IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20230030
Sergeant (E-5) **TYRESE S. CAMPBELL** United States Army, Appellant	Tried at Fort Bliss, Texas, on 3 October 2022, and 18–22 January 2023, before a general court-martial appointed by the Commander, Headquarters, 1st Armored Division and Fort Bliss, COL Robert L. Shuck, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error[1]

I. WHETHER APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE IS FACTUALLY INSUFFICIENT.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING A 911 CALL AND BODY CAMERA FOOTAGE CONTAINING THE COMPLAINING WITNESS'S STATMENTS AS RESIDUAL HEARSAY.

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE TRIAL COUNSEL AND SPECIAL VICTIM'S PROSECUTOR TO COMMENT ON APPELLANT'S RIGHT TO SILENCE DURING CLOSING ARGUMENT AND SENTENCING, RESPECTIVELY.

Statement of the Case

On 21 January 2023, an enlisted panel, sitting as a general court-martial, found appellant guilty, contrary to his pleas, of one specification of domestic violence in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 928b (2019) [UCMJ]. (Statement of Trial Results). On 22 January 2023, the military judge sentenced appellant to 120 days of confinement, a bad conduct discharge, total forfeitures of all pay and allowances, and reduction to E-1. (R. at 1156). The Staff Judge Advocate (SJA) rendered his advice on 2 February 2023, the Convening Authority approved the findings and sentence on 8 February 2023, and the military judge entered judgment on 13 February 2023. (SJA Advice; Convening Authority Action; Judgment of the Court).

Assignments of Error

I. WHETHER APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE IS FACTUALLY INSUFFICIENT.

Facts Relevant to Assignment of Error

I. The Government's Deficiencies of Proof Resulted in Not Guilty Findings on Four Out of Five Specifications

The government prosecuted appellant despite the following deficiencies in proof: 1) an insufficient investigation by the El Paso Police Department (EPPD); 2) an ever-evolving version of events from the complaining witness, Mrs. [redacted] 3) the medical evidence contradicting Mrs. [redacted] story; and 4) and the motivations and pressures influencing Mrs. [redacted] testimony. (R. at 304, 434, 469–70, 481, 486, 525, 539, 541, 793, 879–86, 924; Pros. Ex. 22, at 5).

The arresting officers admitted on the stand they failed to conduct a thorough investigation. (R. at 357–68, 393–403). Mrs. [redacted] appellant's spouse—offered at least five different versions of events. (R. at 304, 469–70, 486, 481, 539, 793, 879–86; Pros. Ex. 22, at 5). The prosecution pressured Mrs. [redacted] to stick to her original report, despite motives to fabricate coloring her original report and subsequent testimony. (R. at 525, 541, 924).

Consequently, at the conclusion of appellant's court-martial, these deficiencies of proof resulted in not guilty findings regarding: 1) strangling Mrs. [redacted] on 26 February 2022; 2) strangling Mrs. [redacted] on 16 July 2022; 3) threatening Mrs. [redacted] on 26 February 2022; and 4) obstruction of justice by pressuring Mrs. [redacted] to "drop the charges." (Statement of Trial Results; R. at 1073).

II. These Same Deficiencies of Proof Undermine the Lone Finding of Guilt

1. The El Paso Police Conducted a Cursory Investigation

The EPPD failed to corroborate any of Mrs. [redacted] allegations or investigate any hypothesis other than guilt—in this instance, self-defense—in their, at most, hours-long investigation. The 911 operator received Mrs. [redacted] call around 0630 on 18 July 2022. (R. at 298). In that 911 call, Mrs. [redacted] reported appellant had, hours earlier in their shared apartment, choked her and "used his shoe and hit me on the mouth." (Pros. Ex. 3). At 0635, El Paso Firefighter, [redacted], responded to the call, met Mrs. [redacted] in the parking lot of her apartment complex, and observed Mrs. [redacted] bloody lip. (R. at 320–22, 330).

El Paso Police Officers [redacted] and [redacted] met Mrs. [redacted] at the hospital, where Officer [redacted] recorded his interview with Mrs. [redacted] on his bodycam. (R. at 346; Pros. Ex. 31). Mrs. [redacted] told Officer [redacted] "I was in an argument with [appellant] and it resulted in him strangling me and hitting me in the mouth with his shoes, which caused my mouth to bleed." (Prox. Ex. 31). She claimed she sought assistance by opening her door, screaming to call the police, and knocking on her neighbor's door, "apartment . . . 1605." (Pros. Ex. 31). Both officers then went to appellant's apartment complex, where they found him in his car. (R. at 349, 388). Appellant fully cooperated with the investigation, describing the altercation between himself

and Mrs. [redacted] she attacked him first, and he struck back in self-defense. (R. at 349, 389–90).

The EPPD officers barely conducted any follow-up investigation. Though they went into appellant's apartment, and—contrary to Mrs. [redacted] claims—found the shoe matching her description with *no* blood on it—they did not take any pictures of the scene, they did not take any pictures of the shoe purportedly used in the assault, and they did not preserve the shoe as evidence. (R. 357–359, 395–96). The officers also failed to follow up on appellant's claims of self-defense. (R. at 360–63, 398–99). They further declined to investigate Mrs. [redacted] assertions about seeking assistance, neglecting to either canvass the apartment complex or even knock on appellant's neighbor's door. (R. at 360–63, 398–99).

At trial, Officers [redacted] and [redacted] acknowledged these failures as investigative missteps. (R. at 364) ("[Q. B]ased on everything I highlighted you did not conduct a thorough investigation? A. That part would have been important, yes."); (R. at 393) ("Q. So especially when there is [sic] conflicting stories, you want to conduct a thorough investigation. A. Correct. Q. Right. . . . but you did not search [Appellant's] apartment, did you? A. that's correct.").

2. Mrs. [redacted] Version of Events Continually Evolved

Initially, during her report to EPPD, Mrs. [redacted] described being strangled, hit in the mouth with a shoe, screaming for her life, and seeking assistance from her

next-door neighbor. (Pros. Ex. 3; Pros. Ex. 31). Approximately one week later, Mrs. [redacted] went directly to the Army Special Victim's Prosecutor (SVP) and described multiple incidents of domestic violence, allegations which resulted overwhelmingly in acquittals and dismissals. (R. at 481–82). A few weeks later, Mrs. [redacted] spoke with Army Criminal Investigation Division (CID), stating appellant struck her by accident and repeatedly emphasized no strangulation occurred. (R. at 533, 538, 540). She specifically never mentioned a shoe during her interview with CID. (R. at 828).

On 11 August 2022, she voluntarily went into appellant's civilian counsel's office and signed an affidavit of non-prosecution, "free of any duress or coercion." (R. at 784, 787, 879). Then, on 30 August 2022, Mrs. [redacted] again went in voluntarily, and requested changes to the affidavit, which appellant's counsel incorporated, and Mrs. [redacted] signed. (R. at 787, 789, 880).

At trial, Mrs. [redacted] testified she was in an argument with appellant that spiraled out of control when she called his mom "a bitch," at which point, he pushed her, she slapped him, he threw her on the floor, and choked her. (R. at 470). Mrs. [redacted] claimed, for the first time, appellant covered her mouth with a sheet, muffling her voice. (R. at 472). Mrs. [redacted] said she called appellant a homophobic slur, at which point, he struck her in the mouth with a shoe. (R. at 473). Mrs. [redacted] then stated appellant locked her out of the apartment, but admitted,

though she allegedly feared for her life, she "forcefully" and repeatedly banged on the door to get back into the apartment while appellant was still inside. (R. at 520, 807).

3. The Medical Evidence Against Appellant Was, At Best, Equivocal

The only injury noted by the first responder was "a bloody lip." (Pros. Ex. 5). Officer [redacted], who met Mrs. [redacted] at the hospital, noted the injury was to the "inside" of her lip, very possibly "because of the braces on her teeth." (R. at 404).

The prosecution's expert, Ms. [redacted], a certified forensic nurse, asserted Mrs. [redacted] injuries were consistent with blunt force trauma to the mouth. (R. at 596, 619). Appellant's expert, Ms. [redacted], however, holds a master's degree in forensic nursing, providing her with advanced training in, inter alia, forensic injury, advance forensic photography, and the biomechanics of wounds. (R. at 709, 712). Ms. [redacted] opined the pictures of Mrs. [redacted] injuries were *inconsistent* with the biomechanics of being struck with a shoe or other blunt object. (R. at 714–16). In her words, "when you have an injury to the lip, and it's from blunt force, you are going to anticipate, depending on the size of the shoe . . . the object that actually hit the patient is going to cause other damage to the area." (R. at 716–17). Upon review of Mrs. [redacted] injuries, and considering the size of appellant's shoes and the relevant wound biomechanics, Ms. [redacted] concluded there

would have been greater injury to Mrs. [redacted] had she been *actually* struck by an object the size of appellant's shoe. (R. at 718).

4. The Prosecution Pushed Mrs. [redacted] to Participate as Her Motives Shifted

Mrs. [redacted] reported appellant as she faced the potential of needing to leave the apartment she shared with appellant. (R. at 541). She was an immigrant who received her green card through marrying appellant. (R. at 525). In accordance with the Violence Against Women Act, should anything happen to jeopardize her immigration status, her ability to continue living in the United States would likely have been more secure if appellant were convicted of domestic violence. (R. at 579–80).

She regretted her report. Mrs. [redacted] pulled back in her statements to CID and provided affidavits of non-prosecution to the defense; she then spoke to SFC [redacted] about the pressure being exerted by the SVP to conform to her original statement. (R. at 924). SFC [redacted] was, at the time, twenty-one years into her Army career and a brigade SARC. (R. at 921). SFC [redacted] learned of Mrs. [redacted] dissatisfaction with her Special Victim Counsel (SVC) bending to the SVP's will. (924–25). "[Mrs. [redacted] said that the major that's here in the room[2] was working with [the El Paso assistant district attorney] to make sure that if she

[2] SFC [redacted] was referring to the SVP in the courtroom. (R. at 926).

changed her story or tried to plead the fifth in the room, that they would hold her in contempt[.]" (R. at 926). SFC [redacted] stated the SVP "pressured and pretty much threatened" Mrs. [redacted] into testifying in accordance with her earlier statements by alleging he had medical proof that could undermine her recantation. (R. at 928). There was "no doubt in [SFC [redacted] mind that [Mrs. [redacted] thought she was intimidated by the government." (R. at 942).

Despite these deficiencies, the panel convicted appellant of striking Mrs. [redacted] in the mouth with a shoe. (R. at 1073).

Standard of Review

This court reviews questions of factual sufficiency de novo. *United States v. Scott*, 83 M.J. 778 (Army Ct. Crim. App. 2023) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

Pursuant to the UCMJ, Article 66(d)(1)(B)(i) (2021), this court may consider whether a finding is factually sufficient "upon request of the accused if the accused makes a specific showing of a deficiency in proof." Once made, this court "may weigh the evidence and determine controverted questions of fact" subject to the following: (1) "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence"; and (2) "appropriate deference to findings of fact entered into the record by the military judge." UCMJ, art. 66(d)(1)(B)(ii)

(2021). This court conducts its review of the record de novo. *Scott*, 83 M.J. 778. After review, if this 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." UCMJ, art. 66(d)(1)(B)(iii) (2021).

Domestic violence is defined, in relevant part, as "a violent offense against a spouse." 10 U.S.C. § 928b. The elements of assault consummated by battery are: 1) that the accused did bodily harm to a certain person; 2) that the bodily harm was done unlawfully; and 3) that the bodily harm was done with force or violence. *Manual for Courts-Martial*, *United States* pt. IV, para. 77.b.(2) (2019 ed.) (MCM)

Instantly, the pertinent question is whether this court is clearly convinced the finding of guilty, which required the panel to find appellant actually and unlawfully struck Ms. [redacted] in the mouth with a shoe, was against the weight of the evidence. *Scott*, 83 M.J. 778**.**

Argument

The sole surviving specification suffers from the same deficiencies of proof that required acquittal or dismissal of the other six specifications. Namely, the government failed to prove beyond a reasonable doubt that appellant struck Mrs. [redacted] in the mouth with a shoe because: 1) the admittedly shoddy investigation by EPPD failed to even attempt to corroborate Mrs. [redacted] story or investigate a possibility other than guilt—namely, whether appellant acted in self-defense; and

2) because Mrs. [redacted] in-court testimony was fatally undermined by her own inconsistencies, her story's incompatibility with the forensic evidence, and the pressures pushing her to fabricate. Both deficiencies, independently, weigh against finding appellant committed bodily harm unlawfully or in the manner alleged by the government.

From the outset of the investigation, the EPPD was there to do no more than establish probable cause. (R. at 366–67) (Admitting to failing to conduct a "thorough investigation"). Appellant calmly cooperated with Officer [redacted], stating, "Mrs. [redacted] attacked him first, and he did hit her, he did strike her back, making the claim of self-defense"—a version of events which went completely uninvestigated. (R at 349, 389–90).

The police did nothing—absolutely nothing—to corroborate Mrs. [redacted] allegations, and CID took no investigative steps to shore up those shortcomings. There are no notes or photographs of the apartment, no documentation whatsoever of its allegedly disheveled state. (R. at 357–58). The police found *a* shoe, but did nothing to determine it was *the* shoe—neglecting to even take a photo or collect the shoe as evidence, let alone test the shoe to see if there was any trace of Mrs. [redacted] DNA. (R. 357–359, 395–96). There was no blood found anywhere, either in the apartment or on the shoe. (R. at 357–58). The least the police could have done to corroborate Mrs. [redacted] story would have been to knock on the next-door

apartment and see if anyone heard her pound on the door, yet the police did not do that. (R. at 360–63, 398–99). Every stone was left unturned.

The importance of these investigative failures was magnified by the ever-evolving nature of Mrs. [redacted] story. Whereas a thorough investigation could have pared down the hydra-headed flowering of mutually exclusive narratives driven by the various pressures on Mrs. [redacted] this court is instead left in a position to affirm appellant's guilt based on shifting stories and motives, unsupported by the weight of scientific expertise.

It is unclear why Mrs. [redacted] made her initial report, perhaps driven by marital and housing insecurity, and the concomitant impact on her immigration status. (R. at 525, 541, 578). However, what is clear is that she changed her story to increase appellant's criminal exposure, then regretted her decision. (R. at 481–82, 533, 538, 540, 784, 877; Def. App. Ex. A; Def. App. Ex. B). After broadening her report in a discussion with the SVP, Mrs. [redacted] corroborated appellant's assertion of self-defense, stating appellant struck her by accident in her statements to CID. (R. at 533, 538, 540). She then worked to actively undo her initial report by voluntarily signing two affidavits in support of appellant. (R. at 784, 877; Def. App. Ex. A; Def. App. Ex. B). Mrs. [redacted] only fully committed to a version of events similar to what she told EPPD after the SVP himself pressured her into providing incriminating testimony. (R. at 924–25).

Appellant's conviction did not occur in the manner alleged by the government. Mrs. [redacted] presented with a "bloody lip." (Pros Ex. 5). That injury, however, was inside of her mouth, very likely "because of the braces on her teeth." (R. at 404). The expert with better qualifications and training in assessing forensic injury determined Mrs. [redacted] injuries were inconsistent with blunt force trauma from an object the size and shape of a shoe. (R. at 712–18).

Taken in toto, under a de novo review of the controverted questions of fact, the government's case rests on factually insufficient evidence as the lone finding of guilt rests upon a markedly insufficient investigation and a demonstrably incredible complaining witness, whose statements are owed little to no deference. *See Scott*, 83 M.J. 778 (outlining appropriate standard). Appellant respectfully requests the finding and sentence be set aside.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING A 911 CALL AND BODY CAMERA FOOTAGE CONTAINING THE COMPLAINING WITNESS'S STATMENTS AS RESIDUAL HEARSAY.

Facts Relevant to Assignment of Error

On 12 January 2023, the government filed a motion in limine to preadmit: 1) Mrs. [redacted] 911 call made on 18 July 2022, and 2) the verbal statements she made to Officer EG later that day, as recorded on his body-worn camera (bodycam video). (App. Ex. XXI). The government, in their motion, relied on *Untied States*

v. Haner, 49 M.J. 72 (C.A.A.F. 1998) and *United States v. Zimmer*, 2023 CCA LEXIS 1, Army 20200671 (Army Ct. Crim App. 4 January 2023) (mem. op.)—both cases in which a victim's recorded statements to law enforcement were found to be admissible only after the victims recanted their statements to law enforcement *and* testified at trial on behalf of the accused. (App. Ex. XXI); *Haner*, 49 M.J. at 75; *Zimmer*, 2023 CCA LEXIS 1, at 9–10.

Though the military judge knew Mrs. [redacted] planned to appear in court and testify, he nonetheless found the 911 call and an edited portion of the bodycam footage admissible under Military Rule of Evidence (MRE) 807, the residual hearsay exception, "conditional based on the uncooperative nature of [Mrs. [redacted] (R. at 29–30; 199). He did not explain any facts, law, or logic relevant to his ruling. (R. at 199).

The 911 call begins with the operator calling Mrs. [redacted] at 0630 on 18 July 2022. (R. at 298). Mrs. [redacted] calmly answers. (Pros. Ex. 3). Mrs. [redacted] tells the operator "he strangled me, like for a while, till I thought I was going to die and I, like, couldn't move for a while . . . and then he used his shoe and hit me on my mouth." (Pros. Ex 3). She then reveals the purported shoe incident happened about two-and-a-half hours earlier, with "the choking . . . much earlier." (Pros. Ex. 3). Mrs. [redacted] concluded the call stating she was not in any danger. (Pros. Ex. 3).

The bodycam footage consists of Officer [redacted] interviewing Mrs. [redacted] as she lay in a hospital gurney. (Pros. Ex 31). He asked Mrs. [redacted] "what happened today" to which Mrs. [redacted] replied, "I was in an argument with him and it resulted in him strangling me and hitting me in the mouth with his shoes, which caused my mouth to bleed." (Pros. Ex. 31).

The military judge admitted these exhibits "conditional[ly] based on the uncooperative nature of the complaining witness in this case." (R. at 199). The government, however, could not have been happier with Mrs. [redacted] cooperation. (R. at 1031) ("I submit to you that Mrs. [redacted] could not have been more open and honest throughout this trial. . . . I don't think she lied to you once in here, members.").

Nevertheless, the government relied extensively on the exhibits conditioned on Mrs. [redacted] nonparticipation. (R. at 278) ("Those are the words of Mrs. [redacted] the wife of the accused. . . . You are going to hear those words from her 911 call."); (R. at 280). First, the government admitted not only the audio of the 911 call, but also elicited the 911 operator's testimony describing the same conversation. (R. at 304) ("She said she was strangled and that she was hit in the mouth with a shoe.").

Further, the government admitted the bodycam footage through officer [redacted] and queried him on the video. (R. at 347–49). The government's closing argument, including their PowerPoint presentation, were presented as the

cornerstone of the government's case, with the transcript of the 911 call being displayed four times and the transcript of the bodycam footage being displayed seven times. (App. Ex. XXXIII); (R. at 1033).

Standard of Review

This court reviews admission of evidence under Mil. R. Evid. 807 for an abuse of discretion. *United States v. Czachorowski*, 66 M.J. 432, 434 (C.A.A.F. 2008). A military judge abuses his discretion when: (1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider important facts. *United States v. Lattin*, 83 M.J. 192, 198 (C.A.A.F. 2023) (citations omitted).

Upon a finding of a military judge erroneously admitting evidence, "the government bears the burden of demonstrating that the admission of that erroneous evidence was harmless." *United States v. Finch*, 79 M.J. 389, 398–99 (C.A.A.F. 2020) (quotation omitted). The court weighs: "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*. (cleaned up).

"[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted." *Id.* (quotation omitted).

"On the contrary, if the military judge fails to place his findings and analysis on the record, less deference will be accorded." *Id.* (quotation omitted).

Law and Argument

Over defense's written objection, the condition precedent for admitting the audio of the 911 call and the body cam footage—that Mrs. [redacted] be uncooperative with the government—simply was not met. (App. Ex. XXV); (R. at 199). Mrs. [redacted] fully cooperated with the prosecution in a manner which rendered her prior out of court statements inadmissible as residual hearsay under MRE 807.

Military Rule of Evidence 807 states, in relevant part:

> (a) *In General*. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Mil. R. Evid. 803 or 804:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

Mil. R. Evid. 807.

The residual hearsay exception "should be used very rarely, and only in exceptional circumstances." *United States v. Marchesano*, 67 M.J. 535, 546

(A.C.C.A. 2008). The Court of Appeals for the Armed Forces recommended the following factors for determining if there are sufficient circumstantial guarantees of trustworthiness, including: "1) the mental state of the declarant; 2) the spontaneity of the statement; 3) the use of suggestive questioning; and 4) whether the statement can be corroborated." *Id.* at 545. Further, the proponent must "show he could not obtain more probative evidence despite reasonable efforts. Failure to meet that burden renders the evidence inadmissible." *Czachorowski*, 66 M.J. at 435.

The military judge abused his discretion as a matter of law in admitting the 911 call and bodycam footage because "the residual hearsay exception is inapplicable when [such testimony] is not unreasonably difficult to obtain directly from an available declarant." *Id*. at 436. Mrs. [redacted] testified, openly, willingly, and repeatedly throughout the court-martial, siding so thoroughly with the government that, the military judge declared her a hostile witness when called by the defense. (R. at 786). There was no recantation, flatly rendering this evidence inadmissible. *Czachorowski*, 66 M.J. at 435.

The government's case was objectively weak—of the original seven specifications, the government only secured a single guilty verdict. (Statement of Trial Results). The defense case was strong—the complaining witness told deeply inconsistent versions of events, the expert evidence weighed in favor of appellant,

and the investigation into appellant's alleged misconduct was, admittedly, lacking. (R. at 364, 393, 470–73, 481–82, 533, 538, 540, 709–18, 784, 877).

The prohibited evidence was extremely material to the government's case, used throughout opening and the case in chief. (R. at 280, 304, 347–49). Critically, the government used the 911 call and the bodycam footage as the anchor of its closing argument, repeatedly displaying the transcripts of both in their presentation as a means of bootstrapping Mrs. [redacted] shaky credibility. (App. Ex. XXXIII); (R. at 1033) ("And then you know that she was consistent on the 911 call at 6:33 AM, on the EMS at 6:45, talking to the doctors and nurses at 7:05, [and] the body cam video at 7:30."). Consequently, the government cannot demonstrate harmless error, and appellant's case requires reversal. *Finch*, 79 M.J. 398–99.

III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE TRIAL COUNSEL AND SPECIAL VICTIM'S PROSECUTOR TO COMMENT ON APPELLANT'S RIGHT TO SILENCE DURING CLOSING ARGUMENT AND SENTENCING, RESPECTIVELY.

Facts Relevant to Assignment of Error

Appellant exercised his right against self-incrimination and did not testify on the merits. (R. at 948). Mrs. [redacted] did not exercise her right, despite offering statements contrary to her signed, notarized affidavits. (R. at 470–473; 784, 877); (Def. App. Ex. A); (Def. App. Ex. B).

During closing argument, in an effort to bolster Mrs. [redacted] credibility, the trial counsel stated "I submit to you that Mrs. [redacted] could not have been more open and honest throughout this trial. She admitted when she was wrong. She admitted what she did. I don't think she lied to you once in here, members.[3]" (R. at 1031). This commentary drew a sua sponte admonition from the military judge. (R. at 1031).

Later in closing argument, with full knowledge appellant had exercised his constitutional rights, the trial counsel presented a slide headlined "Tyrese Campbell's Arguments are Not Credible[.]" (App. Ex. XXXIII). Trial counsel stated, "[s]o I told you why [Mrs. [redacted] is a credible witness. . . . So the flip side of this is that Tyrese Campbell is not. Now he didn't testify, no comment on that." (R. at 1036). This drew an objection. (R. at 1307). The trial counsel continued, "He did not testify. That's okay." (R. at 1307). The military judge again admonished the trial counsel, acknowledging "[t]here's a lot of problems with that first statement, that the accused was not a witness in this case." (R. at 1307). The court further instructed the panel, "the fact that he was not a witness must be completely disregarded by yourself." (R. at 1307). The defense then moved for a mistrial, which the military judge summarily denied. (R. at 1307).

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[3] In *United States v. Norwood*, 81 M.J. 12, 20 (C.A.A.F. 2021), the CAAF found clear misconduct where the government vouched for the complaining witness.

Despite being admonished at findings, the government again commented on appellant's right against self-incrimination at sentencing. (R. at 1135). At sentencing, appellant provided a limited unsworn statement regarding his productivity in service as mitigation evidence—any apology could have been used against him in a then-pending state court action. (R. at 1127–1133). The SVP stated, "So, Your Honor, this is going to be a little frustrating for me because I was prepared to come before you this morning and ask for a specific sentence, a sentence less than the sentence I'm going to ask for right now." (R. at 1135). Until he was cut off by defense counsel, the SVP argued as follows:

> Unfortunately, we have no accountability in this courtroom. And unfortunately, we have no self-improvement in this courtroom. No evidence of it. The accused took the opportunity to give an unsworn statement, which is his absolute right to do. Everything he said was his choice. And the easiest thing, all he needed to say, all he needed to do[4] . . .

(R. at 1136).

Appellant's counsel stated their belief this was "a clear violation of the Fifth Amendment right" and moved for a mistrial. (R. at 1136). Again, the military judge summarily denied appellant's motion.

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[4] Appellant notes this court recently admonished the SVP for "improperly derogate[ing] appellant's right against self-incrimination by adversely commenting on the lack of an apology in his unsworn statement" in another recent case. *United States v. Nieves-Vele*, ARMY 20220166, 2023 CCA LEXIS 549, at *2 fn. 2 (Army Ct. Crim. Ap. 21 Dec. 2023) (mem. op.)

Standard of Review

This court reviews preserved claims of prosecutorial misconduct and improper argument de novo. *United States v. Norwood*, 81 M.J.12, 19 (C.A.A.F. 2021). The court then determines "whether any error materially prejudiced the appellant's substantial rights under Article 59, UCMJ[.]" *Id*. When the error is constitutional, material prejudice is tested for harmlessness beyond a reasonable doubt. *United States v. Carter*, 61 M.J. 30, 35 (C.A.A.F. 2005).

Law

"A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Id*. The court weighs three factors to determine whether trial counsel's improper arguments at either the findings and sentencing stages 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." *Norwood*, 81 M.J. at 19.

Upon finding improper argument during findings, "reversal is warranted only when the trial counsel's comments taken as a whole were so damaging that we cannot be confident the members convicted the appellant on the basis of the evidence alone." *Id.* "Where improper argument occurs during the sentencing

portion of the trial," the court determines whether it can be confident the appellant "was sentenced on the basis of the evidence alone." *United States v. Witt*, 83 M.J. 282, 285 (C.A.A.F. 2023); *see also United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) ("When arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul, blows.").

Servicemembers' claims are owed particular attention when argument implicates their constitutional, statutory, and regulatory right to silence. U.S. Const. amend. V; Article 31, UCMJ; Mil. R. Evid. 301(a). "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. Flores*, 69 M.J 366, 371 (C.A.A.F. 2011). The government may comment on a defendant's failure to refute evidence, and challenged statements are viewed in context. *Id.* However, it is a constitutional violation if the panel would "naturally and necessarily . . . interpret the summation as comment on the failure of the accused to testify." *Id*.

In *Carter*, the CAAF found improper argument under a plain error standard where the trial counsel, in closing argument repeatedly referred to evidence of an indecent assault as "uncontroverted" and "uncontradicted" where the "charged act involved two adults alone in a private room in the early hours of the morning." *Carter*, 61 M.J. at 32–4. These comments were neither tailored to address any

weaknesses in the defense's argument, nor focused on the defense's argument undermining the complaining witness' credibility. *Id.* at 34. Considering these statements in context, CAAF found the government "essentially shifted the burden of proof to [the accused] to establish his innocence—a violation of the protections of the Fifth Amendment." *Id.* Even after the military judge instructed the members not to draw any adverse inferences, government counsel persisted. *Id*. Consequently, the court found the government could not demonstrate the error was harmless beyond a reasonable doubt. *Id* at 35.

Argument

Trial counsel set up a dichotomy. He wanted the panel to know he did not think Mrs. [redacted] lied to them once, while asserting appellant had no credible arguments even though "he didn't testify, no comment on that." (R. at 1031, 1036); (App. Ex. XXXIII). After two meager admonishments from the military judge, the SVP picked up where the trial counsel left off, specifically arguing for a greater sentence in light of appellant declining to comment on his own guilt—a comment bordering on the absurd in light of appellant's ongoing state-level criminal prosecution for the same alleged conduct. (R. at 1136). The government, consequently, offered improper argument at both findings and sentencing. *Norwood*, 81 M.J. at 12.

The government's misconduct was severe—few trial rights are so sacrosanct as the right against self-incrimination. *See* U.S. Const. amend. V; *see also* Article 31, UCMJ; *and see* Mil. R. Evid. 301(a). Both trial counsel and the SVP skated past the indirect commentary or innuendo prohibited by black letter law. *Flores*, 69 M.J. at 371; *Carter*, 61 M.J. at 32–4. In *Carter*, the government edged over the line by offering a more indirect, anodyne phrase—"uncontroverted"—a greater number of times than at issue instantly. *Carter*, 61 M.J. 32–4. Here, the government made much more direct comments on the accused's right to silence, albeit on fewer occasions. (R. at 1031, 1036–36, 1135; App. Ex. XXXIII). The injury, nevertheless, remains the same between the two cases—shifting the burden from the government to the accused. *Carter*, 61 M.J. 32–4

The measures adopted to cure the misconduct were inadequate, at both findings and sentencing. *Norwood*, 81 M.J. at 19. During findings, the military judge admonished the trial counsel after he first bolstered the complaining witness' credibility in a fashion highlighting the accused's silence. (R. at 1031). The trial counsel drove on, directly addressing appellant's failure to testify. (R. at 1307). Even after an objection, the trial counsel continued commenting on appellant. (R. at 1307). Though the fact finder switched from panel to the judge alone at sentencing, the second step of the analysis nevertheless remains in appellant's favor. The SVP, even with the foreknowledge of the trial counsel's transgressions,

continued to comment on the appellant's right to silence, perhaps in a more egregious fashion, as his commentary could have pushed appellant to expose himself to greater criminal liability from the civilian justice system. (R. at 1135–36).

Lastly, the government cannot show the errors described above to be harmless beyond a reasonable doubt. *Norwood*, 81 M.J. at 19. On the findings, as described at length above, the government offered an extremely weak case—a single fact pattern yielding four acquittals and two dismissals. The case concerning the lone conviction merits relief under the revised factual sufficiency standard. Consequently, the court cannot "be confident the members convicted the appellant on the basis of the evidence alone." Likewise, though the sentencing authority switched to military judge alone, the court cannot be confident appellant's sentence was not driven, in part, by the SVP impermissibly arguing for a greater sentence owing to appellant declining to speak on his own guilt. Appellant urges this court to take action regarding these violations of his Fifth Amendment right by setting aside his findings and sentence. *Carter*, 61 M.J. 32–4.

Conclusion

Wherefore, appellant respectfully asks this honorable court to set aside the findings and sentence.

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I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 25 January 2024.

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