places the prestige of the [G]overnment behind a witness through personal assurances of the witness’s veracity.’” *Fletcher*, 62 M.J. at 180 (quoting *United States v. Necochea*, 986 F.2d 1273, 1276 (9th Cir. 1993)). “Bolstering” occurs when trial counsel attempts to improperly enhance his or her own credibility. *See Voorhees*, 79 M.J. at 11.

“[T]rial counsel is also prohibited from injecting into argument irrelevant matters, such as personal opinions and facts not in evidence,” with the exception of “contemporary history or matters of common knowledge within the community.” *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (citing

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<sup>7</sup> U.S. CONST. amend. V.

*Fletcher*, 62 M.J. at 180; *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994)) (additional citation omitted).

“When a trial counsel makes an improper argument during findings, ‘re-versal is warranted only when the trial counsel’s comments taken as a whole were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.’” *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (quoting *Andrews*, 77 M.J. at 401–02). In general, appellate courts “weigh three factors to determine whether trial counsel’s improper arguments were prejudicial: ‘(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.’” *Andrews*, 77 M.J. at 402 (quoting *Fletcher*, 62 M.J. at 184). Where an error is of constitutional dimensions, an appellate court may not affirm the result unless the error was harmless beyond a reasonable doubt. *Mason*, 59 M.J. at 424 (C.A.A.F. 2004). “[T]he lack of a defense objection is ‘some measure of the minimal impact of a prosecutor’s improper comment.’” *Gilley*, 56 M.J. at 123 (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

### **3. Analysis**

Appellant contends trial counsel’s findings argument and rebuttal were improper in multiple respects. Because trial defense counsel did not object, we review for plain error. *Voorhees*, 79 M.J. at 9. We address each type of error Appellant asserts in turn below.

***a. Shifting the Burden***

Appellant asserts trial counsel improperly shifted the burden to the Defense at three points. We address each below.

First, Appellant cites trial counsel's statement that "[t]here has been no evidence provided that [CC] wasn't" Appellant's spouse. Viewed through the lens of plain error review, we do not find trial counsel was clearly or obviously shifting the burden to the Defense to prove CC was not married to Appellant. Trial counsel immediately followed this statement with the observation that the witnesses "talked about the fact that they were married." In context, trial counsel was observing that there was evidence CC and Appellant were married at the time of the charged offenses, and there was no evidence to the contrary. This was not clearly or obviously outside the bounds of fair commentary on the state of the evidence in relation to the elements. Assuming *arguendo* trial counsel's comment was a clear or obvious error, it was harmless beyond a reasonable doubt. The evidence overwhelmingly indicated CC and Appellant were married, and at no point did the Defense contest that element.

Second, Appellant cites trial counsel's comment during rebuttal, regarding the bruise on CC's chin, that the "Defense hasn't given you any explanation but think about where an explanation might be of how someone might get that." Again, in the context of the argument as quoted above, we are not persuaded trial counsel was clearly or obviously improperly shifting the burden. Rather, trial counsel was specifically responding to trial defense counsel's argument, and more particularly asserting trial defense counsel's

inability to address the evidence of the bruise on CC's chin, which was more unusual than a leg bruise. A comment by trial counsel to the effect that the Defense's argument or theory of the case is weak is not inevitably a burden-shifting comment on the Defense's inability to present better evidence for its case. Trial counsel's argument was based on the purported strength of the Government's evidence, and aimed not at the absence of any particular evidence but at the Defense's argument—that is, “comment[ing] on the [D]efense's failure to refute government evidence or to support its own claims.” *Paige*, 67 M.J. at 448 (citations omitted).

Third, Appellant cites several quotes from trial counsel's findings argument and rebuttal which, Appellant contends in his brief, show trial counsel “focused on what the [D]efense *was required to do* in order to *disprove*” the offenses. The cited quotes include: “You have not been provided with any reasonable explanation as to why [D]efense just wants to get up here and say it's a lie, it's a lie, it's all lies;” “The [D]efense needs to get up here and say that all of these people are just lying to you; that it's all one giant conspiracy theory;” “What you have not been given is any reasonable explanation for where this came from, what these [bruises] are about;” and once again, “Defense hasn't given you any explanation but think about where an explanation might be of how someone might get that [bruise on her chin].” However, similar to our analysis above, under plain error review, we are not persuaded trial counsel's argument exceeded the bounds of permissible commentary on the state of the evidence and countering the Defense's argument and theory of the case by anticipating what trial defense counsel would argue in light of the testimony

provided. Although perhaps awkwardly worded in places,<sup>8</sup> essentially trial counsel was not arguing the Defense had failed to present any particular evidence, but that trial defense counsel's argument was weak in the face of the credible evidence the Government put on. Accordingly, we find no clear or obvious error.

***b. Improper Bolstering and Vouching***

Appellant contends trial counsel improperly bolstered and vouched for the Government's witnesses, and for CC in particular. He cites trial counsel's statements that "you have a credible witness," that "[CC] was credible," and "she's telling the truth." Appellant compares the instant case to *Voorhees*, where the United States Court of Appeals for the Armed Forces found numerous examples where that trial counsel "improperly expressed his personal opinion about [the a]ppellant's guilt, utilized personal pronouns, bolstered his own credibility, and vouched for government witnesses." 79 M.J. at 11. Again, we are not persuaded Appellant has met his burden to demonstrate clear or obvious error.

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<sup>8</sup> We acknowledge trial counsel's use of the phrase "needs to"—viewed in isolation—may appear particularly ill-advised. However, viewed in context, it is neither plain nor obvious trial counsel was shifting the burden of proof; rather, he was anticipating what trial defense counsel's argument would be in light of the evidence before the court members. We again note the absence of a defense objection, which suggests trial defense counsel did not perceive the remark as an improper burden shift. Moreover, the court members received this argument after having been repeatedly advised the burden of proof beyond a reasonable doubt rested with the Government, and in particular, "never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each offense."

With respect to the comparison with *Voorhees*, we first note that the alleged improprieties in Appellant's case are less severe in number, type, and degree than in that case. Unlike *Voorhees*, trial counsel in Appellant's case did not bolster his own personal credibility as an advocate, resort to personal pronouns, or starkly express his personal opinion as to Appellant's guilt. *See id.* at 11–12. It is true that trial counsel's statements that CC was credible resemble certain statements included in passages of argument *Voorhees* described as clear and obvious error, *e.g.*, “that [A]irman is credible,” and “[s]he testified credibly.” *Id.* at 11. However, trial counsel's argument “must be examined in light of its context within the entire court-martial,” *Carter*, 61 M.J. at 33 (citation omitted), and “it is improper to ‘surgically carve’ out a portion of the argument with no regard to its context.” *Baer*, 53 M.J. at 238. In *Voorhees*, the context was “findings and rebuttal arguments . . . riddled with egregious misconduct,” including obvious errors of multiple types. 79 M.J. at 10. In Appellant's case, however, a fair reading is that trial counsel was arguing based on the evidence and fair inferences therefrom, rather than relying on personal assurances or the Government's prestige to sway the court members. *See Halpin*, 71 M.J. at 479 (citation omitted); *Fletcher*, 62 M.J. at 180 (citation omitted). Trial counsel are, of course, not categorically prohibited from arguing that court members should find a victim's testimony credible. *See, e.g., United States v. Blackburn*, No. ACM 40303 (f rev), 2024 CCA LEXIS 129, at \*39 (A.F. Ct. Crim. App. 4 Apr. 2024) (unpub. op.) (finding no plain error where trial counsel “argued in general” the child victim was a credible witness in light of the evidence and reasonable inferences therefrom). In Appellant's case, we are not

persuaded trial counsel clearly or obviously invited the court members to base their credibility assessment on inappropriate considerations, as opposed to the state of the evidence, reasonable inferences, their own observations of the testimony, and their common sense and knowledge of the ways of the world. *See United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014) (“[Court] members are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial.”).

Assuming *arguendo* trial counsel’s statements regarding CC’s credibility were improper, applying the three-part harmless-error analysis from *Fletcher* and *Andrews*, we are nevertheless confident the court members convicted Appellant on the basis of the evidence alone. Although it had certain weaknesses, overall the Government’s proof supporting the convictions was moderately strong.<sup>9</sup> CC provided clear testimony Appellant committed the charged acts. Her testimony about these two offenses was corroborated to some extent by the testimony of her coworkers who observed suspicious bruises on CC on or near the same dates, testimony from individuals to whom CC had made prior consistent statements implying or asserting that Appellant was abusive toward her, and photographs of the bruises CC took on 21 May 2021.<sup>10</sup>

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<sup>9</sup> Appellant does not raise legal or factual insufficiency of the evidence in his assignments of error. *See generally United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (setting forth applicable standards for legal and factual sufficiency).

<sup>10</sup> As the Government conceded at trial, the date stamps on the photographs suggest CC was mistaken as to at what point in the day on 21 May 2021 the assault occurred and when she took the photographs. Notwithstanding this discrepancy, the court

Because there was no objection, and the military judge did not intervene sua sponte, there were no specific corrective measures, although the military judge did provide standard instructions that it was the court members' "duty to determine the believability of the witnesses," taking into account a number of considerations. However, most significantly, we find the severity of the misconduct very low. Appellant cites a very few instances of trial counsel referring to CC as "credible" in a lengthy argument<sup>11</sup> primarily focused on the evidence in the case. Moreover, as stated above, even if we assume trial counsel should have been more careful with his words in light of *Voorhees*, he did not suggest the court members should rely on his own trustworthiness or the prestige of the Government to sway their deliberations.

***c. Arguing Facts Not in Evidence***

Appellant contends trial counsel improperly argued facts not in evidence before the court members in three respects.

First, Appellant takes issue with a physical demonstration trial counsel evidently performed during his rebuttal argument while explaining how CC received the bruise to her chin during the 21 May

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members could still reasonably find the photographs of the injuries significantly corroborated CC's testimony regarding the 21 May 2021 assault.

<sup>11</sup> Trial counsel's findings and rebuttal arguments together spanned over 24 pages of the written transcript. By comparison, trial defense counsel's findings argument spanned approximately 13 pages.

2021 incident.<sup>12</sup> According to Appellant’s declaration, trial counsel got on his knees and placed his hands behind his back while describing how CC had her “hands pulled behind [her] back.” Appellant asserts trial counsel thereby improperly “imposed his personal views and interpretation of the evidence on the members given there was no factual basis for his demonstration in the record,” which rendered the demonstration a “hypothetical[ ] with no basis in evidence.” See *Norwood*, 81 M.J. at 21 (“Arguing an inflammatory hypothetical scenario with no basis in evidence amounts to improper argument . . . .”) (citation omitted)). We are not persuaded. Trial counsel are permitted to argue reasonable inferences from the evidence. *Halpin*, 71 M.J. at 479 (citation omitted). Despite Appellant’s assertion to the contrary, based on the description in Appellant’s declaration, it does not appear to us trial counsel’s physical demonstration was inconsistent with CC’s testimony. We find no plain error on this point.

Second, Appellant cites trial counsel’s reference to the burden the investigative and prosecution processes would have imposed on CC. He specifically cites the following statements: “It’s not for the faint of heart to testify in court;” “it is a long, drawn-out,

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<sup>12</sup> This court granted a defense motion to attach a declaration by Appellant, dated 17 May 2024, in which Appellant described a physical demonstration trial counsel performed during his rebuttal argument. Courts of Criminal Appeals may “consider affidavits . . . when doing so is necessary for resolving issues raised by materials in the record.” *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020). The demonstration Appellant describes is not recorded or described in the record of trial. For purposes of our analysis, we conclude we may consider the declaration consistent with *Jessie*.

difficult experience for [CC];” “[w]hat possible motivation does she have;” and “[y]ou saw her and you saw her credibility.” Appellant contends “no evidence of the difficulty in testifying nor the investigative process was ever admitted at trial.” We are not persuaded these comments amounted to plain error. Although the court members were not presented with specific evidence regarding how difficult CC found the investigation and court-martial process, they did have evidence that approximately one year had elapsed between when CC reported the offenses to law enforcement and Appellant’s court-martial, and that she had undergone at least one interview with the prosecutors before trial. Moreover, the court members were aware of the nature of her testimony and able to observe her demeanor on the stand. Court members are routinely advised, “In weighing and evaluating the evidence, [they] are expected to use [their] own common sense and [their] knowledge of human nature and the ways for the world.” Department of the Army Pamphlet 27-9, *Military Judges’ Benchbook*, ¶ 2-5-12 (29 Feb. 2020). We conclude trial counsel’s general statements suggesting that CC’s participation in the investigation and court-martial-imposed burdens on her were not clearly or obviously outside reasonable inferences the court members could draw from the matters before them.

Third, Appellant cites trial counsel’s statement that CC reported Appellant’s offenses because she was “concern[ed] that he might go out and do this to someone else; that that can happen.” Appellant asserts CC “never testified that is why she came forward.” However, toward the end of CC’s direct examination, trial counsel asked her, “[W]hat happens for you ultimately reporting [sic] this to law

enforcement?” CC responded, “I felt as though he used me and I didn’t feel like he loved me. *It made me feel like he was going to do this to someone else.*” (Emphasis added). Trial defense counsel objected to this testimony, but he was overruled by the military judge. Accordingly, we find this aspect of Appellant’s argument is without merit.

#### ***d. Disparaging the Defense***

Finally, Appellant cites as error trial counsel’s comments to the effect that the Defense was trying to convince the court members of a “conspiracy theory.” We acknowledge that, in light of *Voorhees*, accusing opposing counsel of presenting “conspiracy theories” may be ill-advised. See *Voorhees*, 79 M.J. at 10 (holding that “ma[king] the defense theory of the case seem fantastical” was “clear, obvious error”). In light of *Voorhees*, we assume *arguendo* that these comments were clearly erroneous. However, applying the three-part test for harmless error from *Fletcher* and *Andrews*, we are again confident the court members convicted Appellant on the basis of the evidence alone. As stated above, the Government’s case supporting the convictions was moderately strong. Without an objection, the military judge did not provide specific corrective measures. However, once again, we find the low severity of the assumed error decides the issue. The comments Appellant cites were confined to a short portion of a lengthy argument primarily focused on the evidence; they were not part of an extended or egregious personal attack on trial defense counsel or Appellant himself. Although poorly chosen, trial counsel’s statements may be understood as commentary on the strength of the Government’s evidence corroborating CC’s testimony, rooted in

reasonable inferences from the evidence. We do not find Appellant was unfairly prejudiced.

## **B. Lay Witness Testimony Regarding Bruising**

### **1. Additional Background**

At trial, CC's former co-worker at the department store, SM, testified that in early 2021 she noticed CC came to work with "a few bruises." SM further testified that CC later told her in early June 2021 that Appellant caused those bruises. On cross-examination, trial defense counsel explored, *inter alia*, the nature of the work CC and SM did together, which included moving and unpacking boxes and sometimes helping to unload trucks.

On redirect examination, trial counsel asked, "Did the bruises that you saw [CC] display appear consistent with the work that you guys were doing?" SM responded, "No, not really." Trial defense counsel did not object to this testimony.

### **2. Law**

#### ***a. Admission of Lay Opinion Testimony***

We review a military judge's decision to admit evidence for an abuse of discretion. *See United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (citation omitted). Where an appellant failed to make a timely objection to the admission of evidence, we review for plain error. *Knapp*, 73 M.J. at 36 (citations omitted). Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *Id.* (citation omitted).

Mil. R. Evid. 701 provides:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness' perception;
- (b) helpful to clearly understanding the witness' testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Mil. R. Evid. 702 [governing expert testimony].

Thus, “[Mil. R. Evid.] 701 establishes a two-part test for admissibility of lay opinion: (1) the opinion must be rationally based on the witness’s perception; and (2) the opinion must be helpful to the determination of a fact in issue.” *United States v. Byrd*, 60 M.J. 4, 6 (C.A.A.F. 2004); *accord United States v. Norman*, 74 M.J. 144, 149 (C.A.A.F. 2015) (quoting *Byrd*).

### ***b. Ineffective Assistance of Counsel***

The Sixth Amendment<sup>13</sup> guarantees an accused the right to effective assistance of counsel. *Gilley*, 56 M.J. at 124. In assessing the effectiveness of counsel, we apply the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence as stated in *United States v. Cronin*, 466 U.S. 648, 658 (1984). *See Gilley*, 56 M.J. at 124 (citation omitted). We review allegations of ineffective assistance de novo. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)

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<sup>13</sup> U.S. CONST. amend. VI.

(citing *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)).

We utilize the following three-part test to determine whether the presumption of competence has been overcome: (1) are the appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions;" (2) if the allegations are true, did trial defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers;" and (3) if trial defense counsel were deficient, is there "a reasonable probability that, absent the errors," there would have been a different result? *Id.* (alteration and omission in original) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

The burden is on the appellant to demonstrate both deficient performance and prejudice. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted). "[C]ourts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689) (additional citation omitted). We will not second-guess reasonable strategic or tactical decisions by trial defense counsel. *Mazza*, 67 M.J. at 475. With respect to prejudice, a "reasonable probability" of a different result is "a probability sufficient to undermine confidence in the outcome" of the trial. *Datavs*, 71 M.J. at 424 (quoting *Strickland*, 466 U.S. at 694) (additional citation omitted).

### 3. Analysis

Appellant contends the military judge plainly erred by permitting SM to testify to her opinion that the bruises she observed on CC were "not really"

consistent with the type of work CC and SM performed at the department store. In the alternative, Appellant contends he received ineffective assistance of counsel when trial defense counsel failed to object to this testimony. We address each contention in turn.

*a. Admission of Lay Opinion Testimony*

We find the military judge did not plainly or obviously abuse his discretion by permitting SM to testify, without objection, that she did not think CC's bruises appeared consistent with the type of work she and CC did together. The military judge could reasonably conclude SM's testimony was rationally based on her perceptions, in light of the fact that SM spent multiple months performing the same type of work CC performed. In addition, SM's testimony was helpful to the court members in determining a fact in issue. SM testified she saw bruises on CC in early 2021, which tended to corroborate CC's testimony that in January 2021 Appellant bit her on the arm, leaving a bruise that lasted one or two weeks. On cross-examination, trial defense counsel elicited that at work SM and CC moved and unpacked boxes and helped to unload delivery trucks, implying CC may have received bruises while performing her job and suggesting a possible alternative explanation for the bruises SM observed. SM's redirect testimony that the bruises did not appear consistent with their work tended to counter the Defense's suggestion and support the Government's theory that SM saw the bruise CC said she received from Appellant.

Furthermore, we are not persuaded SM's testimony plainly or obviously implicated the sort of scientific, technical, or other specialized knowledge beyond the competence of a lay witness. The military

judge could reasonably conclude the receiving of bruises is a sufficiently commonplace aspect of ordinary life that a lay witness could rationally testify, based on her perceptions and experience, whether certain activities she engaged in were or were not likely to cause certain bruises.

Appellant cites this court's opinion in *United States v. Rameshk*, No. ACM 39319, 2018 CCA LEXIS 520 (A.F. Ct. Crim. App. 29 Oct. 2018) (unpub. op.), for the proposition that "testimony about the nature of bruising . . . require[s] specialized knowledge, skill, experience, training or education." In *Rameshk*, the prosecution called as a witness the nurse who treated the rape victim in the case. *Id.* at \*13. After the military judge recognized the nurse as an expert in "Emergency Room Nursing," the nurse testified without objection regarding the "lifecycle" of bruises, how their appearance changes over time, and that the bruises on the victim's neck were recent based on their color. *Id.* at \*14. On appeal, this court found the military judge did not plainly err by admitting the nurse's testimony regarding the age of the victim's bruises, because the testimony was "an expert opinion based on [her] practical experience in observing and treating bruises and other injuries during her 20-year career as a registered nurse, as well as her personal observation of [the victim] as one of the attending health care providers." *Id.* at \*18. *Rameshk* stands for the proposition that "[a] witness may be qualified as an expert not only by reason of 'training or education' but also by 'knowledge, skill, [or] experience.'" *Id.* at \*17 (quoting Mil. R. Evid. 702). However, it does not stand for the proposition that *any* testimony regarding the causation of bruises *requires* scientific, technical, or specialized knowledge. Moreover,

*Rameshk* is distinguishable in that the specific issue was whether the nurse was qualified to express an opinion regarding the *age* of particular bruises. *Id.* at \*16–17. A military judge might reasonably conclude such a determination calls for greater medical expertise, whether derived from education, training, or experience, than a lay person’s opinion based on their own observations and experience whether their job was likely to result in certain observable injuries. In Appellant’s case, the military judge did not see the need for further explanation, and we see none.

Accordingly, we find Appellant has failed to demonstrate the military judge committed plain or obvious error by failing to sua sponte exclude or limit SM’s testimony.

***b. Failure to Object***

Alternatively, Appellant asserts trial defense counsel were ineffective for failing to object to SM’s testimony. At the Government’s request, this court ordered and received declarations from both of Appellant’s trial defense counsel responsive to the allegations of ineffective assistance. In summary, taken together, these declarations make several points regarding SM’s testimony. First, trial defense counsel believed SM’s testimony was legitimate lay opinion testimony rationally based on SM’s perceptions from the work she and CC did together. Second, no court member would have construed SM as offering an improper expert opinion on the matter. Third, trial defense counsel’s cross-examination suggesting the possibility CC received the bruises at work opened the door to such a response. Finally, objecting to SM’s admissible lay opinion testimony to which the Defense had opened the door would have

further drawn the court members' attention to her testimony and would have been counterproductive.

We find Appellant has failed to overcome the presumption of competence. For reasons similar to our analysis concluding the military judge did not commit plain error, we find trial defense counsel's belief that SM's testimony was admissible, and that objecting to it would have been unhelpful, met the applicable standard of reasonable professional assistance. *See Davats*, 71 M.J. at 424 (citations omitted). Accordingly, Appellant is not entitled to relief.

### **C. Mil. R. Evid. 404(b)**

#### **1. Additional Background**

When the Government called A1C AA, the former housemate of Appellant and CC, to testify, the Defense requested a hearing outside the presence of the court members. Trial defense counsel objected to A1C AA testifying regarding "uncharged misconduct in the sense of verbal altercations [between Appellant and CC] when he lived with them." The military judge received argument from counsel on the Defense's objection, in the course of which trial counsel indicated the Government also intended to elicit that Appellant told A1C AA not to talk to CC.

Analyzing the proposed testimony under Mil. R. Evid. 404(b), the military judge ruled the Government could call A1C AA to offer the proffered testimony. First, the military judge found the court members "could reasonably find whatever facts the witness testifies to." Next, the military judge found the proffered testimony would be relevant, explaining "the existence of some sort of animosity or conflict in the marriage would make it more likely that someone might commit an act of violence against another

person if they harbor ill will or a[ny] ill feelings against that person because of disagreements about things.” Third, the military judge found the probative value was not substantially outweighed by countervailing concerns:

There has already been evidence elicited regarding arguments or disagreements between [Appellant] and [CC] so I don't think that the members will be confused as to the issues before them or be misled. A single witness's testimony will not cause undue delay or a waste of time. Finally, I don't think there's a danger of unfair prejudice since the existence of conflict between the spouses provide possible explanation or motive for [Appellant] to commit the charged offenses.

A1C AA subsequently testified, *inter alia*, that beginning approximately a week after he moved in with Appellant and CC in October 2020, Appellant and CC seem to argue “nonstop” on a daily basis. From what A1C AA could hear, most of the arguments were about “financial stuff,” and Appellant started most of the arguments. In addition, A1C AA testified Appellant told A1C AA to go through Appellant if he needed to talk to CC.

When delivering findings instructions, the military judge advised the court members they could consider A1C AA's testimony that Appellant “may have frequently argued” with CC “for the limited purpose of its tendency, if any, to determine whether [Appellant] had a motive to commit the alleged offenses.” He further instructed the court members they “may not

consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has a bad character and that he therefore committed the offenses charged.”

## 2. Law

We review a military judge’s ruling pursuant to Mil. R. Evid. 404(b) for an abuse of discretion. *United States v. Hyppolite*, 79 M.J. 161, 164 (C.A.A.F. 2019) (citation omitted). “A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable.” *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citation omitted). “The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be ‘arbitrary, fanciful, clearly unreasonable,’ or ‘clearly erroneous.’” *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person’s character in order to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, *inter alia*, proving motive to commit a charged offense. Mil. R. Evid. 404(b)(2). We apply a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b):

1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
2. What “fact . . . of consequence” is made “more” or “less probable” by the existence of this evidence?
3. Is the “probative value . . . substantially outweighed by the danger of unfair prejudice”?

*United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010) (omissions in original) (quoting *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)). The third prong of the test is essentially an application of Mil. R. Evid. 403. See *Reynolds*, 29 M.J. at 109.

### 3. Analysis

Appellant contends the military judge abused his discretion by permitting A1C AA’s testimony because his application of the facts to the law was clearly unreasonable. Appellant argues the evidence that Appellant argued with CC about finances and required A1C AA to communicate with CC through him did not make it more or less likely that Appellant committed the charged assaults. Appellant concedes that “[u]nder the right facts, a contentious marriage might show an accused meant to later abuse his wife . . . .” However, he contends, in this case the charged misconduct did not allegedly arise from arguments over finances, or from Appellant’s attempts to restrict CC’s contact with other men, but instead from confrontations over Appellant’s apparent interest in viewing and communicating with other women. Appellant further argues this evidence “only served to broadly paint Appellant as a bad person.”

We conclude the military judge did not abuse his discretion. He appropriately analyzed the proffered testimony under the applicable three-pronged *Reynolds* test for Mil. R. Evid. 404(b) evidence. As to the first prong, he reasonably concluded the court members could make findings based on A1C AA's testimony; in the event, that testimony closely matched what trial counsel had represented. As to the second prong, the military judge's reasoning that evidence of existing "ill will" or animosity between Appellant and CC made an escalation to physical abuse more likely was not clearly unreasonable. We are not persuaded by Appellant's suggestion that A1C AA's testimony that a "majority" of the arguments he heard were about finances was not relevant if the charged assaults did not originate in disputes over finances. It was not clearly unreasonable for the military judge to find the existence of animosity between Appellant and his spouse, as evidenced by their frequent arguments, regardless of the specific topics, was sufficient to meet the low bar for relevance.<sup>14</sup> See Mil. R. Evid. 401 ("Evidence is relevant if [ ] it has *any* tendency to make a fact more or less probable . . ."); *United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010) (stating the threshold for relevant evidence is "low").

We further find the military judge did not err in finding the probative value of the evidence was not substantially outweighed by the danger of unfair

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<sup>14</sup> Additionally, as the Government notes, the initiation of the 21 May 2021 incident *was* related to finances. CC testified the chain of events began with Appellant using CC's phone and CC's account to order supplies for his business without her permission, leading her to pick up Appellant's phone.

prejudice. The military judge reasonably explained his conclusion that A1C AA's testimony would not be confusing, misleading, a waste of time, or otherwise unfair to Appellant. *See United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) ("Where a military judge properly conducts the balancing test under Mil. R. Evid. 403, we will not overturn his decision unless there is a clear abuse of discretion."). Moreover, such risks were mitigated by the military judge's instructions that A1C AA's testimony regarding arguments could only be used as evidence of motive, and could not be considered as character or propensity evidence. *See United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citation omitted) (stating court members are presumed to follow the military judge's instructions absent evidence to the contrary).

Accordingly, Appellant has failed to demonstrate the military judge abused his discretion by allowing A1C AA's testimony.

## **D. Requested Alibi Instruction**

### **1. Additional Background**

With regard to Specification 2 of the Charge, the assault consummated by battery on or about 21 May 2021, CC testified Appellant assaulted her in the afternoon before she departed for work at approximately 1400. On cross-examination, CC agreed that there was a point in time where Appellant worked on swing shifts, which began at 1500; on those days, Appellant typically went to sleep around 0500 or 0600 and "most of the time" awoke around 1400 before going to work. As described above, the photographs CC took of her leg and chin bruises on 21 May 2021 have time stamps indicating 1058 and 1104. The Defense introduced evidence through Appellant's

former supervisor that Appellant worked a swing shift beginning at 1500 on 21 May 2021.

At trial, the Defense requested the military judge instruct the court members on the defense of alibi with respect to Specification 2. The Defense's proposed instruction stated:

The evidence has raised the defense of alibi in relation to the offense of assault against a spouse as alleged in Specification 2 . . . . "Alibi" means that the accused could not have committed the offense charged because the accused was at another place when the offense occurred. Alibi is a complete defense to the offense of assault against a spouse. In this regard, there has been evidence that [CC] was assaulted in the afternoon of 21 May 2021, before her work shift started at 3pm. There has also been evidence that [Appellant] worked an afternoon shift that started at 3pm, he was present at work on 21 May 2021, he had a 15[-] minute drive to work, and he routinely slept until 2pm when he worked the afternoon shifts.

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused was present at the time and place of the alleged offense, then the defense of alibi does not exist.

The military judge denied the requested alibi instruction in an oral ruling. He explained, *inter alia*, "just based on the timelines of the evidence there does

not seem to be raised evidence that due to [Appellant's] work shift beginning at 1500 that he was not present at the time alleged which was sometime earlier in the afternoon.”

## 2. Law

We review the adequacy of a military judge's instructions de novo. *See United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted).

Alibi -- which in Latin means “elsewhere” -- is a term applied to an accused's claim that he was at another place when the crime was committed. By introducing evidence that he was elsewhere at the time, the accused provides a foundation for the inference that he could not have committed the crime. Although alibi is not an affirmative defense -- which excuses, justifies, or mitigates an accused's action -- it is well settled that, if the issue is raised, a requested instruction on alibi should be given.

*United States v. Brooks*, 25 M.J. 175, 178 (C.M.A. 1987) (citations omitted). “In determining whether to grant a requested instruction on alibi, the judge must not weigh the credibility of the alibi evidence.” *Id.*

“[A]ny party may request that the military judge instruct the members on the law as set forth in the request.” R.C.M. 920(c). However, the military judge has substantial discretionary power in deciding what non-required instructions to give. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (citing R.C.M. 920(c), Discussion; *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992)). Denial of a

defense-requested instruction is reviewed for abuse of discretion. *United States v. Carruthers*, 64 M.J. 340, 345–46 (C.A.A.F. 2007) (citations omitted). “A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable.” *Ellis*, 68 M.J. at 344 (citation omitted). We apply a three-part test to evaluate whether the failure to give a requested instruction is error: “(1) [the requested instruction] is correct; (2) it is not substantially covered in the main [instruction]; and (3) it is on such a vital point in the case that the failure to give it deprived [an appellant] of a defense or seriously impaired its effective presentation.” *Carruthers*, 64 M.J. at 346 (first and second alteration in original) (quoting *United States v. Gibson*, 58 M.J. 1, 7 (C.A.A.F. 2003)). All three prongs of the test must be satisfied in order to find error. *United States v. Barnett*, 71 M.J. 248, 253 (C.A.A.F. 2012).

### 3. Analysis

Appellant contends the military judge erred because an alibi instruction “with modifications” was “clearly raised by the evidence and would have been correct.” Appellant argues the evidence shows Appellant worked a swing shift on 21 May 2021, and would “usually” have awoken around 1400—the same time CC would have departed for her own job. Therefore, while Appellant may have been at home before work on 21 May 2021, he asserts, the evidence indicates CC “was not at the time or place alleged for this injury to have occurred as she testified and as the Government charged.” Appellant concludes,

The defense of alibi was not covered by any standard instruction. At the very least, a tailored instruction here—that the time and place alleged by the Government established that [CC] was not present, and thus, Appellant could not have caused the injury as charged—was warranted by the evidence and not otherwise instructed.

We agree with the military judge that the evidence did not raise the defense of alibi. The evidence indicates CC and Appellant were both present at their shared residence before CC departed for work at approximately 1400. Evidence that “most of the time” Appellant slept until approximately 1400 when he worked swing shifts is not evidence that he was “elsewhere” on 21 May 2021. Trial defense counsel could argue this evidence called into question CC’s version of events; but that does not make it evidence of an alibi.

We have also considered whether the military judge abused his discretion by failing to give the requested instruction, even if it was not required by the evidence. Applying the three-part test set forth in *Carruthers* and *Gibson*, we find he did not. With respect to the first prong, the requested instruction was not “correct” in that the evidence did not raise the defense of alibi. With respect to the third prong, the instruction was not on such a “vital point in the case that the failure to give it deprived [Appellant] of a defense or seriously impaired its effective presentation.” *Carruthers*, 64 M.J. at 346. Trial defense counsel was free to argue that the evidence regarding Appellant’s and CC’s sleep and work schedules tended to make it less likely that events

transpired as CC testified, and thereby undermined the reliability of her testimony with regard to Specification 2, with or without an instruction to that effect.

### **E. Ineffective Assistance of Counsel**

Appellant personally asserts he received ineffective assistance of counsel due to trial defense counsel's failure to "seek expert witness assistance in analyzing the bruising on [CC's] forearm due to a bite and the photographic evidence of the bruising to [CC's] chin and knee, documented in Prosecution Exhibit 1." Appellant contends this failure was unreasonable because the absence of expert assistance

left several areas unaddressed or inadequately explained at trial: (1) whether the bruises in Prosecution Exhibit 1 were consistent with the injury described by [CC], which was the corroboration for the charged encompassed by [S]pecification 2, (2) whether the bruises depicted in Prosecution Exhibit 1 were consistent with the charged timeframe in [S]pecification 2 and the date and time the photograph was taken, and (3) whether the bite as described for [S]pecification 3 would cause a bruise, or a bruise that would last for two weeks but not break the skin or otherwise required no treatment.

Appellant contends such assistance would have likely produced a more favorable result, noting Appellant was convicted of the two specifications for which the

Government introduced corroborating evidence of the bruises CC claimed to have received, and acquitted of the two specifications for which there was not such evidence.

At the Government's request, this court ordered and received declarations from both of Appellant's trial defense counsel responsive to the allegations of ineffective assistance. With respect to expert assistance as to evidence of bruising, trial defense counsel explained that based on their experience they did not believe such expert advice would assist the Defense's case. Because CC did not seek medical treatment for the bruises, the only evidence available for such an expert to analyze were the low-quality photographs CC took of the bruises on her leg and chin. With such limited information, trial defense counsel did not believe a medical expert would be able to determine the age or cause of the bruises, and would not be able to rule out domestic abuse as the cause. Instead, trial defense counsel elected to focus on what they identified as CC's motives to fabricate the allegations and inaccuracies or inconsistencies in her description of events.

The standard of review and burdens applicable to claims of ineffective assistance of counsel are set forth in relation to issue (2), *supra*. The burden is on an appellant to demonstrate both deficient performance and prejudice. *Datavs*, 71 M.J. at 424 (citation omitted). Appellant fails to carry either burden. We agree with Appellant that the evidence of bruising may have played a significant part in the findings of guilty. However, Appellant fails to identify what a qualified expert would have advised or testified to with regard the evidence of bruising in this case, much less how it would have undermined the Government's

case or assisted the Defense's case. Therefore, Appellant fails to demonstrate that trial defense counsel's assessment was unreasonable or their performance was deficient, or that obtaining such assistance offered a reasonable probability of a more favorable result. *See id.*

### **F. Appellate Delay**

Appellant's record of trial was originally docketed with this court on 15 August 2023. Appellant requested and was granted four enlargements of time to file his assignments of error, over the Government's opposition, before filing his brief on 28 May 2024. Over Appellant's opposition,<sup>15</sup> the Government was granted an enlargement of time in order to obtain declarations from trial defense counsel responsive to Appellant's claims of ineffective assistance of counsel. The Government timely filed its answer brief on 4 August 2024.<sup>16</sup> Appellant filed a reply brief on 11 August 2024.

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay "where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals." 63 M.J. at 142. Where there is a facially unreasonable delay, we examine the

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<sup>15</sup> Appellant's opposition included an assertion of "his right to speedy appellate review."

<sup>16</sup> On 22 August 2024, the Government moved to file an amended answer brief; this court granted the motion on 4 September 2024.

four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice [to the appellant].” *Id.* at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of an appellant’s due process right to timely post-trial review: (1) oppressive incarceration; (2) “particularized” anxiety and concern “that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;” and (3) impairment of the appellant’s grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). We review de novo an appellant’s entitlement to relief for post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *Moreno*, 63 M.J. at 135).

Over 18 months have elapsed since Appellant’s record of trial was originally docketed with this court. Therefore, under *Moreno*, there is a facially unreasonable delay, although we note the 18-month threshold has been exceeded by less than one month. Accordingly, we have considered the *Barker* factors and find no violation of Appellant’s due process rights. Appellant has not specifically alleged cognizable prejudice, and we do not find any. With regard to oppressive incarceration, based on the adjudged term of confinement, at the latest, Appellant was due to be released from confinement shortly after his case was

originally docketed with this court. In addition, we do not perceive any particularized anxiety or concern, nor any particular reason why Appellant's defense at a sentence rehearing or future appeal might be impaired due to the delay.

Absent prejudice, we find the delay involved in Appellant's case has not been so egregious as to adversely affect the perception of the military justice system. The appellate delay was partly occasioned by Appellant's own requests for enlargements of time, and partly by the Government's request for an enlargement occasioned by the need to carefully assess Appellant's claim on appeal of ineffective assistance by his counsel at trial. In addition, Appellant's claim of prosecutorial misconduct required detailed analysis by the court and resulted in a lengthy dissenting opinion. Accordingly, we find no egregious delay and no violation of Appellant's due process rights. Furthermore, recognizing our authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d), we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). After considering the factors enumerated in *United States v. Gay*, 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015), we conclude no such relief is warranted.

### III. CONCLUSION

As entered, the findings are correct in law, and the sentence is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d); *see* National Defense

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Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b)(1)(A), 134 Stat. 3388, 3611–12 (2021). Accordingly, the findings and sentence are **AFFIRMED**.

GRUEN, Judge (dissenting):

I generally concur with my esteemed colleagues as to the majority opinion with the exception of their opinion addressing issue (1). I find trial counsel engaged in prosecutorial misconduct amounting to plain error which resulted in prejudice to Appellant. Further, I find trial counsel improperly implicated Appellant's constitutional rights and the Government failed to meet their burden on appeal to show such error was harmless beyond a reasonable doubt. Therefore, I respectfully dissent as to issue (1) and would SET ASIDE the findings and sentence and return the record of trial to The Judge Advocate General of the Air Force authorizing a rehearing.

## I. BACKGROUND

Specifications 2 and 3 of the Charge for which Appellant was convicted are based on allegations of assault made by Appellant's wife, CC, which she claimed occurred at or near their home in Surprise, Arizona, while Appellant was stationed at Luke Air Force Base. The conduct charged in Specification 3 allegedly occurred sometime in mid-January 2021. The conduct charged in Specification 2 allegedly occurred on or about 21 May 2021.

According to testimony at Appellant's court-martial, Appellant met CC in December 2019 through mutual church friends in Missouri. Appellant was 23 years old and CC was 22 years old. Appellant entered active duty on 10 March 2020. He married CC in June 2020 by virtual ceremony while at technical school. In August 2020, they moved in together for the first time. At the onset of their married life, Appellant and CC had a roommate, AA, to help with finances. AA lived

with them from approximately September/October 2020 through January 2021.

While the majority provides a thorough factual background of the case, I believe it necessary to provide additional facts presented from Appellant's record of trial. Specifically, I think it is important to highlight CC's testimony in relation to other witness testimonies. Further, there were several references throughout CC's testimony that would suggest a bias as to why she would allege the offenses against Appellant.

### **A. Specification 3 (Unlawful Biting of CC)**

With respect to Specification 3, CC testified Appellant assaulted her in mid-January 2021, by biting her arm and leaving a bite-mark bruise. Allegedly, the altercation leading to this assault started because Appellant commented on the large breasts of another woman he saw on television, leading to Appellant biting CC on the arm and CC testifying that the bite resulted in a bruise visible for one or two weeks. CC was confident this bite and bruising occurred in mid-January 2021, because it happened just before her birthday and sister's visit on approximately 17 January 2021. This alleged conduct of Appellant biting CC formed the basis for Specification 3 occurring sometime during January 2021.

However, five other witnesses testified to the offense regarding Appellant biting CC. Four of these witnesses likely personally observed CC during mid-January 2021.<sup>1</sup> Each was asked whether they

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<sup>1</sup> SM testified she last saw CC mid-January, so it is unclear if she would have had an opportunity to see her arm at work with a

observed bruising on CC's arm. RL and CW, who were both neighbors of Appellant and CC, testified they saw CC regularly in January 2021 but did not witness any arguments between CC and Appellant or any injury to CC. Another witness, AA, testified he lived with CC and Appellant during the charged timeframe, but he never saw a bite mark or any bruising on CC, nor did he witness any physical altercations. CC's sister testified she visited CC and Appellant four days in mid-January 2021 but observed no bruises or bite marks on CC, and while CC and her sister are very close, CC did not tell her sister Appellant had bitten her or had physically assaulted her in any way.

The fifth witness, SM, testified she worked with CC in a backroom warehouse-type job at a retail store from November 2020 to mid-January 2021. According to SM, their work included moving, packing, and putting boxes on pallets as well as unloading trucks when needed. SM testified CC came in with "a few bruises" during the time they worked together but she could not provide a specific date to correlate any bruises to the timeframe for the alleged crime. According to SM, CC specifically denied any abuse by Appellant. While SM testified she periodically saw bruises on CC's arms, she did not describe seeing any bite mark. SM did not say at any time CC pulled up her sleeve to show her specific bruises.

CC's allegation that Appellant bit CC and caused bruising during January 2021 is not corroborated by any witness. There was no other evidence offered to corroborate CC's testimony relating to Specification 3.

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bruise in the time frame with which CC testified she was bitten and developed a bruise.

**B. Specification 2 (Unlawful Pressing of Knee into CC's Back)**

CC testified the offense alleged in Specification 2 occurred just before she left for work at approximately 1400 hours on 21 May 2021. Appellant worked a swing shift on 21 May 2021, from 1500 hours to approximately 2300 hours. CC testified when Appellant worked a swing shift, he would regularly sleep until approximately 1400 hours and leave their home to go to work at approximately 1430 hours. According to CC, just prior to her leaving for work, Appellant and CC argued because Appellant took CC's phone to purchase items via an online retailer account for his car detailing business. She further testified she tried to take her phone back from him because she wanted Appellant to use his own money to buy such items. According to CC, when she tried to grab her phone, Appellant ran to the garage preventing her from retrieving it. Choosing not to pursue Appellant, CC then accessed Appellant's phone, which was left in the house, and went through his social media accounts. She discovered Appellant had added a woman to one of his accounts who had sent a post of herself dressed in lingerie. When Appellant returned from the garage, CC started an argument with Appellant over this woman's post. According to CC, Appellant escalated the verbal argument into a physical altercation.

According to CC, while sitting on a bar stool behind the kitchen island counter, Appellant grabbed her wrists, lifted them up, and then lifted her arms to raise her off the bar stool. CC stated she tried to kick Appellant causing him to lift her arms higher. According to CC, this caused her to lose her balance and fall onto the wooden floor reddening her left knee

and bruising her chin. Appellant then unlawfully put his knee on her back in between her shoulder blades, which was very painful. CC stated she immediately left for work after this incident. This conduct formed the basis for Specification 3 on or about 21 May 2021.

As to this incident, several witnesses were questioned whether they observed evidence of CC's purported injuries relating to Specification 3. CS, who was a co-worker of CC's during the charged timeframe, testified she saw a bruise on CC's chin between April and June 2021. Again, Appellant and CC's neighbors, RL and CW, who were neighbors who knew both Appellant and CC—CW being a neighbor who saw CC regularly and who had visited with her at both residences—testified they never saw any bruising on CC, abuse of CC by Appellant, nor heard any fights or arguments between the two at any time. CC never reported to either of them any problems she might have been having with Appellant.

Like Specification 3, discussed *supra*, CC's allegation that Appellant unlawfully pressed his knee on CC's back on or about 21 May 2021 is not corroborated by any witness but for CS who did not know when between April and June 2021 she might have seen a bruise on CC's chin or where the bruise came from.

To corroborate CC's testimony that she was injured as a result of Appellant pressing his knee against CC's back, photographs were admitted at trial, found at Prosecution Exhibit 1 and Defense Exhibit A. CC claimed the alleged injuries from falling on her left knee and chin are depicted in these exhibits. However, looking at the images one finds they are grainy and difficult to identify as

corroborating evidence of the red knee or bruised chin CC described. Defense Exhibit A shows the clearest picture of CC's chin and neck and depicted no visible bruise.

CC testified she took the photos in the exhibits after returning home from work at approximately 2200 hours on 21 May 2021. The time stamps on the images show, however, that they were actually taken at "10:58" and "11:04" hours on the morning of 21 May 2021, therefore indicating that the alleged incident would have occurred when Appellant was sleeping before his night shift.<sup>2</sup> The images in Defense Exhibit A are clearer, but equally difficult to analyze as evidence of the bruising CC claimed occurred. Interestingly, CS, CC's co-worker, was not shown Prosecution Exhibit 1 or Defense Exhibit A, nor asked to compare what she claimed she saw on CC's chin with the photos in the exhibits. Notably, no expert was called to testify as to the origin or age of any reddening or bruising or to analyze or connect the images to the conduct alleged to have caused any marks that might have existed on CC's body.

### **C. CC's Motives**

Furthermore, in CC's testimony, she admitted to biases as to why she would allege the offenses against Appellant—she wanted him to lose his ability to become an Air Force pilot. She further testified to becoming increasingly frustrated that her complaining to Appellant regarding his predilections towards interacting with women on adult websites

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<sup>2</sup> CC testified her phone was on a 24-hour clock and the times shown on the exhibit indicated "10:58" and "11:04" were on the morning of 21 May 2021.

was having no effect on his conduct. Moreover, testimony by CC and her sister made clear Appellant's actions in engaging women online was not a sufficient basis for divorce given CC and her family's religious beliefs—but physical abuse was one of few legitimate reasons to leave your spouse and divorce—this being another motive for CC to fabricate allegations of physical abuse after she finally decided to divorce Appellant.

## II. DISCUSSION

### A. Prosecutorial Misconduct

Appellant set forth multiple theories of alleged prosecutorial misconduct by trial counsel which my colleagues addressed separately and which I will also address in turn. As indicated, *supra*, Appellant claims trial counsel, during findings arguments, (1) improperly shifted the burden of proof, (2) improperly interjected trial counsel's personal beliefs, (3) improperly vouched for witness testimony and evidence, (4) maligned the defense case, and (5) improperly used facts not in evidence. I concur with Appellant that trial counsel made several improper arguments that touched on all of these raised claims and materially prejudiced Appellant.

#### 1. Law

A prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *United States v. Berger*, 295 U.S. 78, 88 (1935)). "Prosecutorial misconduct 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." *United*

*States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citation omitted).

In arguments to the court members, “trial counsel may argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence[.]” *United States v. Hasan*, 84 M.J. 181, 220 (C.A.A.F. 2024) (internal quotations and citation omitted). “He may not, however, 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.” *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citations omitted).

It is improper for trial counsel to suggest to the court members that the accused has a burden to establish his or her own innocence. *See United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004) (finding trial counsel’s question to expert witness about whether either party had requested a DNA retest improperly shifted the burden of proof to the defense but was harmless beyond reasonable doubt in cases involving overwhelming evidence of accused’s guilt). Such an error offends due process by violating the core legal standard of criminal proceedings that the Government always bears the burden of proof to produce evidence on every element of the charged offenses and to persuade the members of the accused’s guilt beyond a reasonable doubt. *See United States v. Czekala*, 42 M.J. 168, 170–71 (C.A.A.F. 1995). This court has previously found it improper “for . . . trial counsel to make comments suggesting [an accused] had a duty to offer evidence to prove his innocence,” and, furthermore, for a military judge to fail “to sua sponte instruct the court members that [an accused] had no duty to call witnesses or put on evidence.”

*United States v. Crosser*, No. ACM 35590, 2005 CCA LEXIS 412, at \*14 (A.F. Ct. Crim. App. 23 Dec. 2005) (unpub. op.).

Trial counsel may not offer his or her personal opinions about the evidence or the accused's guilt. *Sewell*, 76 M.J. at 18. "This is a dangerous practice because when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his opinion, even if biased and baseless . . . in fact[.]" *Fletcher*, 62 M.J. at 180 (citing *United States v. Modica*, 663 F. 2d 1173, 1178 (2d Cir. 1981)).

Furthermore, a trial counsel's "personal views of a defendant's guilt or innocence . . . may confuse the jurors and lead them to believe that the issue is whether or not the prosecutor is truthful instead of whether the evidence is to be believed." *Id.* at 181 (citing *Modica*, 663 F.2d at 1181). "Such tactics are not to be condoned. They tilt the scales of justice, risk prejudicing the defendant, and carry the potential for distracting the jury from its assigned task of assessing the credibility based solely on the evidence presented at trial and the demeanor of the witnesses." *Id.* (quoting *United States v. Perez-Ruiz*, 353 F.3d 1, 9–10 (1st Cir. 2003)).

Trial counsel is also forbidden from improperly vouching for the credibility of witnesses. This occurs when an attorney "plac[es] the prestige of the government behind a witness through personal assurances of the witness's veracity." *United States v. Necochea*, 986 F.2d 1273, 1276 (9th Cir. 1993).

Our superior court has determined "[i]mproper vouching can include the use of personal pronouns in connection with assertions that a witness was correct

or to be believed.” *Fletcher* 62 M.J. at 180 (C.A.A.F. 2005) (citing *United States v. Washington*, 263 F. Supp. 2d 413, 431 (D. Conn. 2003)). In particular, “[p]rohibited language includes ‘I think it is clear,’ ‘I’m telling you,’ and ‘I have no doubt.’” *Id.*

It is also “improper for a trial counsel to attempt to win favor with the members by maligning defense counsel.” *Fletcher*, 62 M.J. at 181 (citing *United States v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001)). Doing so detracts from the dignity of the proceedings and has the potential to turn the court-martial into a “popularity contest” with the members deciding the case, not on the facts and the law, but “based on which lawyer they like better.” *Id.* (citation omitted). In addition, “[d]isparaging remarks that suggest that defense counsel has lied to or withheld information from the jury can further prejudice [an accused] by causing the jury to believe that the defense’s characterization of the evidence should not be trusted and, therefore, that a finding of not guilty would be in conflict with the true facts of the case.” *Xiong*, 262 F.3d at 675.

In *Fletcher*, the CAAF found error where trial counsel described the defense with words like “nonsense,” “fiction,” “unbelievable,” “ridiculous,” and “phony.” 62 M.J. at 180. Such comments could be perceived as putting the weight of the Government behind the statements with the result that the testimony or evidence in question appears stronger than it really is. *Id.* (citing *Berger*, 295 U.S. at 88).

Counsel for the Government is free to argue the evidence in the court-martial record and reasonable inferences flowing from such evidence. *Hasan*, 84 M.J. at 220. However, trial counsel is prohibited from

referring to facts not in evidence, especially when the remarks are “aimed directly” at the accused’s defense, as opposed to “extraneous commentary.” *Fletcher*, 62 M.J. at 185.

Ordinarily, “[w]e [as an appellate court] review prosecutorial misconduct and improper argument de novo[.]” *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citations omitted). When no objection is made at trial, we review for plain error. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (citations omitted). “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.” *Id.* at 401 (quoting *Fletcher*, 62 M.J. at 179).

If we find a prosecutor’s argument “amounted to . . . obvious error,” we then determine “whether there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different.” *Voorhees*, 79 M.J. at 9 (internal quotations marks and citations omitted). In a plain error analysis, the most straightforward way of resolving an allegation of prosecutorial misconduct may be to do so based on prejudice. *United States v. Palacios Cueto*, 82 M.J. 323, 335 (C.A.A.F. 2022) (citation omitted).

“In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused’s substantial rights and the fairness and integrity of his trial.” *Fletcher* 62 M.J. at 184 (C.A.A.F. 2005) (citation omitted). *Fletcher* set out three factors to weigh in determining 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.” *Id.* “In other words, prosecutorial misconduct by a trial counsel will require reversal when the trial counsel’s comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.” *Id.*

We apply a heightened standard to our review of prosecutorial misconduct implicating an accused’s constitutional rights. In particular, a trial counsel’s suggestion that an accused may have an obligation to produce evidence of his or her own innocence is constitutional error. When such error occurs, the Government has the burden on appeal to show such error was harmless beyond a reasonable doubt. *Mason*, 59 M.J. at 424.

The test for determining if the error was harmless beyond a reasonable doubt is “whether, beyond a reasonable doubt, the error did not contribute to the [accused’s] conviction or sentence.” *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (quoting *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016)). When an appellate court is not confident that a constitutional error did not taint the proceedings, it should find prejudice. *See id.* at 29.

## 2. Analysis

In determining Appellant failed to meet his burden to demonstrate prosecutorial misconduct, my esteemed colleagues rely heavily on *Voorhees*. They were correct in stating that “in *Voorhees*, the context was findings and rebuttal arguments . . . riddled with egregious misconduct, including obvious errors of multiple types.” 79 M.J. at 10. Where I cannot agree with their analysis is in their position that this case is not exactly that—one where the findings and rebuttal

arguments were riddled with egregious misconduct, including obvious errors of multiple types. Additionally, they rely too heavily on *Voorhees* as the extreme egregiousness of the conduct exhibited by trial counsel in that case should be seen as exactly that—extreme. *Voorhees* should not set the bar such that if counsel do not act as egregiously as trial counsel in that case, then it is not considered clear or obvious error. Our superior court has made that point with their opinion in *Fletcher* and other precedented cases which I have cited throughout this dissent, finding error when conduct was much less egregious than that of trial counsel in *Voorhees*.

My esteemed colleagues rely on two additional points with which I do not agree are their view that trial counsel’s closing and rebuttal arguments were “lengthy” and that the evidence put on by the Government was even “moderately strong.” Trial on the merits lasted one day and trial counsel’s findings and rebuttal arguments were brief—a total of approximately 40 minutes—from the beginning of closing through to his very last words of the rebuttal argument.<sup>3</sup> Nevertheless, within this time frame, trial counsel rarely argued evidence, spent an enormous amount of time describing Appellant and CC’s marriage, repeated the elements of the offenses, emphasized what the military judge would be instructing the members on, and repeatedly intermingled improper arguments in his effort to persuade the members to convict Appellant of all specifications in a case with minimal, low-quality evidence of guilt. The lack of evidence is discussed further *infra*.

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<sup>3</sup> This did not include trial defense counsel’s closing argument.

Trial counsel's general theme was that Appellant would become upset and get physical when he felt he could not control CC. This theory significantly lacked evidentiary support yet, in denying Appellant relief on the prosecutorial misconduct issue, my esteemed colleagues find there was support for this theory citing a long paragraph of trial counsel's argument before which they stated, "[T]rial counsel then reviewed the evidence at some length." This portion of trial counsel's argument was then used to justify the majority position that trial counsel did not shift the burden because he was merely responding to the defense theory in a case with "moderately strong" evidence. The problem is trial counsel's long recitation of "evidence" used by my esteemed colleagues was devoid of evidence. In this recitation, trial counsel argued improperly about the credibility of their primary witness, argued what this case *was not* about, complained about what defense counsel had not provided the panel in the way of evidence, vouched for CC when arguing at length that the trial was inevitably difficult for her, discussed why she would not lie, and insisted the defense case was all lies and conspiracy theories. This display of improper argument was in an attempt to gain a conviction in a case lacking evidentiary support, and culminated in trial counsel arguing, "Members, you absolutely should be firmly convinced that you know what's happened here, that this is the case of a woman who has endured multiple abuses, physical control from her husband, and he absolutely must be held accountable for what he's done." I submit that not only was the evidence scant to non-existent to support such a theory, but the evidence actually showed that it was CC who became upset and abusive when she could not control Appellant.

Shortly after Appellant and CC married, while on their honeymoon, CC engaged Appellant about his interacting with women online and she wanted him to delete the electronic applications (apps) with which he accessed these women. Appellant refused to do so but told CC she could if she wanted to—a clear indication he did not care if she knew how many or what type of women he was engaging—a point of contention for CC. CC testified that she did go on his phone to make deletions and “there was a lot [of women] so it took [her] a long time.” In December 2020, after again finding women on his apps, just two months after they had moved in together, CC contacted Appellant via Facebook messenger regarding what she found. Looking at Defense Exhibits C and D, text messages between CC and Appellant, we see CC admits she feels “really insecure about their relationship.” Specifically, in Defense Exhibit D, CC confronted Appellant via messenger with some photos of women on his social media. In response, he sent a meme of the Sesame Street character Elmo with his head cocked sideways. CC’s response was, “That’s all you have to say,” to which Appellant replied “[O]ops.” CC then responded, “No f[\*\*]k you.” She then texted, “We’ll talk about this later I’m going to bed,” to which Appellant responded with another meme that read, “Bye Bye.” When CC was not receiving the responses from Appellant she believed she deserved she texted him, “You’re an immature piece of s[\*\*]t.” Appellant then went offline. This is documentary evidence of how Appellant and CC interacted when she became upset about Appellant’s engaging women online—she became verbally assaultive, and he retreated. This is in stark contrast to CC’s testimony with which trial counsel vouched strenuously during his closing and rebuttal arguments as being “true.”

At another point in CC's testimony, she stated that towards the end of their relationship, she told Appellant if he would apologize, she would stay with him; he did not apologize and seemingly did not care if she left their marriage. Defense Exhibit C is a text message between CC and Appellant on 25 April 2021, wherein she apologized to him and explained she did not want to get a divorce. It is a lengthy text where she explains that she does not feel Appellant finds her attractive because they "don't have sex and [she does not] feel like [Appellant] compliment[s] [her] unless [she] ask[s]." She further states she loves Appellant and wants their "relationship to work" and wants them to "grow together." She confides in Appellant that she feels "really insecure about [their] relationship when [he] look[s] at other women." Nowhere in this text from late April 2021 did CC complain about physical conduct towards her by Appellant. The text messages between CC and her father-in-law focused significantly on the basis of her grief and anger being the fact she could not make Appellant stop interacting with women online. She only alleged Appellant had "physically harmed" her after her father-in-law humiliated her regarding her complaints to him about Appellant's online conduct. Moreover, these conversations happened on 15 June 2021, well after CC left Appellant and divorce was imminent. CC's testimony was weak and unsupported and required trial counsel to make improper arguments in order to secure a conviction.

***a. Burden Shifting – Constitutional Error***

In this case we must apply a heightened standard to our review of prosecutorial misconduct because in addition to other methods of misconduct employed by trial counsel during his arguments, he at the very

least suggested that Appellant may have an obligation to produce evidence of his own innocence, which shifted the burden of proof, implicating Appellant's constitutional rights. Thus, on this issue the Government has the burden to now show on appeal such error was harmless beyond a reasonable doubt. The majority opinion seemingly did not hold the Government to this heightened standard stating "we do not find trial counsel was clearly or obviously shifting the burden to the Defense," rather than explaining how the portions of the argument in issue did not even *suggest* an obligation on behalf of Appellant. I analyze below why the statements by trial counsel did indeed, at the very least, suggest Appellant had an obligation to produce evidence. I therefore submit my esteemed colleagues were required to apply this same heightened standard and state how the errors Appellant complains of did not amount to constitutional error, contribute to his conviction and sentence, or taint the proceedings prejudicing Appellant.

With respect to specific statements that shifted the burden of proof to Appellant, when discussing Specification 2 (pressing his knee on CC) in his rebuttal argument, trial counsel responded to trial defense counsel's point during closing argument that the timestamps on the pictures that purported to show bruising on the chin and a red knee, were inconsistent with CC's testimony. Specifically, CC's testimony about the time she allegedly received her purported injuries and her testimony regarding when she photographed the alleged injuries were inconsistent with the timestamps on the exhibits. Trial defense counsel's point was that these pictures do not corroborate CC's testimony, but conversely, they

prove her version of events could not have occurred as she testified. Trial counsel argued the members should not put much weight behind trial defense counsel's point about the timing because "you have not been given [ ] any reasonable explanation for where this [the alleged injuries] came from, what these are about." Trial counsel pressed this position further when he argued, "[S]pecifically[,] what I want you to focus on is the chin . . . although you've been given no reasonable explanation . . . why does she have an injury to her knee and her chin? I really truly challenge you to think about that. *Defense hasn't given you any explanation.*" (Emphasis added).

Yet these were not the only burden-shifting statements made by trial counsel. When discussing CC's overall credibility, he also engaged in improper burden shifting when he stated, "*You have not been provided with* any real reason to doubt the credibility of this witness. She's telling the truth. What does she have to gain by not telling the truth?" (Emphasis added). Thereafter, trial counsel again stated, "*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[.]" (Emphasis added). At another point, trial counsel stated, "*The defense needs to get up here and say that all of these people are just lying to you; that it's all one giant conspiracy theory. None of it makes sense.*" (Emphasis added). While I address improper burden shifting in this section, it is notable that trial counsel interwove other improper arguments, which I will discuss in more detail *infra*, such as improper vouching, maligning the defense case, and improperly asserting that there was no reason to doubt CC's credibility when trial counsel knew there were at least

three theories elicited from the evidence at trial to support the possibility that CC fabricated the alleged assaults.

My esteemed colleagues base their findings on their position that there was no burden shifting because “[t]rial counsel’s argument was based on the purported strength of the Government’s evidence and aimed not at the absence of any particular evidence but at the Defense’s argument,” with which I am also not inclined to agree. In fact, the majority tries to gloss over the constitutional error by describing trial counsel’s argument as merely being “awkwardly worded in places.” First, trial defense counsel had not yet made their argument when trial counsel set to shifting the burden and planting in the minds of the members that Appellant had any burden in the trial. Second, this case had none of the hallmarks of a strong evidentiary case. There was no admission by Appellant, medical records of injuries, DNA, CCTV, pretext phone call or text or email evidence between Appellant and CC supporting CC’s claims. CC’s co-worker’s witness testimony was weak and on many salient points added little to nothing to corroborate CC’s claims of assault.

With respect to the alleged bite, SM’s testimony was the only evidence provided to corroborate CC’s testimony and in reality, was no corroboration at all. As for documentary evidence, the photos purporting to support the 21 May 2021 alleged assault were grainy and it was impossible to know what “shading” shown on the photo was supposed to be a chin bruise. The photo in the record purporting to show a chin bruise had “shading” all down CC’s neck starting under the chin. There was no testimony that this was the extent of the “chin bruise” and it is unlikely if this was

extensive bruising that it would result from the events to which CC testified. It is also unlikely it would go unnoticed by the neighbors or others with whom she came into contact. Moreover, it begs the question as to why trial counsel did not show CS the photos when she testified and question her as to whether the photo was consistent with any chin bruise she might have seen—CS being the only potential corroborating witness to the alleged chin bruise since the two neighbors who also saw CC regularly in that time period said they witnessed no bruises. Defense Exhibit A is a photo of CC's chin, which looks to have been taken on 21 May 2021 at either 1104 or 1146 hours—it shows no signs of a bruise.

CS's and SM's testimonies purporting to corroborate CC's testimony were weak given her co-workers could not identify specific dates of when they may have seen a bruise on her, they were not shown the picture purporting to show a chin bruise to CS for comparison with what she saw, nobody saw a bite bruise, the timing of incidents did not match other evidence, and much of what CC said herself was proven to be inconsistent with other evidence or simply inaccurate. Couple this with AA's and CC's sister's testimonies that even while staying in the home in mid-January 2021 during the time CC alleged Appellant bit her, she did not tell anyone of the bite, and nobody saw a bite bruise. In my estimation the evidence at trial was very weak and, in many respects, negated CC's testimony, and I find it was improper for trial counsel to make comments suggesting Appellant had a duty to call witnesses, put on evidence, or suggest any duty to prove his own innocence.

Trial defense counsel made no objections to the burden-shifting arguments. The military judge did

not issue any curative instructions, sua sponte or otherwise. Rather, the military judge gave the members standard instructions on the law, including how to consider the findings arguments of counsel. Nevertheless, I find error of a constitutional dimension because the military judge improperly allowed trial counsel to shift the burden of proof to the Defense when he suggested the members seek answers from the Defense in determining whether Appellant was guilty or not guilty.

As our superior court stated in *Czekala*, such burden shifting “violates the core legal standard of criminal proceedings . . . that the Government always bears the burden of proof to . . . persuade the members of guilt beyond a reasonable doubt.” 42 M.J. at 170. Appellant’s case is also similar to *Mason*, where trial counsel improperly suggested the accused was obligated to prove his own innocence by providing an explanation why neither party requested a DNA retest. 59 M.J. at 423. In this case, trial counsel suggested Appellant was obligated to provide evidence and an alternate explanation for the bruises or prove untruthfulness of witnesses. Moreover, this court has previously found it improper “for trial counsel to make comments suggesting [an accused] had a duty to offer evidence to prove his innocence.” *Crosser*, unpub. op. at \*14. In this connection, trial counsel’s remarks posed a legitimate risk of improperly swaying panel members, especially in light of the weak evidence in this case. I analyze whether the constitutional error was harmless beyond a reasonable doubt *infra*.

Trial counsel also made other statements amounting to prosecutorial misconduct where I apply plain error analysis.

***b. Trial Counsel's Interjection of Personal Views***

During trial counsel's closing remarks to the members, he repeatedly interjected his personal views, to include characterizing the defense case as one of "conspiracy theories," and making personal assurances as to the quality of the evidence. Defense counsel never referred to its case as a case of conspiracy theories—it was trial counsel who interjected this theory from his personal views of the case. In reference to the case as a whole, he told the members, "[T]his makes sense. The allegations that you have, the narrative that you've been told . . . makes sense. It rings true." These types of statements do not invite the members to make their own decision based on the evidence, but instead instructs the members as to the state of the evidence according to trial counsel's view. Essentially, trial counsel is saying, as a legal representative of the Government, this is the way it is, you should trust me, and that is the way you need to see the case.

Trial counsel expressed his personal views again while discussing the photographic evidence when he asked, "Why would [CC] take these pictures? Why does someone take pictures of multiple bruises on their body if not but to document as she said what had happened to her? She had been abused." Trial counsel further asserted, "[S]he needed it documented because she had been abused[,]" and, "*That is the only reasonable explanation.*" (Emphasis added). Whether or not CC had been assaulted (abused) was a question for the factfinders and was not for trial counsel to interject as a matter of fact from his own personal opinion. Trial counsel had invaded the province of the members by injecting his own personal conclusions as

to whether CC was assaulted or not. Making more egregious the insertion of his personal opinion that abuse was the “only reasonable explanation,” was the fact trial counsel said this knowing CC had admitted to biases as to why she would allege the offenses against Appellant—she wanted him to lose his ability to become an Air Force pilot and had become increasingly frustrated when her complaining about Appellant’s use of adult entertainment websites had no effect on him. Additionally, pursuant to her religious beliefs and the opinions of those close to her, Appellant’s penchant for engaging women online was something for CC to work out in counseling, but not a valid basis for divorce. However, divorce could be forgiven if physical assault was the basis thereof.

While CC claimed Appellant had assaulted and bruised her as early as January 2021, she had not taken pictures until close in time to, and likely after, her decision to leave the relationship in May/June 2021—the pictures having been taken on 21 May 2021. The timing begs the question as to why she would take pictures on that day. Looking at the pictures, which leave questions as to what bruise or bruises supposedly corroborated her testimony, and considering CC’s testimony of when the interaction with Appellant occurred and when she took the pictures, which are inconsistent, there is potential for other reasonable explanations as to why she took the pictures at that time.

Interestingly, and maybe most importantly, on or about 8 May 2021, CC went to visit her sister in Florida. During this visit, CC complained about her marriage but never complained about any physical abuse—her sister advised CC to go to counseling. According to CC, shortly after she returned home her

sister stated that if Appellant ever got physical with her, they, seemingly meaning CC's family in Florida, would come and get her. It is not unreasonable to believe the defense theory that CC had all she could take of being disrespected by Appellant's online engagements, realized he would not change and really did not care to change, and also realized that if she was to be justified in leaving him, she would have to claim she was physically abused. In light of the facts that came out at trial, it was improper for trial counsel to argue his personal view that the only reasonable explanation for CC to take pictures was because "she had been abused."

***c. Improper Vouching***

Trial counsel also engaged in prosecutorial misconduct by vouching multiple times for the credibility of witnesses, especially that of CC, the Government's primary witness in the case. Even the majority alludes that trial counsel's statements may be improper when it comes to improper bolstering and vouching, but "nevertheless [is] confident the court members convicted Appellant on the basis of the evidence alone." In addressing CC's overall credibility, trial counsel stated, "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 any reason to make this up." He did not say, "The evidence showed that CC is a credible witness." Trial counsel specifically vouched for CC by saying "she was credible" and according to the law, trial counsel are specifically "forbidden from improperly vouching for the credibility of witnesses." *Necochea*, 986 F.2d at 1276.

Trial counsel further vouched when he addressed the issue of whether CC had a motive to fabricate when he personally asked the panel to “think about . . . how is a victim supposed to feel . . . is she supposed to say no accountability . . . those are the words of the victim. Those are the words of someone who has been abused over the course of many months . . . .” In trial counsel’s rebuttal argument, he responded to trial defense counsel’s argument as is permitted. However, it was a bridge too far for him to invite members, as he did, to essentially step into the shoes of the alleged victim while he vouched for her testimony as being “the words of the victim . . . the words of someone who has been abused over the course of many months.”

As noted above, counsel for the Government may not offer his or her personal opinions about the evidence or the accused’s guilt. *Sewell*, 76 M.J. at 18. “This is a dangerous practice because ‘when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore’” this opinion, even if “‘biased and baseless . . . in fact.’” *Fletcher*, 62 M.J. at 180 (citing *United States v. Modica*, 663 F. 2d 1173, 1178–79 (2d Cir. 1981)). “Such tactics are not to be condoned. They tilt the scales of justice, risk prejudicing the [accused], and carry the potential for distracting the jury from its assigned task of assessing the credibility based solely on the evidence presented at trial and the demeanor of the witnesses.” *Id.* (quoting *United States v. Perez-Ruiz*, 353 F.3d 1, 9–10 (1st Cir. 2003)).

#### ***d. Maligning Defense***

Trial counsel committed further misconduct during his closing arguments by maligning the

Defense's case. Trial counsel from the outset characterized the Government's case as one of domestic violence, although it was not charged as such, and went on to paint the Defense's case as one of a "giant conspiracy theory." As to the overall Defense, trial counsel opined, "Members, the [D]efense can get up here and come up with any *conspiracy theories* they want, but that's not reasonable . . . . You have the corroborating evidence you need to know that this happened." (Emphasis added). When trial counsel argued the two co-workers' testimonies were credible, he invited members to believe that what Defense was doing was attempting to mislead the court by saying, "Think about this, *this grand conspiracy theory*, when you have two different witnesses – what are the chances? Think about yourselves and any coworker you might have . . . and then to have two individuals during two different charted time frames. You absolutely have all of the corroboration you need[.]" While trial defense counsel argued bias on the part of certain witnesses, it is only trial counsel who regarded the defense theory of the case as a "conspiracy theory," or addressed the Appellant as having committed domestic violence, and did so several times during his arguments. Even before trial defense counsel had an opportunity to make a closing argument, trial counsel was effectively planting these theories early on into the minds of the members to ensure they would convict Appellant—inevitably invading the purview of their fact-finding responsibilities, but also vouching for the two co-workers and misstating facts about their testimonies.

Rebuttal argument, of which only trial counsel has the privilege as the Government has the burden of proof and thus has the last word, began with trial

counsel immediately alleging trial defense counsel's closing argument was disingenuous—specifically stating, “I’m not going to walk you through all of the *misstatements of fact* . . .,” (emphasis added), insinuating trial defense counsel was not honest with the panel in his argument. Trial counsel impugned trial defense counsel’s credibility by characterizing their case as one of conspiracy theories, and misrepresentations at the same time he offered his unsolicited personal views on such evidence. Such argument is plain and obvious error.

***e. Improper Use of Facts Not in Evidence***

In addition to arguments already addressed above, trial counsel improperly referred to facts not in evidence by saying, “[SM] knew what these bruises were. There’s a reason she’s asking the victim about whether there is violence at home because she can see the bruises and she knows.”<sup>4</sup> This argument was made in light of SM stating she did not know the origin of the bruises, she did not see a bite mark, she did not know when she saw the bruises, specifically stating she was “not sure when in that period [November 2020–mid-January 2021] [she] saw bruises, just throughout periodically,” and CC had specifically denied to SM Appellant abused her. Moreover, even

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<sup>4</sup> On this issue, SM testified that at no point while she and CC worked together did CC claim Appellant abused her in any way. On redirect, trial counsel asked SM “Did you guys ever discuss whether that was physical abuse at the time when these bruises were something that you were seeing?” SM answered, “We had discussed it a little bit, just like inferring it, I guess, and then like I said at the time she denied it just saying literally it was like anything else.”

knowing SM's actual testimony, trial counsel inartfully argued:

January working together at [the retail store] and [SM] saw a bruise and [SM] mentioned that specifically that when [CC] lifted up her sleeve she saw a bruise on her arm in that same timeframe [insinuating mid-January 2021] as the bite on her arm.

Given SM never testified "when [CC] lifted up her sleeve" nor that any bruising she might have seen was necessarily in the timeframe of the alleged bite nor that she saw a bite mark, this amounted to impermissible argument of facts not in evidence.

Trial counsel argued throughout that CC got a bruise from falling on her knee. CC characterized the picture of her knee as "the one where [her] knee is red," not as a picture where her knee is bruised. If the suggested corroboration from that picture was the redness on her knee, one could get a red knee by merely leaning on it to clean or do yoga for example, whereas characterizing the picture as trial counsel did, as depicting a bruise, makes the nature of what is depicted seem more severe than described by CC.

Counsel for the Government is free to argue the evidence in the court-martial record and reasonable inferences flowing from such evidence. *Hasan*, 84 M.J. at 220. Trial counsel is prohibited, however, from referring to facts not in evidence, especially when the remarks are "aimed directly" at Appellant's defense, as opposed to "extraneous commentary." *Fletcher*, 62 M.J. at 185. Appellant's defense was that CC made up the allegations and the two co-workers were biased due to friendship and offered little to no evidence to

support CC's allegations. Recharacterizing evidence, arguing that SM knew the origin of the bite bruise, arguing SM saw the bruise when CC lifted her sleeve, and then vouching for her testimony are remarks exaggerated to hit directly at Appellant's defense and overcome the weakness of the Government's case.

### **3. Plain Error Prejudice to Appellant**

Finding plain and obvious error, I now turn to evaluate whether prejudice occurred. I first look at the severity of the misconduct in context of the entire court-martial. *See Fletcher*, 62 M.J. at 184; *Baer*, 53 M.J. at 238. Appellant's trial on the merits lasted approximately one day, and trial counsel made multiple improper arguments and remarks during approximately 40 minutes of combined closing and rebuttal arguments. While my colleagues consider this to be a "lengthy" argument, in my estimation this is a brief argument, which was riddled from top to bottom with the inappropriate statements I have addressed, as well as limited reference to any evidence. As is standard, trial counsel introduced himself from the outset as the spokesperson for the Government. This, in and of itself, is not improper.

However, after trial counsel essentially took on the persona of the Government, his improper arguments and burden-shifting comments amounted to a general thematic discourse that dominated the Government's theory of the case. He wove his burden shifting, personal views, vouching of the key witness, disparagement of the defense case, and assertion of facts not in evidence into central themes of the Government's case. In doing so, he undoubtedly made these improper tactics all the more effective in

convincing the members to believe trial counsel's position on the case when the members' proper task was to focus on the evidence—evidence that was essentially non-existent as testimony and documentary evidence diminished CC's claims and the essential elements the Government was required to prove. Additionally, my colleagues stated multiple times that trial counsel was addressing defense counsel's arguments, but I find many of the impermissible statements were made in the original closing argument, well before trial defense counsel made their closing argument. Employing such impermissible arguments very likely influenced the listeners and invaded the province of fact finding that is solely the purview of the members.

Next, we look at whether there were any curative measures taken. As discussed above, trial defense counsel did not object to any of trial counsel's improper remarks and the military judge did not *sua sponte* undertake any specific curative measures. To be sure, the lack of a defense objection to a prosecutor's improper comments is often indicative of their minimal impact. The same is often true when a military judge takes no remedial action *sua sponte*. Here, however, where trial counsel so thoroughly saturated his closing and rebuttal arguments with impropriety, it is a mystery as to why the military judge, at the very least, did not step in to address and attempt to cure the improprieties. I refrain from determining if the military judge erred by not issuing curative instructions *sua sponte*.

Finally, I consider the strength of the evidence against Appellant. In the case at bar the Government's evidence was scant. Trial counsel

elicited testimony of the alleged misconduct from CC and then produced other witness testimony, texts, and photographs that purported to corroborate the offenses for which Appellant was convicted, but in reality, such purported corroboration was littered with inconsistencies and did little to nothing to support CC's allegations nor make the Government's case even "moderately strong." Some of the evidence actually countered Government's theory of the case and CC's testimony. The Government had weak evidence, and but for the trial counsel's attempts to misalign the evidence in his closing arguments, the results of Appellant's case would have been different.

I recognize the Government may meet its burden to prove each element of an offense beyond a reasonable doubt through testimony of only one witness and corroboration is not required. In this case, the Government relied on CC to relay the facts to support all four specifications of the Charge. Her testimony alone was insufficient to support convictions for two of the four charged specifications as seen by the members' decision to find Appellant not guilty. The charges of which Appellant was convicted are those trial counsel argued strenuously, and on many points improperly, that there was corroboration through the photos, texts, and CC's co-workers' testimony. Because the evidence purporting to corroborate CC's testimony was slight at best and because trial counsel made improper arguments when specifically addressing the meaning and weight of such evidence there is simply no way to be sure the panel convicted based on the evidence, rather than undue persuasion by trial counsel employing improper argument.

Given the weaknesses in the Government's case, I have grave concerns regarding the fairness and integrity of Appellant's court-martial. After considering the entire record, I am not convinced that the members convicted Appellant based solely on the evidence of his guilt and, therefore, I find material prejudice.

#### **4. Error Harmless Beyond Reasonable Doubt**

As stated above, I find trial counsel erred and made multiple improper statements in his closing and rebuttal arguments, specifically by shifting the burden of proof to the Defense regarding an element of the offenses, an obligation for Appellant to produce evidence of innocence, and/or suggesting Appellant had an obligation to offer alternate explanations for alleged bruising on CC. This court has concluded that it was "clear error for the trial counsel to make comments suggesting Appellant had a duty to offer evidence to prove his innocence," and that it was "clear error when the military judge failed to sua sponte instruct the court members that Appellant had no duty to call witnesses or put on evidence." *Crosser*, unpub. op. at \*14. If the Government shifts the burden of proof to Appellant, the standard shifts to the Government to show the error was harmless beyond a reasonable doubt. *Mason*, 59 M.J. at 424. The test for determining if the error was harmless beyond a reasonable doubt is "whether, beyond a reasonable doubt, the error did not contribute to [Appellant's] conviction or sentence." *Prasad*, 80 M.J. at 29. "Where a court cannot be certain that the [error] did not taint the proceedings, or otherwise contribute to the defendant's conviction or sentence, there is prejudice." *Id.* at 29 (citing *United States v. Williams*, 77 M.J. 459, 464 (C.A.A.F. 2018) (internal quotation marks and

additional citation omitted). Given the relative weakness of the Government's case, I find it was error for trial counsel to implore the members to seek answers from the Defense by improperly shifting that burden to Appellant. This is error of a constitutional dimension and the Government did not meet its burden to show the error was harmless beyond a reasonable doubt.

### **5. Cumulative Error Doctrine**

To be certain, I find many independent arguments made by trial counsel to be plain and obvious error standing alone, even given the cumulative and overlapping nature of the errors in this case. Under the cumulative error doctrine, "a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding." *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) (quoting *United States v. Banks*, 36 M.J. 150, 170–71 (C.M.A. 1992)). Trial counsel's misconduct, in light of the relatively short trial and brief findings and rebuttal arguments, was not "slight or confined to a single instance, but . . . pronounced and persistent, with a probably cumulative effect upon the jury which cannot be regarded as inconsequential." *Fletcher*, 62 M.J. at 185 (citing *Berger*, 295 U.S. at 89). The cumulative effect of all plain errors and preserved errors is reviewed de novo. *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

In Appellant's case, I find the cumulative prejudicial effect of trial counsel's improper statements to the court members, and the military judge's failure to provide a curative instruction, necessitates a remedy. Taken as a whole, this prosecutorial misconduct was damaging to the point

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where one cannot be confident that the members convicted Appellant on the basis of the evidence alone, thus, in my opinion, relief is required.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court

## **Constitutional, Statutory, and Regulatory Provisions Involved**

### 1. Due Process Clause of the Fifth Amendment

The Due Process Clause of the Fifth Amendment provides: “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

2. The Jury Trial Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .” *Id.*, amend. VI.

3. Article 16 of the Uniform Code of Military Justice (UCMJ) provides:

#### **§816. Art. 16. Courts-martial classified**

(a) In General.-The three kinds of courts-martial in each of the armed forces are the following:

(1) General courts-martial, as described in subsection (b).

(2) Special courts-martial, as described in subsection (c).

(3) Summary courts-martial, as described in subsection (d).

(b) General Courts-martial.-General courts-martial are of the following three types:

(1) A general court-martial consisting of a military judge and eight members, subject to sections 825(e)(3) and 829 of this title (articles 25(e)(3) and 29).

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(2) In a capital case, a general court-martial consisting of a military judge and the number of members determined under section 825a of this title (article 25a), subject to sections 825(e)(3) and 829 of this title (articles 25(e)(3) and 29).

(3) A general court-martial consisting of a military judge alone, if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

(c) Special Courts-martial.-Special courts-martial are of the following two types:

(1) A special court-martial consisting of a military judge and four members, subject to sections 825(e)(3) and 829 of this title (articles 25(e)(3) and 29).

(2) A special court-martial consisting of a military judge alone-

(A) if the case is so referred, subject to section 819 of this title (article 19) and such limitations as the President may prescribe by regulation; or

(B) if the case is referred under paragraph (1) and, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military

judge alone and the military judge approves the request.

(d) Summary Court-martial.-A summary court-martial consists of one commissioned officer.

10 U.S.C. § 816.

4. Article 51(a) of the UCMJ provides:

(a) Voting by members of a general or special court-martial on the findings and on the sentence shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

10 U.S.C. § 851(a).

5. Article 52(a) of the UCMJ provides, in relevant part:

No person may be convicted of an offense in a general or special court-martial, other than . . . in a court-martial with members under section 816 of [title 10, U.S. Code] (article 16), by the concurrence of at least three-fourths of the members present when the vote is taken.

10 U.S.C. § 852(a).

6. Rule for Courts-Martial 501(a) is a presidentially prescribed procedural rule for general and special courts-martial. It provides, in relevant part:

(a) *Composition of courts-martial.*

(1) *General courts-martial.*

(A) *Non-capital cases.* In non-capital cases, a general court-martial shall consist of:

(i) A military judge and eight members;

...

(2) *Special courts-martial*. Special courts-martial shall consist of:

(A) A military judge and four members;

Rule for Courts-Martial 501(a), *Manual for Courts-Martial, United States* (2024 ed.).

7. Rule for Courts-Martial 921(c) is a presidentially prescribed procedural rule for general and special courts-martial. It provides, in relevant part:

(c) *Voting*.

(1) Secret ballot. Voting on the findings for each charge and specification shall be by secret written ballot. All members present shall vote.

(2) *Numbers of votes required to convict*. A finding of guilty results only if at least three-fourths of the members present vote for a finding of guilty.

(3) *Acquittal*. If fewer than three-fourths of the members present vote for a finding of guilty, a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

Rule for Courts-Martial 921(c), *Manual for Courts-Martial, United States* (2024 ed.).