UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLOR, POND, and STEELE
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant ANTONIO R. ADEN
United States Army, Appellant

ARMY 20240055

Headquarters, United States Army Japan
Matthew S. Fitzgerald, Military Judge
Colonel Nagesh Chelluri, Staff Judge Advocate

For Appellant: Colonel Frank E. Kostik, Jr., JA; Lieutenant Colonel Kyle C. Sprague, JA; Major Kelsey Mowatt-Larssen, JA; Captain Eli M. Creighton, JA (on brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Elizabeth G. Van Dyck, JA; Captain Nicholas A. Schaffer, JA (on brief).

14 August 2026

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

FLOR, Chief Judge:

An enlisted panel, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of violation of a lawful general order, two specifications of rape, three specifications of sexual assault, and one specification of aggravated assault by strangulation, in violation of Articles 92, 120, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 928 [UCMJ]. The panel acquitted appellant of one specification of attempted extramarital sexual conduct, one specification of making a false official statement, two specifications of abusive sexual contact, and one specification of assault consummated by a battery, in violation of Articles 80, 107, 120, and 128.

Appellant raises three assignments of error, only one of which merits discussion: whether trial counsel's pervasive improper arguments constituted prosecutorial misconduct that warrants reversal.[1] We find no prejudice and will affirm the findings and sentence in our decretal paragraph.

BACKGROUND

Appellant joined the Army in February 2016 as a military police soldier from Sierra Vista, Arizona, just outside of Fort Huachuca. He met his wife while they were freshmen in high school. They later formed a romantic relationship in their senior year and married in June 2016, about one year after graduating high school. Their first duty station together was Fort Riley, Kansas.

Appellant completed an unaccompanied Permanent Change of Station (PCS) move to Camp Walker, Korea, in November 2018. His wife stayed in the United States. For purposes of trial, and consistent with the Rules of Practice Before Army Courts-Martial, appellant's wife was identified using the moniker "Victim 3 [V3]."[2] Their marriage was strained during this separation. In July 2019, V3 visited appellant in Korea for approximately ten days to repair their marriage. During this visit, appellant and V3 stayed in Seoul.

On one night of the visit, appellant and V3 went to a bar and consumed alcohol to the point that appellant had to carry her back to their hotel. Once in the hotel room, V3 passed out face down on the bed with her clothes still on. She awoke to appellant removing her pants, unsnapping her bodysuit between her legs, and pulling down her underwear. She then felt appellant climb on top of her, spit on her buttocks, and insert his penis into her anus. She passed out again. When she next woke up, she told appellant to stop and to get off her before passing out again. She finally fully woke up to appellant still penetrating her anus with his penis. She yelled at appellant to get off her and asked him what he was doing. Appellant did not stop until she was able to push her arms underneath her and force herself up.

Several months later, V3 confronted appellant by Facebook Messenger, stating, "I am still 100% uncomfortable that you had sex with me anally while I was passed out drunk in Korea. . . . You knew from the very beginning I said no and

[1] We have given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine they merit neither discussion nor relief.

[2] *See* App. Exhibit II. For clarity, there were a total of three alleged victims in this case, but appellant was acquitted of all offenses involving Alleged Victim (AV) 1. For consistency, this opinion refers to Victim 2 (V2) and V3 by their numbering at trial.

didnt [sic] want to participate in anal sex." Appellant responded, "Yeah, i [sic] was stupid drunk and I can't [sic] and can never find the words to say [f]or forgiveness." V3 reported him to law enforcement in March 2022. Appellant's act against V3 on the bed in the hotel room formed the basis for one of the sexual assault specifications.

Appellant PCS'd to Torii Station, Okinawa, in December 2019. While appellant was serving in Okinawa, in November 2021, appellant's father passed away. Appellant traveled to California, then on to Mexico, to deal with his father's affairs and to attend the funeral. While in California, appellant stayed at the apartment of his "quasi stepsister" -- his father's ex-girlfriend's twenty-one-year-old daughter-- at her request. For purposes of trial, she was V2.

One day during this stay, appellant had been drinking. While V2 was doing laundry on the patio of her apartment, appellant kept trying to put a piece of plastic between her bra and her breasts, and he was ultimately successful. V2 pushed appellant away and went inside the apartment. Appellant followed V2, grabbed her by the back of the neck, and forced her down the hallway to her bedroom. V2 kept telling appellant to stop and attempted to use her hands to try to stop him from pushing her down the hallway, but appellant did not stop. Once in the bedroom, appellant locked the door and, with V2's back to the door, started to squeeze the front of her neck with his hands. Appellant told her to pull her pants down. When she did not comply, appellant squeezed her neck harder. V2 testified that her vision started to "go" and to "blur" and that her breathing was limited, so she removed her pants to get him to stop strangling her. Then appellant moved her to a sitting position on the edge of the bed while he kneeled on the bed. He grabbed her by the hair and repeatedly pulled it to try to get V2's mouth to open while attempting to put his penis in her mouth. She kept telling him to stop and tried to remind him that he was married and had a son.

The next thing V2 recalled was being on her back on the bed with appellant on top of her. Appellant penetrated V2's vagina with his penis while she kept telling him to stop. He did not stop. When he was finished, he got dressed and started to leave the apartment. V2 stopped him so that he would not drive drunk and potentially get into an accident. Afterwards, appellant told V2 that he knew she was going to report what had happened to the police and that he was "willing to face the consequences."

After appellant left, V2 contacted her mother and asked her to come over to the apartment. When her mother arrived, V2 disclosed the rape to her, called 911 to report appellant's actions to the local police, and underwent a sexual assault forensic examination. DNA testing conducted on swabs taken during this examination included appellant's DNA. Appellant's acts against V2 formed the basis for the two

specifications of rape, two of the specifications of sexual assault, and the specification of aggravated assault by strangulation.

In November 2022, appellant violated curfew by entering the gate to Torii Station between the hours of 0100-0500, in violation of Command Policy Memorandum 21-20 from Headquarters, U.S. Army Japan, Subject: United States Army in Japan (USARJ) Supplement to the United States Forces Japan Liberty Order (20 Oct. 2021), para. 8a. This formed the basis for the specification of violation of a lawful general order.

The members sentenced appellant to a dishonorable discharge, confinement for twenty years, total forfeiture of all pay and allowances, and reduction to the grade of E-1.

LAW AND DISCUSSION

A. Additional Background

On appeal, appellant contends trial counsel committed prejudicial error by making sixteen improper arguments.[3] Six of the statements were objected to at trial: the first during findings argument, the second during rebuttal argument, and the last four during sentencing argument. The defense counsel objected to the first five statements of which the military judge sustained all but one. The sixth was addressed *sua sponte* by the military judge. The six statements are summarized below:

(1) "Sleeping, unconscious, or incompetent person cannot consent. That's verbatim. Consent is red until green." The military judge overruled the defense objection, which was that trial counsel was arguing that the law has an affirmative consent requirement. Then the military judge told the members, "Members, the instructions I have provided you with are the instructions of the law. . . . there is no affirmative consent instruction provided to you."

(2) "Tampons, clothing, testing, are you really gonna victimize the victims, again?" The military judge sustained the objection from defense counsel on the grounds that this was burden shifting.

(3) The trial counsel argued:

> [Rule for Courts-Martial [R.C.M.]] 1002(f)(3)(a) requires a strict sentence to reflect the seriousness of these actions. .

[3] The special trial counsel made the findings argument, while the trial counsel argued on sentencing. For simplicity, we refer to both as trial counsel.

> . . R.C.M. 1002(f)(2)(a) the impact of the offense on the victims requires a harsh sentence. R.C.M. 1002(f)(3)(a) requires of a sentence, provided just punishment for the offense. We heard about these women. We heard about the severity of the offense against her. Rape and sexual assault are horrendous crimes. A strong sentence is absolutely necessary. For that same reason, R.C.M. 1002(f)(3)(d) requires that punishment."[4]

The defense objected, stating that the trial counsel was arguing the rules required the imposition of a harsh sentence. The military judge sustained this objection. He also instructed trial counsel to not quote from the rules any further, that the members would receive sentencing instructions from the court, that R.C.M. 1002(f) does not use the word "strict," and that the "court-martial shall impose punishment that is sufficient, but not greater than necessary to promote justice and to maintain good order and discipline in the armed forces." After the trial counsel attempted to clarify, the military judge stopped him, admonished him again to not recite the rules, and informed him that "the members are aware they must follow my instructions, not yours."

(4) "The facts in this case require punishment – the facts in this case merit punishment to promote adequate deterrence and misconduct. Here it is important to send a message to all Soldiers. To send a message loud and clear about any sort." Trial counsel stated this immediately following the judge's admonishment in response to the previous statement regarding R.C.M. 1002(f). The military judge sustained the objection from defense counsel and stated that general deterrence was a valid sentencing principle but to "be careful saying sending a message." He then informed the panel to disregard the phrase "send a message."

(5) "The defense is asking for mercy, show him the same mercy that he shown [sic] to those women whose trust." The military judge sustained the objection from defense counsel on the grounds that the defense had not made an argument yet and that trial counsel's argument was improper.

(6) "The government respectfully asks for 60 years confinement without parole . . . ." *Sua sponte*, the military judge excused the panel members, went into an Article 39(a) session and admonished the trial counsel for bringing up parole outside of the context of a sentence for life in prison. He also reiterated his concerns with the trial counsel quoting R.C.M. 1002(f) and using the word "strict." Ultimately, the military judge gave curative instructions during his sentencing

[4] The version of R.C.M. 1002(f) referenced by the trial counsel is R.C.M. 1002(f), *Manual Courts-Martial, United States* (2019 ed.), which is now reflected in R.C.M. 1002(c), *Manual for Courts-Martial, United States* (2024 ed.).

instructions to the panel at the defense counsel's request. After sentencing instructions, defense counsel confirmed they had no objections or requests for further instructions.

Appellant also raises ten other statements by trial counsel as improper argument—the first eight made during findings argument and the last two during rebuttal argument—[5] none of which were objected to by defense counsel at trial:

(7) "These three wom[e]n bravely came up and told you what happened."

(8) "[V3] told you when she went up on the stand that's a testimony of an honest person. She didn't make it up."

(9) "Does that sound like it's coming from a person [appellant] who's [sic] doesn't know what she's [V3] talking about?" This statement referred to appellant's apology to V3 after she accused him of sexual assault via Facebook Messenger.

(10) "Common sense, I hope that when we came in, we all brought our common sense with us into this court room." This statement was the next sentence after statement (9) above.

(11) "You saw her, what does she have in this, what does she have to gain?" This statement referred to the gate guard at Torii Station who testified regarding appellant's curfew violation.

(12) "The three victims got on the witness stand and they pour [sic] their hearts out."

(13) "Commonsense instructions, you're expected to use your own common sense and knowledge and of human nature and the ways of the world. Now, speaking of the common sense, defense team may not have liked how I presented this case." On appeal, appellant argues this and statement (10) above were illustrative of several instances in which trial counsel improperly personalized arguments by using the word "I".

[5] Trial counsel made an eleventh statement during rebuttal that did not receive an objection. "[AV1], she thought of [appellant] as a younger brother. Was there any indication that she would have any motivation to lie, did she look like a lying person[?] She laid it out as it was." However, we will not address this statement because appellant was acquitted of all offenses against AV1. Even assuming plain error, appellant cannot establish prejudice because he was acquitted of these offenses. *See United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017).

(14) "We, the government, want you to follow the law, the instruction [sic] given by the judge." For context, prior to this statement, trial counsel encouraged the panel to refer to the military judge's definition of reasonable doubt and then following this statement, referred the panel to the military judge's instruction on circumstantial evidence.

(15) "I'm a bit surprised that they did not ask you to consider if there is a DNA swab of the gate or footprint of the gate showing that [appellant] was there." This statement referred to appellant's curfew violation. Defense counsel argued in their findings argument that there was a lack of proof—i.e., no video footage, written reports, or digital log of appellant's common access card being scanned before 0500.

(16) "Trauma, alcohol and look what I'm doing and remember what defense was doing." For context, this statement referred to memory gaps in V2 and V3's testimony due to alcohol consumption and that they testified with statements such as "I don't remember" when they did not remember specific facts. Immediately following this statement, trial counsel made the objected-to statement (2) regarding "Tampons, clothing . . ."

At the conclusion of findings arguments, right before the members began deliberations, the military judge gave the panel another curative instruction. This instruction was not objected to by defense, although they did propose an alternative, which was marked as Appellate Exhibit XLVII.

The proposed defense instruction stated:

> Members, you heard the Government stated [sic] "do not revictimize the victims" or words to that effect. You are advised that you are not to consider the effect of your findings, emotional or otherwise, on any person or party to the trial.
>
> You are further reminded that the Accused is presume [sic] innocent until the Government proves, beyond a reasonable doubt, the elements as I read them to you. That burden lies solely with the Government.

The military judge's instruction stated:

> Remember I told you closing summations are not evidence. They are what the parties believe the evidence showed you. You are to decide this case, as I've said several times, based on the evidence that was presented in court, the instructions

> on law that I provided you, and your own conscience. You may not decide this case based on any appeals to your emotions or advocacy that appeals to your emotions, that would be impermissible. So, you should set aside anything that was not the three things you can decide that on. You should also not consider anybody's appeal to what justice is. In your role as the fact finder, justice is what you determine in your findings and the facts in evidence, the law I've instructed you on, and your own conscience, and nothing else.

On the record, and in front of the panel, defense counsel confirmed they had no objection to the judge's given instruction. The members then began deliberations, which lasted eight hours over the course of two days.

B. Law

"Whether a statement made during an argument on findings or sentencing is improper is a question of law that [we] review[] de novo." *United States v. Matti*, 86 M.J. 384, 390 (C.A.A.F. 2026) (citation omitted).

If an argument is objected to at trial, that argument is reviewed for prejudice under Article 59, UCMJ. *E.g.*, *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). Article 59(a) states, "A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."

If an argument is not objected to at trial, a different standard applies. "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); *see also Matti*, 86 M.J. at 390 (quoting R.C.M. 919(c)). "Failure to object to improper argument before the military judge begins deliberations, or before the military judge instructs the members on sentencing, shall constitute forfeiture of the objection." R.C.M. 1001(h).

"When an objection is forfeited, this Court reviews the assertion of improper comment only for plain error." *Matti*, 86 M.J. at 390-91 (citing *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019)). Plain error occurs "when (1) there was an error, (2) the error was clear or obvious, and (3) the error caused material prejudice to a substantial right of the accused." *Id.* at 391 (citation omitted). "[T]he appellant has the burden of establishing the prejudice." *Sewell*, 76 M.J. at 18 (citation omitted).

In assessing prejudice, we apply the three-part balancing test from *Fletcher*: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Fletcher*, 62 M.J. at 184. Factors impacting the severity of the misconduct 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.

Id. As our superior court stated, prosecutorial misconduct requires 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.*

C. Discussion

First, we conclude that several of the statements challenged on appeal were not improper. For instance, in statement 1, trial counsel merely recites the military judge's instruction on the definition of consent. We also find no error with the rhetorical question posed in statement 11, "what does [the gate guard] have to gain?" that fairly argued lack of motive or bias of that particular witness. Similarly, the rhetorical question in statement 9 regarding appellant's apology to V3 after she accused him of sexual assault – "Does that sound like it's coming from a person [appellant] who doesn't know what she's [V3 is] talking about?" – fairly argued permissible inferences about the appellant's knowledge, his state of mind, and V3's credibility. Also, trial counsel's argument in statement 15 that he was "surprised that [the defense] did not ask you to consider if there is a DNA swab of the gate or footprint of the gate showing that [appellant] was there" was also not an impermissible argument of the defense's theory. Lastly, trial counsel's argument in statement 16, "Trauma, alcohol and look what I'm doing and remember what defense was doing" was not an impermissible argument in context, despite the use of the word, "I."

There were, however, several arguments by the trial counsel that were improper:[6]

[6] We see no plain and obvious error in trial counsel's statement (Statement 7)

(continued . . .)

(2) "Are you really gonna victimize the victims again?" We agree with the military judge that this statement shifted the burden. In making this statement during findings, trial counsel shifted away from the government's burden of proof and implied a duty of the panel to convict in order to protect the victim rather than a duty to neutrally weigh the evidence and determine whether the elements had been met beyond a reasonable doubt. It also tended to improperly play on the panel's emotions.

(3) "R.C.M. 1002(f)(2)(a) the impact of the offense on the victim requires a harsh sentence." As the military judge correctly found, this was a misstatement of the law, as the rule provides that "the court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline . . . ."

(6) Similarly, asking the panel to sentence appellant to sixty years *without parole* was improper as an adjudged term of "without parole" can only be applied to a life sentence.

(8) "[V3] told you when she went up on the stand that's a testimony of an honest person. She didn't make it up." While not objected to, this statement clearly and plainly constitutes impermissible vouching. *See Matti*, 86 M.J. at 392.

(10),(13) "Commonsense instructions, you're expected to use your own common sense and knowledge and of human nature and the ways of the world. Now, speaking of the common sense, defense team may not have liked how I presented this case." This was one of several appeals to the panel's common sense, to include Statement 10 concerning common sense, throughout the government's closing argument, which is otherwise permissible argument.[7] However, when coupled with

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(. . . continued)
remarking that the victims "bravely" told the panel what happened or that the victims "pour[ed] their hearts out" (Statement 12). In certain contexts, these characterizations of a victim's demeanor could be impermissibly used to bolster a victim's credibility or to seek sympathy from a panel. Given the context in which they were used here, we find no plain or obvious error. On appeal, the government concedes in its brief that these arguments were impermissible vouching. While we appreciate this concession, we are not bound by it.

[7] We note that the Benchbook includes this instruction for every contested trial with members:

(continued . . .)

the second sentence above, trial counsel insinuated that the defense team did not like common sense. This court and our superior court have long held that trial counsel may not disparage or attack defense counsel. *See Voorhees*, 79 M.J. at 10. Under a plain error review, we find this argument was an impermissible personal attack on defense counsel.

(14) Similarly, the argument, "We, the government, want you to follow the law, the instruction given by the judge" implied that defense counsel did not want the panel to follow the military judge's instructions. Under a plain error review, we find this statement was an impermissible personal attack on the defense team.

For purposes of our analysis, we will assume that the trial counsel's arguments that the panel should "show [appellant] the same mercy that he [showed] to [the victims]" (Statement 5) and that "it is important to send a message to all Soldiers" (Statement 4) were error and the military judge did not abuse his discretion in sustaining those objections. Regarding the argument to "send a message," as the military judge correctly stated, general deterrence is a recognized sentencing principle under R.C.M. 1002. *See also United States v. Lania*, 9 M.J. 100, 102 (C.M.A. 1980) ("general deterrence is a proper function of sentencing."). However, we also agree that counsel must be careful in making arguments to "send a message." Counsel must ensure such argument is framed strictly as an appeal to general deterrence and is not the sole focus of their sentencing case. Counsel also should not improperly ask the panel to consider their personal and professional reputations. *E.g.*, *United States v. Witt*, 83 M.J. 282 (C.A.A.F. 2023), cert. denied 144 S. Ct. 498 (2023); *United States v. Akbar*, 74 M.J. 364 (C.A.A.F. 2015).

Finding several of the government's arguments were improper, we test for material prejudice under Article 59(a), UCMJ, applying the three-part *Fletcher* test.

First, we conclude the severity of the misconduct was not egregious. The five indicators of severity lead us to this conclusion. While the improper arguments spanned closing argument, rebuttal, and sentencing argument, the total number of

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(. . . continued)

> Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence, you are expected to use your own *common sense* and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence.

Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 2-5-12 (29 Feb. 2020) (emphasis added).

statements were low compared to the overall length of government's arguments. Furthermore, the nonpermissive statements occurred at the end of a lengthy trial of five days, a relatively long trial. Moreover, the panel members deliberated for approximately eight hours on findings across two days and more than two hours on sentence—again a relatively long period of time, which indicates that they took their roles seriously. Finally, the trial counsel almost always abided by the rulings from the military judge.

Second, we find the military judge's curative measures mitigated most of the trial counsel's improper arguments. The military judge ruled mostly in favor of defense on their objections, raised his own objection *sua sponte*, and gave curative findings and sentencing instructions as required. Panel members are presumed to follow the military judge's instructions unless there are indications to the contrary —and there are none in this case. *See United States v. Short*, 77 M.J. 148, 151 (C.A.A.F. 2018). We are confident in the panel members' adherence to the military judge's instructions based on the mixed findings. "The panel's mixed findings further reassure us that the members weighed the evidence at trial and independently assessed [a]ppellant's guilt without regard to trial counsel's arguments." *Sewell*, 76 M.J. at 19.

Turning to the sentencing argument, the panel heard the military judge admonish the trial counsel multiple times during sentencing. The military judge's curative instructions, to which the defense did not object, sufficiently addressed the error. Add to this the fact that the panel sentenced appellant to twenty years of confinement, which was much closer to the defense request (no more than fifteen years) than to the government request (sixty years) and we are convinced that the panel followed the military judge's instructions.

Finally, the weight of the evidence supporting the convictions was high. The most convincing evidence with regard to V3 was appellant's apology: "Yeah, i [sic] was stupid drunk and I cant [sic] and can never find the words to say [f]or forgiveness." Regarding V2, appellant stated to V2 that he knew V2 was going to call the police and report what had happened, and that "he was willing to face the consequences." V2's account was buttressed by her mother's testimony concerning her outcry and demeanor upon her mother's arrival to the apartment a few hours after the offenses. DNA evidence also supported V2's testimony. Regarding the curfew violation, appellant's own testimony established that he violated the curfew by being away from his installation or inside his command approved off-post residence between the hours of 0100 and 0500.

"In light of the evidence and the outcome of [a]ppellant's trial, we are confident that the members convicted the appellant on the basis of the evidence alone." *Sewell*, 76 M.J. at 19 (internal quotations and citation omitted). Based on the foregoing, we are convinced that appellant cannot show material prejudice from

the improper arguments in this case. As a result, appellant's claim that these arguments constituted prejudicial prosecutorial misconduct fails.

CONCLUSION

On consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.[8]

Senior Judge POND and Judge STEELE, concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

[8] We correct the Statement of Trial Results Findings Worksheet, which reflects a guilty finding to Specification 2 of Charge II (assault consummated by a battery), to a finding of "not guilty".