IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE, ERRATA CORRECTED
v.	)	
	)	Crim.App. Dkt. No. 201600208
Raiden J. ANDREWS, Quartermaster Seaman Apprentice (E-2) United States Navy Appellant	)	USCA Dkt. No. 17-0480/NA

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

SEAN M. MONKS
Captain, U.S. Marine Corps
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686
Bar no. 36771

KELLI A. O'NEIL
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7687
Bar no. 36883

VALERIE C. DANYLUK
Colonel, U.S. Marine Corps
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 36770

BRIAN K. KELLER
Deputy Director
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

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UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

STATUTES, RULES, BRIEFS, OTHER SOURCES

Issue Presented

THE LOWER COURT FOUND SEVERE PROSECUTORIAL MISCONDUCT. THEN IT AFFIRMED THE FINDINGS AND SENTENCE, GIVING ITS IMPRIMATUR TO THE PROSECUTORIAL MISCONDUCT IN QMSA ANDREWS' CASE. DID THE LOWER COURT ERR?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge convicted Appellant, pursuant to his pleas, of one specification of unauthorized absence, one specification of flight from apprehension, one specification of making a false official statement, one specification of wrongful use of marijuana, and one specification of larceny, in violation of Articles 86, 95, 107, 112a, and 121, UCMJ, 10 U.S.C. §§ 886, 895, 907, 912a, 921 (2012). A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of sexual assault by penetrating the Victim's vulva with his penis

when he knew or reasonably should have known she was incapable of consenting due to impairment by alcohol, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012).

The Members sentenced Appellant to thirty-six months of confinement, reduction to pay grade E-1, forfeiture of $1,616.00 pay per month for thirty-six months, and a dishonorable discharge. The Convening Authority disapproved forfeitures in excess of Appellant's pay entitlement, approved the remaining sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. The Pretrial Agreement had no effect on the sentence.

After oral argument, the lower court affirmed the Findings and Sentence. *United States v. Andrews*, No. 201600208, 2017 CCA LEXIS 283 (N-M. Ct. Crim. App. Apr. 27, 2017). This Court granted Appellant's Petition for Review on August 18, 2017.

Statement of Facts

A. Appellant pled not guilty to sexual assault.

Appellant pled not guilty to three Specifications of sexual assault, charged in the alternative: (1) a sexual act by causing bodily harm under Article 120(b)(1)(B); (2) a sexual act when he knew or reasonably should have known the Victim was unconscious or asleep under Article 120(b)(2); and, (3) a sexual act when he knew

or reasonably should have known the Victim was incapable of consenting due to alcohol impairment under Article 120(b)(3)(A). (J.A. 127-29.)

B. At trial, Witnesses testified that Appellant met the Victim at a party, watched her become intoxicated, ignored his hosts' warnings to leave her alone, entered her room while she slept, watched her vomit, and had sex with her without her consent.

1. The Victim and Appellant attended a party, but did not know each other. Appellant asked the host about "trying to hook up with" the Victim.

In May 2014, Petty Officer K invited Appellant, his new shipmate, to a beach party he was hosting to celebrate his then-wife's birthday. (J.A. 184-85.) RW—Petty Officer K's wife at the time—invited the Victim. (J.A. 214.)

Though Appellant did not know the Victim and interacted with her very little at the party, Petty Officer K testified that Appellant asked "about trying to hook up with her on the beach." (J.A. 186, 214-15.) Petty Officer K said that "wasn't a good idea" because the Victim was currently seeing one of the other Sailors at the party, Petty Officer H. (J.A. 186, 199-201, 205, 216.) After the beach party, the group went to Petty Officer K's apartment where they ate dinner, played beer pong, and continued to drink alcohol. (J.A. 135, 145, 186-87, 216-17.)

2. Multiple witnesses testified they saw the Victim quickly become heavily intoxicated, barely coherent, and noticed her reject several attempts by Appellant to interact with her.

Petty Officer K testified that once the group arrived at his home, he observed the Victim "getting . . . drunk pretty fast," but there was a plan for her to sleep in the guest room that night. (J.A. 187-88.) RW testified that the Victim drank "Pink Panty Droppers," which she prepared by pouring the liquor into a two-liter bottle, and drinking over one-half of the bottle throughout the night. (J.A. 157-58.) Other guests also observed that the Victim appeared "intoxicated," slurring her speech and swaying back and forth. (J.A. 135, 146.)

Towards the end of the night, the Victim was "[r]eally drunk . . . [s]louched on the couch, barely coherent," and barely able to follow the conversations around her. (J.A. 135-37, 146-48.) Her clothes were disheveled, and she had "to use the wall to stand up." (J.A. 147-49, 153, 159, 205, 219.) The Victim testified that she felt "very numb," as if she was "out of place and out of body"—so much so that she believed she may have been drugged. (J.A. 219-20, 246, 251-52.)

Throughout the evening, Appellant tried talking to the Victim a few times, but "[s]he was still very standoffish from him," giving no indication that she was interested in sexual activity with him. (J.A. 136, 141, 148-49, 152-53, 159, 188, 218, 226, 283, 486, 495.) Instead, she hugged and kissed Petty Officer H in the

living room in front of the other guests, including Appellant. (J.A. 139-40, 148, 152-53.)

3. At the end of the evening, the Victim went to the guest room to sleep; Petty Officer K and RW told Appellant not to go into the guest room.

The Victim testified that after she "became numb," she recalled making her way to the guest room, and falling to the floor. (J.A. 219.) She then made her way into bed, and "pass[ed] out." (J.A. 220.) RW testified that she helped the Victim to the bedroom, but did not help the Victim undress or get into bed. (J.A. 159.)

Petty Officer K testified that Appellant asked him whether he could sleep in the guest room, but he told Appellant "not to go in there," and to sleep on the couch. (J.A. 188, 221, 488.) A while later, RW saw Appellant outside the Victim's room. (J.A. 161.) Appellant claimed "[h]e just wanted to sleep in a bed." (J.A. 161.)

RW told him "No," and that he would have to sleep on the couch until the Victim woke up and left in the morning. (J.A. 161.) RW specifically told Appellant, "Do not go in there," indicating the guest room where the Victim was sleeping. (J.A. 161, 221, 488.) She then joined her husband in their bedroom. (J.A. 161-62.)

4. The Victim awoke to Appellant having sexual intercourse with her.

The Victim testified that after passing out, the next thing she remembered was being "startled . . . awake" by the feeling of "pressure on [her] hip bone area around [her] upper thighs" and she realized that Appellant was on top of her. (J.A. 220-22, 225.) She yelled "Stop" three different times and pushed him off of her. (J.A. 221.) The Victim "was completely in panic, shocked, and . . . scared out of [her] wits." (J.A. 221.)

Prior to this, she "did [not] know [Appellant] was in the room" and she did not "consent to any sexual activity with [him]." (J.A. 225.) She testified that she would not "ever have consented to any sexual activity with [him]." (J.A. 225.)

The Victim testified that after she pushed Appellant off of her, she "passed out" or "blacked out," and the next thing she remembered was waking up again, still feeling "very intoxicated" and "numb." (J.A. 222.) The Victim then got out of bed, "stumbled" to the door, and had to "crawl against the wall" as she left the room. (J.A. 222.)

5. The Victim woke Petty Officer K and RW telling them that Appellant was in the guest room and she thought something happened; Petty Officer K saw Appellant leave the guest room.

After going to sleep, the next thing Petty Officer K remembered was the Victim coming into his room at approximately 0400 that morning, wearing only a

T-shirt and underwear. (J.A. 165, 369.) The Victim testified that she was not wearing underwear when she went to Petty Officer K's bedroom. (J.A. 249.) She was "frantic and scared," "pretty shaken up," and physically shaking. (J.A. 162, 370.) She told Petty Office K that "the new guy" was in the room with her, and she thought she had been "assaulted." (J.A. 162, 190.) Petty Officer K got up and gave her shorts so she could "cover up." (J.A. 190.)

Petty Officer K went to look and found Appellant "bolting out of the guest bedroom" in "[j]ust his shorts, . . . putting his shirt on, on his way out." (J.A. 191.) Petty Officer K "caught him on his way out" and noticed vertical scratches on Appellant's lower back, later noting to Civilian Defense Counsel in an interview that they also "looked like scratches . . . when you're hitting it just right." (J.A. 193.)

In the guest room, Petty Officer K and RW found a "pile of vomit" next to the pillow at the head of the bed, as if the Victim "just kind of turned her head." (J.A. 164, 191.)

Back in their bedroom, Petty Officer K and RW found the Victim in the bathroom, "hugging the toilet and dry heaving and . . . throwing up . . . ." (J.A. 164, 192.) RW testified that after the Victim finished in the bathroom, she was still intoxicated, but able to communicate that she did not need anything else and wanted to go to sleep. (J.A. 172-73.)

6. The Victim reported the incident to law enforcement around one month later.

The Victim stayed at Petty Officer K's house until she had to go to work in the morning. (J.A. 223.) She testified that later in the morning, she still felt physically "out of it," and was in a "terrible" emotional state. (J.A. 224.) She did not remember much ofwhat happened, only "bits and pieces" from the night before. (J.A. 224.) The Victim went to work that morning, returning home after lunch to tell her mother what happened. (J.A. 210, 224.) Her mother noticed bruises on her upper arms, which appeared to be handprints, and additional bruises on her thigh and lower calf. (J.A. 210, 250.)

The Victim did not report the incident to law enforcement until around four weeks later. (J.A. 252.) She did so after speaking with Petty Officer K, who admitted that he tried to discourage the Victim from reporting the incident because he was worried about getting in trouble for providing alcohol to Appellant, who was underage. (J.A. 203, 254.)

The Victim stated that when she tried to report it to local police, they explained that they did not have "jurisdiction," and "sent [her] away." (J.A. 252.) She filed a report with NCIS approximately two weeks later. (J.A. 240, 254.) She testified that she did not report it because she did not know what to do since the incident occurred in Navy housing. (J.A. 247-28.)

7. Appellant denied knowing the Victim was in a relationship and claimed she consented to sexual intercourse before and after vomiting.

Members heard a recording of Appellant's interview with an Naval Criminal Investigative Service (NCIS) Special Agent and were provided Appellant's written statement. (J.A. 458-60, 462-522.) Contrary to Petty Officer K's testimony, Appellant denied knowing that the Victim was in a relationship with Petty Officer H; he admitted that the Victim was drunk when he saw her go to bed. (J.A. 485-86, 496.) Appellant denied that Petty Officer K told him to stay out of the guest room, but admitted that RW told him the Victim was in there and to sleep on the couch, but he "wasn't paying attention to what they said," and that he did not care. (J.A. 488, 515.)

Appellant explained to NCIS that after he went into the bedroom, he was there approximately ten to fifteen minutes before the sexual intercourse began. (J.A. 283, 493.) He denied any "physical interaction," kissing or other foreplay, prior to the sexual intercourse, and became aroused simply by thinking about sex. (J.A. 285, 492.) However, he claimed that they had "talked slightly," that he asked the Victim if she was willing to have sex, and that she said yes. (J.A. 486, 493.) Appellant admitted that the Victim threw up prior to having sex, but that he did not care. (J.A. 491.) He claimed that after he witnessed the Victim vomit in the bed, he asked her a second time if she wanted to have sex and she said, "Yes."

(J.A. 486, 497, 505-06.) At this point, Appellant claims he said "awesome," got on top of the Victim, and had sex with her. (J.A. 505-06.)

NCIS asked Appellant what made him believe that the Victim was willing to have sex with him. (J.A. 486.) Appellant responded:

> The reason—well, my reasoning behind this is I assumed she thought I was [Petty Officer H]. . . . So we were going at it, and then she grabbed . . . my hair. And that's when I couldn't get away and then she said, no, she wanted to stop and then that's when I backed off.

(J.A. 486-87.)

NCIS then asked him, "What possessed you to go into that room?" (J.A. 487.) Appellant stated: "Stupidity I guess. I assumed I could make it up and get lucky once." (J.A. 487.) He agreed that he went into the room "on a whim" and hoped "to get lucky." (J.A. 498-99.)

However, when NCIS suggested that Appellant believed that he thought the Victim "would think [he] was [Petty Officer H]," Appellant responded that he did not find out that the Victim was dating Petty Officer H until after the party. (J.A. 487.)

Appellant claimed that once he stopped, the Victim got up and left the room. (J.A. 500-01.) He then said he left the room and went to sleep on the couch. (J.A. 501.)

He finally reaffirmed to NCIS that he did not know the Victim was in a relationship when he went in the room and that he felt that the Victim was likely embarrassed to "have sex with somebody and it wasn't who she thought they were and to find out she was in a relationship with someone else." (J.A. 503.)

C. Appellant called a toxicologist to testify about the Victim's behavior and called RW to testify about the Victim's prior inconsistent statements.

Appellant presented the testimony of an expert witness on alcohol use and its effects. (J.A. 317-367.) The expert testified that based on an estimate of the Victim's intoxication, her behavior was consistent with an alcohol-induced blackout. (R. 338-39.) But she said it was "equally plausible" that the Victim passed out and was woken up by Appellant having sex with her. (J.A. 367.)

Appellant recalled RW to the stand. Appellant challenged the Victim's credibility by eliciting prior inconsistent statements made by the Victim. (J.A. 309-11.) RW also testified that she never heard the Victim yell or scream that evening, even though she was a light sleeper. (J.A. 310-12.)

D. The Military Judge instructed Members.

Before findings arguments, the Military Judge provided the standard instruction on arguments of counsel:

> [A]rguments or statements of counsel are not evidence in this case. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the

> issues in the case on the evidence as you remember it and apply the law as I instruct you. Counsel may refer to my instructions, and in that regard, if there is any inconsistency between what the counsel say and my instructions, you must follow my instructions.

(J.A. 390-91, 453.)

E. Trial Counsel argued that Appellant's NCIS statement was not credible, that Appellant wanted the Victim to believe Appellant was someone else, and that the Victim's use of alcohol made her unable to consent. Civilian Defense Counsel did not object.

During arguments on Findings,[1] Trial Counsel discussed the elements of sexual assault and argued the evidence proved Appellant's guilt beyond a reasonable doubt. (J.A. 391-95.)

1. Trial Counsel argued that Appellant's NCIS statement was not credible and thus "lies," citing contradictions in the evidence.

Trial Counsel argued that Appellant's statement to NCIS was not credible, citing contradictions between his statement and the evidence before the Members:

> I'm not going to show every single lie he tells, but let's talk about some of them. For example, [Petty Officer K], he lies about him. He says . . . in his written statement, "[Petty Officer K] made a comment in a joking fashion about how maybe [Appellant] can get lucky . . . ." You remember [Petty Officer K's] statement in court. He said he specifically told [Appellant] not to pursue her. . . . Does it seem reasonable that [Petty Officer K] whose [sic] closer friends with [Petty Officer H], . . . would say hey you, why don't you go in an mess up the relationship? . . . Does that make sense? It shouldn't because it's not true. He's lying[.] Why is he lying? He's trying to get away with

[1] Though Assistant Trial Counsel gave the United States' closing argument and Trial Counsel gave the rebuttal, this Brief refers to both as "Trial Counsel."

> sexually assaulting this woman, and that's the rationale behind every single lie he tells in his statement.

(J.A. 395-96.)

> See if this makes any sense. "While laying there, [Petty Officer K] opened the door to the room and looked inside. He did not say anything to me or her." Does that make any sense? We've had not one, but two different people tell you that they told [Appellant] that night, "Do not go into that room." That's the evidence you have. Does it seem reasonable that [Petty Officer K], after telling him, hey don't hook up with this person would open the door and just look approvingly . . . . That makes zero sense. . . . He's lying about Krueger. It's obvious, you can't believe him, and he's lying to cover up his sexual assault.

(J.A. 396-97.)

2. Trial Counsel characterized Appellant as a liar multiple times without immediately tying it to evidence in the Record.

Trial Counsel used words like "lie," "liar," "lying," or argued that Appellant's argument was "fanciful" approximately twenty other times, across eleven of the twenty-three transcribed pages of his Findings argument without directly referencing contradictions in the Record. (J.A. 391-413.) Appellant did not object. (J.A. 391-413.)

While these references do not immediately cite specific contradictions in the Record, they are in the vicinity of and are directly related to contradictions later argued by Trial Counsel.

3. Trial Counsel argued that the NCIS statement supported a conclusion that Appellant hoped the Victim would mistake him for Petty Officer H when he entered the room.

During closing argument, Trial Counsel quoted portions of Appellant's response to NCIS's question about why he believed the Victim would be willing to have sexual intercourse with him. (J.A. 410.) Trial Counsel argued that Appellant's response supported a finding that:

> [Appellant] was counting on her not recognizing him. He was counting on that . . . . He admits, and in fact, he says that he was counting on the fact that I hope that she will confuse me with [Petty Officer H]. "Maybe she will think I'm [Petty Officer H]." He's counting on it, and that's evidence that she was impaired[,] that he knew she was impaired . . . .

(J.A. 410.)

Appellant did not object then, or assert at any time that Trial Counsel was misstating Appellant's words or evidence in the Record. Later, Appellant objected to this argument on grounds that it raised an uncharged theory of liability. *See infra*.

4. Trial Counsel used analogies to demonstrate the Victim's lack of capacity to consent.

Trial Counsel used two analogies, over the course of two transcribed pages in the Record, to argue that that the Victim was not competent to consent. (J.A. 405-06.) Rather than objecting, Appellant responded to the arguments in his closing. *See infra*.

F. After Trial Counsel's argument, Civilian Defense Counsel objected in an Article 39(a) session, that Trial Counsel's argument that the Victim believed Appellant was someone else raised "uncharged misconduct."

Appellant objected in an Article 39(a) session to Trial Counsel's reference to "uncharged misconduct." He claimed that Trial Counsel improperly argued an alternate theory of liability not on the Charge Sheet by arguing that "[Appellant] was counting on [the Victim] not recognizing him before he goes into the room," and "I hope she will confuse me with [H]." (J.A. 413-25.)

Appellant requested the following curative instruction:

> You may have heard argument that the accused was counting on [the Victim] not recognizing him before going into the room. There is no evidence the accused concealed his identity from [the Victim]. You may not rely on this argument to convict the accused. I remind you that argument of counsel is not evidence.

(J.A. 422.) In the alternative, Appellant requested a mistrial. (J.A. 417, 423.)

The Military Judge denied Appellant's request for a mistrial and concluded Trial Counsel's comments did not put "uncharged misconduct" before the Members. (J.A. 417-19.)

The Military Judge nevertheless agreed to give Appellant's proposed instruction, with the caveat that she would couple it with a reminder to the Members that they "can consider the notion of the accused's knowledge of who [the Victim] could have thought the accused was when he had sex with her . . . for

the purposes of a[ss]essing . . . his knowledge of whether she was incapable of consenting" due to alcohol impairment. (J.A. 423.)

Appellant withdrew his request for a curative instruction, explaining that "it would be inappropriate for the military judge to highlight the government's [theory of the] case." (J.A. 423.)

G. Civilian Defense Counsel rebutted the Trial Counsel's argument that Appellant lied in his NCIS statement and attacked the Government's use of analogies, accusing Trial Counsel of misstating the law.

Civilian Defense Counsel opened his argument by immediately attacking Trial Counsel's allegation that Appellant was lying to NCIS, stating, "The problem with the government's argument [is] they made a big deal trying to allege that [Appellant] was lying in his NCIS interview." (J.A. 428.) He countered Trial Counsel's argument by highlighting the Victim's inconsistencies and arguing it was she, not Appellant, who was lying. (J.A. 428, 31, 434, 441.)

Appellant attacked Trial Counsel's use of analogies to explain the Victim's inability to consent to sexual intercourse:

> We have never said she wasn't intoxicated that night, never. And they had the audacity to ask you to adopt the standard, which by the way, is clearly not the law that if somebody walks into a Navy recruiting office, you know a drunk person can't consent to signing a contract are you kidding me is that really where we're going. It's clearly not the law; a person is incapable of consenting if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or

> communicate decision regarding such conduct. You know he is coming up and tell [sic] you—well it's all lies from that guy over there it's all lies from the Don Juan.

(J.A. 443.)

H. In rebuttal, Trial Counsel argued that Defense Counsel did not believe their own client. Appellant did not object.

In rebuttal, Trial Counsel argued that Appellant was lying and three times argued Appellant engaged in a "fantasy world" without specifically tying the arguments to contradictions in the Record. (J.A. 447-49.) Additionally, Trial Counsel argued that the defense "did not believe their own client." (J.A. 448-49.) Appellant did not object. (J.A. 447-49.)

I. The Military Judge reminded Members that arguments of counsel are not evidence.

After Trial Counsel concluded his rebuttal argument, the Military Judge instructed the Members:

> I want to remind you that argument by counsel is not evidence and counsel are not witnesses. If the facts as you remember the[m] differ in any way from how counsel for either [sic] see that the facts; it's your memory of the facts that controls. Likewise, I remind you that if there's any discrepancy between my instructions and what counsel have argued to you or how they have referred to those instructions, you must follow my instructions.

(J.A. 453.)

J. The Members convicted Appellant of sexual assault after three hours of deliberation.

After three hours of deliberation, the Members convicted Appellant of sexually assaulting the Victim by penetrating her vulva with his penis when he knew or reasonably should have known she was incapable of consenting due to impairment by alcohol, in violation of Article 120(b)(3)(A), UCMJ. (J.A. 454-57.)

K. The Navy-Marine Corps Court of Criminal Appeals affirmed the Findings and Sentence. It found some of Trial Counsel's arguments were error, but Appellant suffered no prejudice.

The lower court found four instances of prosecutorial misconduct: (1) characterizing Appellant's statements to NCIS as "invented admissions" (*Andrews*, 2017 CCA LEXIS 283, at *20-21); (2) making approximately twenty-five disparaging comments about Appellant, not tied to evidence before the Members (*Id*. at *15-16); (3) asserting that the Defense did not "believe their own client" (*Id*. at *22); and, (4) misstating the law. (*Id*. at *26-27.)

The lower court held that the four findings of Trial Counsel misconduct were "severe," but even assuming that the curative measures taken by the Military Judge were inadequate, based on the strength of the United States' case, the court was "confident that the members convicted the appellant . . . on the basis of the evidence alone." *Id*. at *31(citing *Sewell*, 76 M.J. at 14-15 (citation and internal quotation marks omitted).

Summary of Argument

Under the plain text of R.C.M. 919, Appellant waived appellate review of all but one of his claims of prosecutorial misconduct. The lower court erroneously found misconduct in Trial Counsel's evidence-based argument that Appellant's hoped the Victim would mistake him for someone else. And, the lower court overstated the severity of Trial Counsel's argument, which was in part based on Appellant's own words and the evidence. Finally, the trial was fair and the impact of the argument was low, given the contained and limited extent of language untethered to evidence, the Defense strategy of not objecting and refusing curative instructions, the two acquittals that showed the Members independently assessed the evidence, and the strong case against Appellant.

Argument

> APPELLANT WAIVED OBJECTION ON APPEAL TO UNOBJECTED-TO ARGUMENTS. THE LOWER COURT ERRED FINDING MISCONDUCT IN ONE OF TRIAL COUNSEL'S ARGUMENTS WHICH WERE REASONABLE AND FAIR INFERENCES BASED ON EVIDENCE. EVEN SO, APPELLANT WAS NOT PREJUDICED AS THE EVIDENCE AGAINST HIM WAS OVERWHELMING.

The Issue Appellant requested does not limit this Court's review solely to either the lower court's finding of error or to the remedy: "THE LOWER COURT FOUND SEVERE PROSECUTORIAL MISCONDUCT. THEN IT AFFIRMED .

. . DID THE LOWER COURT ERR?" Because the question broadly asks whether the lower court erred, each of error, severity, and remedy are proper issues for this Court's consideration.

A. Appellant waived appellate review of unobjected-to arguments by Trial Counsel.

Whether an appellant waives an issue is a question of law reviewed *de novo*. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

Failure to object to improper argument constitutes waiver. R.C.M. 919(c). A valid waiver leaves no error to correct on appeal. *Ahern*, 76 M.J. at 197. Though this Court has previously treated failure to object to improper argument as forfeiture, *see, e.g.*, *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017), the plain text of the President's Rule requires that waiver be applied to unobjected-to arguments of counsel. Precedent to the contrary should be overruled. *See*, *e.g.*, *Ahern; see also United States v. Simmermacher*, 74 M.J. 196 (C.A.A.F. 2014) (overruling prior precedent in favor of plain-text application of President's R.C.M. 701).

In *Ahern*, this Court distinguished between Manual for Courts-Martial "waiver" rules that mention plain error review and therefore actually mean "forfeiture"—such as R.C.M. 920(f)—and rules that "do[] not mention plain error review" and therefore literally mean "waiver," such as Mil. R. Evid. 304(f)(1).

Ahern, 76 M.J. at 197. The plain text of R.C.M. 919(c) forecloses appellate review of improper argument unless an appellant objects prior to deliberations. *See* R.C.M. 919(c).

Appellant objected to one portion of Trial Counsel's argument as improper: "[Appellant]" is counting on her not recognizing him before he goes into the room," and "I hope she will confuse me with [H]." (J.A. 414.)

Appellant thus waived appellate review of all other alleged improper arguments by Trial Counsel.[2]

This Court should find waiver, review only the sole objected-to argument for prosecutorial misconduct, find no reversible error, and affirm the Findings and Sentence on other grounds than used by the lower court.

B. The lower court erroneously found prosecutorial misconduct in Trial Counsel's argument that Appellant hoped the Victim would mistake him for someone else.

1. The standard of review for Appellant's preserved improper argument is *de novo*.

"Improper argument involves a question of law that this Court reviews *de novo*." *Pabelona*, 76 M.J. at 11 (quoting *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014)). "The legal test for improper argument is whether the argument

[2] Should this apply R.C.M. 919(c) and find that waiver applies, this Court is left to analyze the prejudicial impact of only one facet of what the lower court found to be improper argument: Trial Counsel's use of "invented admissions" by Appellant. *See Andrews*, 2017 CCA LEXIS 283, at *16-21.

was erroneous and whether it materially prejudiced the substantial rights of the accused." *Id.* (citing *Frey*, 73 M.J. at 248); *see also United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (noting that, when reviewing whether a trial counsel's argument amounted to "prejudicial error," the court "considers the legal norm violated by the prosecutor and determines if its violation actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice) . . . [given] the trial record as a whole [and] under all the facts of a particular case"); *accord United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014); *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

2. In closing arguments, prosecutors may strike hard blows, and may forcefully argue reasonable inferences from the record.

"Prosecutorial misconduct is '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." *Pabelona*, 76 M.J. at 11 (quoting *Meek*, 44 M.J. at 5). Prosecutorial misconduct occurs when "the prosecuting attorney 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)).

One standard applicable to closing arguments is that "prosecutor[s] should not knowingly misstate the evidence in the record, or argue inferences that the

prosecutor knows have no good-faith support in the record." ABA Criminal Justice Standards for the Prosecution Function 3-6.8(a) (4th ed. 2015) [hereinafter ABA Prosecution Standards]. Furthermore, they "should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty." ABA Prosecution Standard 3-6.8(c).

However, prosecutors "may argue all reasonable inferences from evidence in the record," ABA Prosecution Standard 3-6.8(a), "including that one of two sides is lying." *United States v. Wilkes*, 662 F.3d 524, 540 (9th Cir. 2011) (internal citations and quotation marks omitted). Thus they are "free to argue that the jury should arrive at a particular conclusion based upon the record evidence, including the conclusion that the evidence proves the defendant's guilt." *United States v. Davidson*, 452 F. App'x 659, 664 (6th Cir. 2011) (citation and quotation marks omitted). Prosecutors also may "argue the record, highlight any inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence." *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008).

3. Trial Counsel did not intentionally mislead the Members. Rather, he used Appellant's own words and forcefully argued reasonable inferences from the Record.

The lower court found that Trial Counsel's argument that Appellant "admits, and in fact says that he was counting on the fact that I hope she will confuse me

with [Petty officer H]" amounted to "invented admissions" because they "take [the statements] out of context." *Andrews*, 2017 CCA LEXIS, at *20-21.

But the lower court's opinion ignores Appellant's response when NCIS asked him why he believed the Victim consented: "The reason—well, my reasoning behind this is I assumed she thought I was [Petty Officer H]." (J.A. 486.) He then reiterated that he went into the room because he "assumed he could make it up and get lucky once." (J.A. 487.)

Though Appellant continued to insist that he was unaware that the Victim was in a relationship with Petty Officer H at the time, that knowledge was directly contradicted by Petty Officer K's testimony. Even if the lower court believes that Trial Counsel's argument took Appellant's statement out of context, the argument did not misstate Appellant's statements, and were, based on the Record as a whole, "reasonable inferences from evidence in the record" in accordance with ABA Prosecution Standard 3-5.8(a). This argument falls short of prosecutorial misconduct, and should be excised from this Court's *Fletcher* analysis.

C. The lower court found misconduct in some of Trial Counsel's statements that it found to be "disparaging" and "derogatory." But not all comments about Appellant's credibility were plain error, and the lower court made no clear finding about the number of plainly erroneous uses of "lies."

1. If not waived, unobjected-to improper argument is reviewed for plain error.

If this Court does not apply waiver, where an appellant fails to object at trial, allegations of improper argument are reviewed for plain error. *Pabelona*, 76 M.J. at 11 (citing *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004)). Under plain error, an appellant must demonstrate that "(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *Id*. (quoting *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (internal citation and quotation marks omitted)).

2. The lower court made no clear finding on the number of disparaging comments that amounted to plain error.

The lower court found that some of Trial Counsel's comments regarding Appellant's credibility amounted to prosecutorial misconduct while some did not because they were directly tied to contradictory evidence. *See Andrews*, 2017 CCA LEXIS 283, at *14-15. Though the court provided illustrative examples, it did not distinguish whether it believed the "25 times in total" of Trial Counsel's attack on Appellant's credibility amounted to misconduct or whether those references included proper argument. *Id*. at 14.

It is not improper for a prosecutor to "argue all reasonable inferences from evidence in the record," ABA Prosecution Standard 3-6.8(a), "including that one of two sides is lying." *Wilkes*, 662 F.3d at 540. There is an "exceedingly fine line which distinguishes permissible advocacy from improper excess." *Fletcher*, 62 M.J. at 183 (quoting *United States v. White*, 486 F.2d 204, 207 (2d Cir. 1973)). This line "is to be drawn within the concrete terrain of specific cases." *White*, 486 F.2d at 207.

The lower court here properly noted that some of Trial Counsel's attacks on Appellant's credibility were directly tied to contradictions between Appellant's statement and evidence before the Members—but did not determine if it was the full twenty-five, or fewer than twenty. *See supra* pp 23-24; (J.A. 156, 188, 199-201, 205, 214-15, 485, 488.) A majority of Trial Counsel's unobjected-to references to Appellant's credibility were indirectly tied to the evidence before the Members and are not plainly error. Around a half-dozen of those, moreover, are direct and tangible comments on contradictions in the evidence, and are thus not improper. These should be excised from this Court's *Fletcher* "severity" analysis.

D. Despite the lower court's partially correct findings of some prosecutorial misconduct, the conduct was less severe than found by the lower court, and the case against Appellant was strong.

Relief for prosecutorial misconduct is warranted only where prejudice results. *Pabelona*, 76 M.J. at 12. "The characterization of certain action as

'prosecutorial misconduct,' . . . does not in itself mandate dismissal of charges against an accused . . . ." *Meek*, 44 M.J. at 5; *see also United States v. Young*, 470 U.S. 1, 11 (1985) (criminal conviction "not to be lightly overturned" unless, seen in context, "prosecutor's conduct affected the fairness of the trial"). "Improper argument does not require reversal unless '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. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quoting *Fletcher*, 62 M.J. at 184); *see also United States v. Mejia-Lozano*, 829 F.2d 268, 274 (1st Cir. 2009) ("We must . . . determine whether the offending comments so poisoned the well that the trial's outcome was likely affected.").

In assessing prejudice, this Court considers the cumulative impact of individual instances of prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial; to merit relief, the misconduct must be "so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184. To determine if this is the case, courts consider: (1) the severity of the misconduct, (2) any curative measures taken, and (3) the strength of the United States' case. *Id*; *Schroder*, 65 M.J. at 58. It is possible for the third factor to "so overwhelmingly

favor[] the government" so as to "establish [a] lack of prejudice" from improper argument "in and of itself." *Pabelona*, 76 M.J. at 12.

1. Because the "invented" argument violated no ethical regulations or norms, and Appellant rebutted Trial Counsel's misstatement of law, the overall prosecutorial misconduct was less severe than found by the lower court.

    a. Because the lower court erred in finding Trial Counsel "invented admissions" by Appellant, it overstated the severity of Trial Counsel's misconduct.

To determine whether improper argument is "severe," courts consider

> (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.

Fletcher, 62 M.J. at 184.

Here, the lower court found that Trial Counsel's improper argument amounted to "severe" prosecutorial misconduct. *See Andrews*, 2017 CCA LEXIS 283, at *29. The lower court did not specifically analyze its finding in terms of the raw numbers, but it found that based on the length of the trial and length of deliberations, and the fact that the improper argument "permeated" the initial findings argument, the misconduct was severe. *Id*.

The lower court erred in finding that Trial Counsel "invented admissions," and overstated the severity of Trial Counsel's improper argument, both in terms of raw instances, and in whether it permeated the initial findings argument.

b. Appellant's tactical choices to attack Trial Counsel's "misstating the law," rather than object to the argument, mitigated its severity.

When measuring prejudice resulting from improper argument in terms of its impact on findings, reversal is only warranted when "trial counsel's comments . . . were so damaging" that they impacted the members' findings. *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (quoting *Hornback*, 73 M.J. at 160) (internal quotations omitted). Thus, when an Appellant tactically uses Trial Counsel's improper argument to rebut or undermine the United States' case, any resulting impact is not caused by the Trial Counsel, but by the Appellant.

Here, the lower court found improper argument where Trial Counsel misstated the law by his use of analogy. *Andrews*, 2017 CCA LEXIS 283, at *25-26.

But in closing, Civilian Defense Counsel attacked Trial Counsel's analogy to contract law, arguing "a drunk person can't consent to signing a contract are you kidding me is that really where we're going. It's clearly not the law . . . ." (J.A. 443.)

Rather than allowing the Military Judge to ameliorate any possible prejudice to Appellant by objecting to this argument, Appellant instead chose to tactically discredit Trial Counsel, and undermine the strength of the United States' case. Thus any resulting impact on the Members from Appellant's tactical decision to counter, rather than object to Trial Counsel's misstatement of the law or disparaging comments is not prejudice "caused by trial counsel's comments," and should not be held against the United States. *Cf. Sewell*, 76 M.J. at 18. Further, by correctly reminding the Members that Trial Counsel's argument was a misstatement of the law, it further mitigated any impact Trial Counsel's improper argument may have otherwise had on the Members.

c. The lower court erred in overstating severity, and any misconduct was confined to eleven pages of closing out of an 847-page Record of Trial.

Here, Trial Counsel's alleged misconduct was confined to eleven pages of a thirty-one page closing argument. No similar instances occurred in the remainder of the four day trial, which spanned 847-pages of transcript. The Members deliberated for three hours before convicting Appellant. (J.A. 454-55.) Finally, Trial Counsel did not disobey any rulings from the Military Judge. (J.A. 371.)

The first *Fletcher* prong favors the United States.

2. The Military Judge gave no specifically tailored instructions, but the instructions were adequate given Appellant's decision to not object and tactical withdrawal of the one offered curative instruction.

Though the Military Judge did not "issue[] repeated curative instructions to the members . . . [or act] early and often to ameliorate trial counsel's [alleged] misconduct," *Hornback*, 73 M.J. at 161, this was primarily Appellant's own doing because he did not object at all *during* Trial Counsel's arguments, despite it being "the duty of . . . [defense counsel] to ferret out improper argument, object thereto, and seek corrective action . . . ." *United States v. Toro*, 37 M.J. 313, 318 (C.M.A. 1993) (citation omitted).

When the Military Judge offered to give the curative instruction requested by Appellant—with slight modification to mirror the Military Judge's previous explanation of "incapable of consenting"—Appellant declined the instruction for tactical reasons. (J.A. 423.)

Furthermore, though the Military Judge issued no tailored curative instructions, she properly instructed the Members before and after closing arguments that: (1) "arguments of counsel are not evidence" and Members "must base the[ir] determination of the issues in the case on the evidence as [they] remember it and apply the law" in accordance with the Military Judge's instructions; and (2) "if there is any inconsistency between what the counsel say

and [the Military Judge's] instructions, [they] must follow [her] instructions." (J.A. 390-91, 453, 536.) She then repeated the instruction after Trial Counsel's rebuttal argument, before the court closed for deliberation. (J.A. 453.)

Absent evidence to the contrary, this Court presumes that court-martial members follow a military judge's instructions. *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012). As Appellant offers no evidence to rebut this presumption (Appellant's Br. at 29-31), this Court should presume the Members followed the Military Judge's instructions here, further removing any danger of unfair prejudice. *See also United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (appellant not prejudiced by the military judge's failure to interrupt argument at sentencing or issue a curative instruction).

3. The United States' presented overwhelming evidence that Appellant had sexual intercourse with the Victim when he knew or should have known she was too intoxicated to consent.

In cases of prosecutorial misconduct, the strength of the United States' case may, in and of itself, establish lack of prejudice. *Pabelona*, 76 M.J.at 12.

The evidence against Appellant was strong. The United States established through witnesses at the party that the Victim was so heavily intoxicated she was unable to follow conversations, and could not walk without assistance. (J.A. 135-37, 146-49, 153, 159, 205, 219.) The evidence established that the Victim vomited

just before Appellant decided that "he didn't care" and had sex with her. (J.A. 491.)

Appellant admitted that he barely knew the Victim and knew she was intoxicated. Guests witnessed the Victim showing no warmth or receptiveness to Appellant's repeated attempts to talk to her. Appellant admitted that although he was warned repeatedly by Petty Officer K and RW against trying to "hook up" with the Victim, he nonetheless went the room where the Victim slept to see if he could "get lucky." The evidence demonstrated not only that the Victim was in no state to consent to sexual activity, but also that Appellant knew or should have known her physical state.

4. Appellant received a fair trial. This Court can be convinced he was convicted on the evidence alone.

This Court has previously indicated that Members' mixed findings indicate that they were able to convict an appellant on the basis of the evidence alone, even when a trial counsel commits prosecutorial misconduct. *See, e.g.*, *Pabelona*, 76 M.J. at 12.

Though the lower court found that Appellant received "no significant consideration from the panel in the form of an acquittal," *see Andrews*, 2017 CCA LEXIS 283, at *29, this Court may still consider it in determining whether Appellant was convicted on the basis of the evidence alone.

Here, the Members' acquittals reflect that they were able to weigh all evidence presented to them, and distinguish which elements they believed the United States proved beyond a reasonable doubt.

The Members were presented with differing versions of what transpired in the guest room. The Victim testified that she said "Stop;" (J.A. 221), Appellant stated that she said, "yes." (J.A. 486.) The Victim testified that she was asleep when Appellant climbed on top of her (J.A. 220-22, 25); Appellant stated that she was awake. (J.A. 492-93.) The Members resolved those contradictions by acquitting Appellant of committing sexual acts by bodily harm and on someone who is asleep. (J.A. 454-57.)

However, both Appellant and the Victim, as well as multiple witnesses, all agreed that the Victim was extremely intoxicated that night, that she vomited on the bed, that Appellant did not know her, and that he went in the room uninvited. Appellant admitted he had sexual intercourse with her. (J.A. 505-06.) Having heard Appellant admit details that established that he committed a sexual act upon the Victim, that she was so intoxicated that he reasonably knew or should have known she was unable to consent, and reviewing the corroborating evidence, the Members rightly convicted Appellant of one of three Specifications, based not on Trial Counsel's argument, but on Appellant's own words and the evidence before them.

The fact that the Members acquitted on two of the three offenses charged stands as ample testament to the degree to which the Members listened to and applied the instructions of the Military Judge and disregarded any possible improper arguments of counsel.

E. The lower court's decision did not give an "imprimatur" to prosecutorial misconduct. It properly focused on "the fairness of the trial" rather than the "culpability of the prosecutor."

The Supreme Court has continuously reinforced that "the touchtone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209 (1982). Thus, in determining legal issues before appellate courts, due process is satisfied not by the "punishment of society for the misdeeds of the prosecutor," but by ensuring an appellant was not burdened by an "unfair trial." *Id.* (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

Appellant's demand to enact deterrence policy goes beyond this Court's mandate under Articles 59(a) and 67 to determine whether *this* Appellant received a fair trial. *See United States v. Payner*, 447 U.S. 727, 734, n.7 (1980) (the supervisory authority in the federal courts merely permits the federal courts to supervise "the administration of criminal justice" among the parties before the bar) (citing *McNabb v. United States*, 318 U.S. 332, 340 (1943)); *cf. Clinton v.*

Goldsmith, 526 U.S. 529, 534 (1999) (this Court's jurisdiction is confined to the review of specified sentences imposed by courts-martial).

The *Fletcher* test—and its progeny—lay out the factors for prosecutorial misconduct and what is required to overturn a verdict. Appellant's argument does not offer some new test, but rather begs this Court to find—in the name of deterrence—that "severe" prosecutorial misconduct is structural error regardless of the application of ethical rules and regulations regarding prosecutors, and binding precedent from this Court.

This Court should decline Appellant's demand.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the Findings and Sentence.

SEAN M. MONKS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686
Bar no. 36771

KELLI A. O'NEIL
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7687
Bar no. 36883

VALERIE C. DANYLUK
Colonel, U.S. Marine Corps
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 36770

BRIAN K. KELLER
Deputy Director
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

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I certify that the foregoing was electronically filed with the Court and on opposing counsel on October 16, 2017.

SEAN M. MONKS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE

Washington Navy Yard, DC 20374
(202) 685- 8387, fax (202) 685-7687
Bar no. 36771