IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF DIRECT APPEAL**
Appellee,	)	**PURSUANT TO ARTICLE**
	)	**66(b)(1)(A), UCMJ**
v.	)	
	)	
	)	
Airman First Class (E-3)	)	
JOHN P. MATTI,	)	
United States Air Force	)	11 August 2023
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

On 23 June 2022, a panel of officer and enlisted members in a Special Court-Martial, convicted Airman First Class (A1C) John P. Matti, 56th Aircraft Maintenance Squadron, Luke Air Force Base, Arizona, contrary to his pleas, of violating two specifications of Article 128, Uniform Code of Military Justice (UCMJ).[1] The military judge sentenced A1C Matti to be reduced to the grade of E-1, to be confined for 75 days for specification 2 (running concurrently with confinement of 14 days for specification 3), to forfeit $1,222 pay per month for two months, and a Reprimand.

A1C Matti has not submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ. On 31 May 2023, the Government sent A1C Matti the required notice by mail of his right to appeal, within 90 days, because his court-martial sentence did not contain any punishment which would trigger automatic review by the Air Force Court of Criminal Appeals. Pursuant to Article 66(b)(1)(A), A1C Matti respectfully files his notice of direct appeal with this Court.

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[1] A1C Matti was charged with four specifications of assault consummated by a battery against his spouse in violation of Article 128, UCMJ. ROT Vol. 1, Entry of Judgment, dated 28 July 2022. He was found not guilty of two of the four specifications. *Id.*

Respectfully submitted,

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4777
Email: nicole.herbers@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I ce1tify that the original and copies of the foregoing was sent via email to the Comt and served on the Appellate Government Division on 11 August 2023.

Respectfully submitted,

NICOLE J. HERBERS, Maj, USAF
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Air Force Appellate Defense Division
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22072**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
John P. MATTI	)	**DOCKETING**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

A notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was submitted by Appellant and received by this court in the above-styled case on 11 August 2023. On 15 August 2023, the record of trial was delivered to this court by the Military Appellate Records Branch.

Accordingly, it is by the court on this 15th day of August, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 3. Briefs will be filed in accordance with Rule 18 of the Joint Rules of Appellate Procedure and Rule 23.3(m) of this court's Rules of Practice and Procedure. *See* JT. CT. CRIM. APP. R. 18, A.F. Ct. Crim. App. R. 23.3(m).

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO ATTACH AND SUSPEND RULE 18**
v.	)	Before Panel 3
Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant*	)	No. ACM 22072 23 August 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(b) and 23.3(r) of this Honorable Court's Rules of Practice and Procedure, Airman First Class (A1C) John P. Matti (Appellant) hereby moves (1) to attach the below document to the Record of Trial and (2) moves this Honorable Court to suspend its rules in regards to the time for filing a Brief on Behalf of Appellant, JT. CT. CRIM. APP. R. 18, until such a time as the verbatim transcript is produced.

1. Government's Email to JAT Central Docketing Workflow, dated 16 August 2023, 2 pages (Appendix)

The attached email is relevant to the Appellant's request that this Honorable Court suspend its rules in regards to the time for filing a Brief on Behalf of Appellant. The authenticity of the email should be apparent. The email shows a request from the Government to the Trial Judiciary (JAT) to produce a verbatim transcript in the case. Since the Government has already requested JAT prepare a verbatim transcript, it is unnecessary for Appellant to move this court to order its production.

However, Appellant still respectfully requests this Honorable Court suspend Rule 18 until such a time as a verbatim transcript has been produced by the Government.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this Motion to Attach and to Suspend Rule 18.

Respectfully submitted,

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: nicole.herbers@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 23 August 2023.

Respectfully submitted,

NICOLE J. HERBE , Maj, USAF
Appellate Defense Counsel
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1500 West Perimeter Road, Suite 1100
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24 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOHN P. MATTI, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO ATTACH AND SUSPEND RULE 18 ACM 22072 Panel No. 3

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion to Attach and Suspend Rule 18. A verbatim transcript is being prepared for Appellant's case. The United States respectfully requests that this Court not set a particular due date for production of the verbatim transcript, unless it later becomes necessary to intervene. Should Appellant believe production of the verbatim transcript has taken too long, he can file for relief in his assignments of error brief.

WHEREFORE, the United States respectfully requests that this Court grant Appellant's motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 August 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22072**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John P. MATTI	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 13 January 2023, Appellant was convicted at a special court-martial of two specifications of assault consummated by a battery against his spouse in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.[1] The military judge sentenced Appellant to 75 days confinement, forfeiture of $1,222.00 pay per month for two months, and a reprimand. On 11 August 2023, the Appellant filed a timely notice of direct appeal pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A),[2] which was docketed with this court on 15 August 2023.

On 23 August 2023, Appellant moved to attach an email to present to this court that the Government requested the Air Force Trial Judiciary produce a verbatim transcript in his case. Appellant further requested that this court suspend Rule 18 until such time a verbatim transcript has been produced by the Government. *See* JT. CT. CRIM. APP. R. 18.

On 17 August 2023, the Government responded, requesting the court grant Appellant's motion.

In consideration of the foregoing, and the Government's position, the court grants the Appellant's Motion to Attach, suspends Rule 18, and will establish a timeline for the completion of this transcript.

Accordingly, it is by the court on this 28th day of August, 2023,

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[1] References to the punitive articles of the UCMJ in this order are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] *See* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022).

ORDERED:

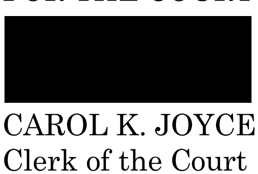
Appellant's Motion to Attach and Suspend Rule 18 is **GRANTED.**

It is further ordered:

The Government will provide the verbatim transcript, either in printed or digital format, to the court, appellate defense counsel, and appellate government counsel not later than **31 October 2023**. If the transcript cannot be provided to the court and the parties by that date, the Government will inform the court in writing not later than **24 October 2023** of the status of the Government's compliance with this order.

Appellant's brief will be submitted in accordance with the timelines established under Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals with one exception: Appellant's brief shall be filed within 60 days after appellate defense counsel has received a printed or digital copy of the certified verbatim transcript.

FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENT**
	)	
v.	)	Before Panel No. 3
	)	
Airman First Class (E-3) **JOHN P. MATTI**, United States Air Force *Appellant*	)	No. ACM 22072 31 October 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following document to the record:

> **Appendix – General Court Martial Verbatim Transcript – United States v. Airman First Class John P. Matti, dated 21 June 2022 (446 pages)**

On 28 August 2023, this Court ordered the Government to prepare a verbatim transcript in this case. (*Order*, dated 28 August 2023). This appendix is responsive to the Court's order. The attached file contains an electronic version of the transcript. There are no sealed or classified portions that require delivery of a separate hard copy.

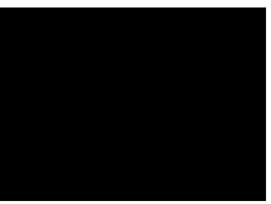
WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Document.

KA SAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court on 31 October 2023. A copy of the motion and attachment were delivered to the Appellate Defense Division.



KATE E. LEE, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **JOHN P. MATTI,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 3 Case No. ACM 22072 Filed on: 20 December 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on 28 February 2024. The case was docketed on 15 August 2023. On 23 August 2023, Appellant moved to attach an email that the Government had already requested a verbatim transcript and also requested suspension of Rule 18 until such time as the verbatim transcript was received. On 28 August 2023, the court granted this request. The court suspended Rule 18, with the exception that Appellant's brief would be filed within 60 days after receipt of the certified verbatim transcript. A verbatim transcript was not filed with this court until 31 October 2023, 77 days after docketing. From the date of docketing to the date of this filing, 127 days have elapsed. On the date requested, 197 days will have elapsed from the date this case was received by

the Court.[1] However, on the date requested, only 120 days will have elapsed from the date of receipt of the verbatim transcript.

On 21 September through 23 September 2022, Appellant was tried by a special court-martial composed of a panel of officer and enlisted members at Luke Air Force Base, Arizona. Appellant was convicted of one charge and two specifications in violation of Article 128, Uniform Code of Military Justice (UCMJ) for assault consummated by a battery against a spouse.[2] R. at 421. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $1,222 pay per month for two months, to 75 days confinement on specification 2 of the Charge, and to 14 days confinement on specification 3 of the Charge, to run concurrently. R. at 446. The convening authority took no action on the findings or the sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 21 July 2022.

The record of trial consists of 5 prosecution exhibits, 19 defense exhibits, and 19 appellate exhibits; the transcript is 446 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters as a Reservist. Since this transcript has been received on 31 October 2023, Counsel has finalized a Brief on Behalf of Appellant for U.S. v. Vanzant, ACM 22004. Counsel argued U.S. v. Jennings, ACM 40282 on 31 October

---

[1] Although this is Appellant's first request for an EOT, additional details are added to this motion given more than 180 days will have passed on the date requested since the docketing of this case, not counting the time suspended, in compliance with Rule 23.3(m)(6).

[2] Appellant was acquitted of two specifications of assault consummated by a battery on a spouse, Specifications 1 and 4 of the Charge. ROT Vol. 1, Entry of Judgement (EOJ), dated 23 June 2022.

2023. Counsel has reviewed Appellant's record of trial but has not yet finalized coordination with Appellant on the matters to be raised. Appellant is also seeking outside counsel.

Appellant was informed of his right to a timely appeal and concurs with this request for an enlargement of time. This enlargement of time is necessary to allow the undersigned to fully review Appellant's case and advise Appellant regarding potential errors. Further it will allow Appellant adequate time to exercise his right to counsel.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement.

Respectfully Submitted,

NICOLE J. HERBERS
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
E-Mail: nicole.herbers@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 20 December 2023.

NICOLE J. HERBERS
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27 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOHN P. MATTI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 22072 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

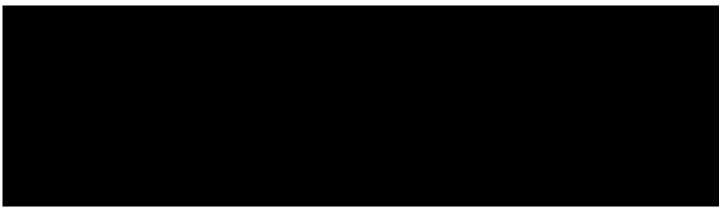
Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 December 2023.



PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **JOHN P. MATTI,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 3 Case No. ACM 22072 Filed on: 20 February 2024

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on 29 March 2024. The case was docketed on 15 August 2023. On 23 August 2023, Appellant moved to attach an email that the Government had already requested a verbatim transcript and also requested suspension of Rule 18 until such time as the verbatim transcript was received. On 28 August 2023, the court granted this request. The court suspended Rule 18, with the exception that Appellant's brief would be filed within 60 days after receipt of the certified verbatim transcript. A verbatim transcript was not filed with this court until 31 October 2023, 77 days after docketing. From the date of docketing to the date of this filing, 189 days have elapsed. On the date requested, 227 days will have elapsed from the date this case was received by the Court. However, on the date requested, only 150 days will have

elapsed from the date of receipt of the verbatim transcript and only 163 days from docketing, excluding those 77 days when time to file was suspended.

On 21 September through 23 September 2022, Appellant was tried by a special court-martial composed of a panel of officer and enlisted members at Luke Air Force Base, Arizona. Contrary to his pleas, Appellant was convicted of one charge and two specifications in violation of Article 128, Uniform Code of Military Justice (UCMJ) for assault consummated by a battery against a spouse.[1] R. at 421. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $1,222 pay per month for two months, to 75 days confinement on specification 2 of the Charge, and to 14 days confinement on specification 3 of the Charge, to run concurrently. R. at 446. The convening authority took no action on the findings or the sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 21 July 2022.

The record of trial consists of 5 prosecution exhibits, 19 defense exhibits, and 19 appellate exhibits; the transcript is 446 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters as a Reservist. Since the grant of the first Enlargement of Time, Counsel has finalized a Reply Brief and Response to Motion to Dismiss for U.S. v. Vanzant, ACM 22004. Counsel has also reviewed and is close to submitting the case of U.S. v. Haynes, ACM 40306 (f. rev.). Therefore, this case is counsel's priority.

[1] Appellant was acquitted of two specifications of assault consummated by a battery on a spouse, Specifications 1 and 4 of the Charge. ROT Vol. 1, Entry of Judgement (EOJ), dated 23 June 2022.

Counsel has reviewed Appellant's record of trial but has not yet finalized coordination with Appellant on the matters to be raised. Appellant is in the processing of hiring outside counsel and asked the undersigned request additional time to allow for outside counsel's review of this record of trial.

Appellant was informed of his right to a timely appeal and concurs with this request for an enlargement of time. This enlargement of time is necessary to allow the undersigned to fully review Appellant's case and advise Appellant regarding potential errors. Further it will allow Appellant adequate time to exercise his right to counsel.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this second requested enlargement of time for good cause shown.

Respectfully Submitted,

NICOLE J. HERBERS
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E-Mail: nicole.herbers@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 20 February 2024.

NICOLE J. HERBERS
Appellate Defense Counsel
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22 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOHN P. MATTI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 22072 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

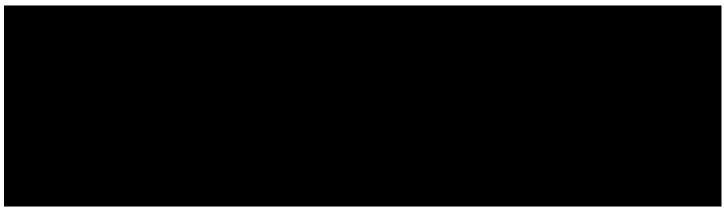
Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 February 2024.



PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **JOHN P. MATTI,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 3 Case No. ACM 22072 Filed on: 19 March 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3), (4), and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on 28 April 2024. The case was docketed on 15 August 2023. On 23 August 2023, Appellant moved to attach an email that the Government had already requested a verbatim transcript and also requested suspension of Rule 18 until such time as the verbatim transcript was received. On 28 August 2023, the Court granted this request. The Court suspended Rule 18, with the exception that Appellant's brief would be filed within 60 days after receipt of the certified verbatim transcript. A verbatim transcript was not filed with this court until 31 October 2023, 77 days after docketing. From the date of docketing to the date of this filing, 217 days have elapsed. On the date requested, 257 days will have elapsed from the date this case was received by the Court. However, on the date requested, only 180 days will have

elapsed from the date of receipt of the verbatim transcript and only 193 days from docketing, excluding those 77 days when time to file was suspended.

On 21 September through 23 September 2022, Appellant was tried by a special court-martial composed of a panel of officer and enlisted members at Luke Air Force Base, Arizona. Contrary to his pleas, Appellant was convicted of one charge and two specifications in violation of Article 128, Uniform Code of Military Justice (UCMJ) for assault consummated by a battery against a spouse.[1] R. at 421. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $1,222 pay per month for two months, to 75 days confinement on specification 2 of the Charge, and to 14 days confinement on specification 3 of the Charge, to run concurrently. R. at 446. The convening authority took no action on the findings or the sentence. ROT, Vol. 1, Convening Authority Decision on Action, 21 Jul. 2022.

The record of trial consists of 5 prosecution exhibits, 19 defense exhibits, and 19 appellate exhibits; the transcript is 446 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters as a Reservist. Since the grant of the second Enlargement of Time, Counsel has submitted a Brief on Behalf of Appellant for *United States v. Haynes*, ACM 40306 (f rev). Counsel is also assigned to *United States v. Tozer*, ACM ( ), however, no transcript has been received. Therefore, this case is counsel's priority. Counsel has reviewed Appellant's record of trial and started the draft brief, but has

[1] Appellant was acquitted of two specifications of assault consummated by a battery on a spouse, Specifications 1 and 4 of the Charge. ROT Vol. 1, Entry of Judgement (EOJ), dated 23 June 2022.

not yet finalized coordination with Appellant on all the matters to be raised. Appellant has hired civilian counsel since the last grant of additional time. Civilian counsel has just started review of the record of trial and Appellant asked the undersigned to request additional time to allow for civilian counsel's review of the record to determine if he wishes to raise additional matters.

Appellant was informed of his right to a timely appeal, was consulted about the right to timely appeal, and concurs with this request for an enlargement of time. This enlargement of time is necessary to allow the undersigned to fully review Appellant's case and advise Appellant regarding potential errors. Further it will allow Appellant adequate time to confer with civilian counsel on matters he may raise.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this third requested enlargement of time for good cause shown.

Respectfully Submitted,

NICOLE J. HERBERS
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Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
E-Mail: nicole.herbers@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 19 March 2024.

NICOLE J. HERBERS
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
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20 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOHN P. MATTI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 22072 Panel No. 3

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 March 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **JOHN P. MATTI,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 3 Case No. ACM 22072 Filed on: 18 April 2024

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3), (4), and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on 28 May 2024. The case was docketed on 15 August 2023. On 23 August 2023, Appellant moved to attach an email that the Government had already requested a verbatim transcript and also requested suspension of Rule 18 until such time as the verbatim transcript was received. On 28 August 2023, the Court granted this request. The Court suspended Rule 18, with the exception that Appellant's brief would be filed within 60 days after receipt of the certified verbatim transcript. A verbatim transcript was not filed with this court until 31 October 2023, 77 days after docketing. From the date of docketing to the date of this filing, 247 days have elapsed. On the date requested, 287 days will have elapsed from the date this case was received by the Court. However, on the date requested, only 210 days will have

elapsed from the date of receipt of the verbatim transcript and only 223 days from docketing, excluding those 77 days when time to file was suspended.

On 21 September through 23 September 2022, Appellant was tried by a special court-martial composed of a panel of officer and enlisted members at Luke Air Force Base, Arizona. Contrary to his pleas, Appellant was convicted of one charge and two specifications in violation of Article 128, Uniform Code of Military Justice (UCMJ) for assault consummated by a battery against a spouse.[1] R. at 421. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $1,222 pay per month for two months, to 75 days confinement on specification 2 of the Charge, and to 14 days confinement on specification 3 of the Charge, to run concurrently. R. at 446. The convening authority took no action on the findings or the sentence. ROT, Vol. 1, Convening Authority Decision on Action, 21 Jul. 2022.

The record of trial consists of 5 prosecution exhibits, 19 defense exhibits, and 19 appellate exhibits; the transcript is 446 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters as a Reservist. Since the grant of the third Enlargement of Time, Counsel has submitted a Reply Brief for *United States v. Haynes*, ACM 40306 (f rev). Counsel is also assigned to *United States v. Tozer*, ACM ( ), however, no transcript has been received. Therefore, this case remains counsel's priority. Counsel has reviewed Appellant's record of trial and started the draft brief, but has not yet

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[1] Appellant was acquitted of two specifications of assault consummated by a battery on a spouse, Specifications 1 and 4 of the Charge. ROT Vol. 1, Entry of Judgement (EOJ), dated 23 June 2022.

finalized coordination with Appellant on all the matters to be raised. Appellant hired civilian counsel and is coordinating with civilian counsel since the last grant of additional time. Civilian counsel reviewed the record of trial and Appellant asked the undersigned to request additional time given civilian counsel and Appellant finalized review on the day prior to this filing.

Appellant was informed of his right to a timely appeal, was consulted about his right to timely appeal, and concurs with this request for an enlargement of time. This enlargement of time is necessary to allow the undersigned to fully review Appellant's case and advise Appellant regarding potential errors. Further it will allow Appellant adequate time to confer with civilian counsel on matters he may raise.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this third requested enlargement of time for good cause shown.

Respectfully Submitted,

NICOLE J. HERBERS
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 18 April 2024.

NICOLE J. HERBERS
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19 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOHN P. MATTI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 22072 Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 19 April 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel 3
Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant*	)	No. ACM 22072 28 May 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ASSIGNMENTS OF ERROR

I.

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

II.

WHETHER IT WAS PLAIN ERROR FOR THE MILITARY JUDGE TO ADMIT LAY WITNESS TESTIMONY ON THE NATURE OF BRUISING AND IN THE ALTERNATIVE, WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL FAILED TO OBJECT TO LAY WITNESS TESTIMONY ON THE NATURE OF BRUISING.

III. [1]

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING AIRMAN FIRST CLASS A.A. TO TESTIFY TO "OTHER BAD ACTS."

[1] Appellant personally raises issues III, IV, V, and VI pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Pursuant to Rule 18.2 of this Court's Rules of Practice and Procedure, these issues are raised in the attached Appendix.

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISRETION IN DENYING DEFENSE AN ALIBI INSTRUCTION.

V.

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL FAILED TO SEEK ASSISTANCE FROM AN EXPERT TO EXPLAIN WHETHER THE DOCUMENTED INJURIES WERE CONSISTENT WITH THE ALLEGATIONS.

VI.

WHETHER APPELLANT'S CONVICTION AND SENTENCE SHOULD BE SET ASIDE BECAUSE APPELLANT WAS ENTITLED TO A UNANIMOUS VERDICT.

STATEMENT OF THE CASE

At Luke Air Force Base, Arizona, Airman First Class (A1C) John P. Matti, (hereinafter "Appellant") pled not guilty to the charge and four specifications of assault consummated by a battery upon a spouse, in violation of Article 128, Uniform Code of Military Justice (UCMJ), and was tried before a panel of officer and enlisted members. R. at 47, Entry of Judgment (EOJ), 23 June 2022. Appellant was convicted of the charge and two specifications. R. at 421. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $1,222 pay per month for two months, to 75 days confinement on specification 2 of the Charge, and to 14 days confinement on specification 3 of the Charge, to run concurrently. R. at 446. The convening authority took no action on the findings or the sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 July 2022. On 31 May 2023, Appellant was notified of his right to submit a direct appeal to the

Air Force Court of Criminal Appeals. Notice of Right to Submit Direct Appeal to the Air Force Court of Criminal Appeals, 31 May 2023. On 11 August 2023, Appellant filed a notice of direct appeal, and this Court docketed the case with receipt of the record of trial on 15 August 2023. Notice of Docketing, 15 August 2023.

STATEMENT OF FACTS

Appellant was acquitted of the two specifications of assault consummated by a battery upon a spouse which were based solely on the testimony of the named victim, C.C., but was convicted of two specifications that had some evidence introduced as alleged corroboration of bruising purporting to arise from the charged conduct. EOJ, R. at 181-91.

Appellant married C.C. in June of 2020, when Appellant was at technical training. R. at 207. In August 2020, they moved together to Surprise, Arizona after living separately since March of 2020, when Appellant joined the Air Force. R. at 173, 176, 206-07. At the onset of their married life, Appellant and C.C. had a roommate to help with finances. R. at 176-77. A1C A.A. lived with them through January 2021. R. at 177.

Both specifications that Appellant was convicted of occurred at or near their home in Surprise, Arizona. EOJ. Specification 3 occurred in January 2021 and specification 2 was on or about 21 May 2021. *Id*. The Government's only photographic evidence of any injury was related to specification 2. R. at 192-98; Prosecution Exhibit (Pros. Ex.) 1. C.C's testimony supporting the allegation in specification 2 details a specific date and time and it is the only specification charged

on an exact date. R. at 192-98; EOJ.

Specification 2

Specification 2 alleged Appellant placed his knee on C.C.'s back on or about 21 May 2021 at their home in Surprise Arizona. EOJ. Narrowing the timeframe in which she alleged this conduct occurred, C.C. testified the acts underlying specification 2 happened on 21 May 2021, specifically before she left for work that afternoon, at approximately 2 p.m. R. at 192, 195-96. Appellant worked swing shift on 21 May 2021, from 3 p.m. to 11 p.m. Defense Exhibit (Def. Ex.) E, R. at 323-24. Consistent with C.C.'s proffered timeframe, C.C. testified when Appellant worked swing shift, he would sleep until around 2 in the afternoon and leave around 2:30 p.m. for work at 3 p.m. *Compare* R. at 191, 195-96, *with,* R. at 216.

According to C.C.'s testimony, just prior to her leaving for work at 2 p.m., Appellant and C.C. were arguing because Appellant took C.C.'s phone to use her Amazon account. R. at 192, 193, 195-96, 216. C.C. testified she tried to grab her phone back, but Appellant ran to the garage. *Id*. When Appellant was out of the room, C.C. took his phone and went through his social media account, finding that Appellant had added a woman to his account who had made a post dressed in lingerie. *Id*. When Appellant returned, they argued over this woman on Appellant's account and Appellant is alleged to have made the argument physical. *Id.*

C.C. testified Appellant grabbed C.C.'s wrists, lifted them up and lifted her arms higher to raise her off the stool where she had been going through Appellant's phone. *Id.* C.C. tried to kick Appellant, and when she did, she testified Appellant lifted her arms to where she lost balance and fell onto her left knee and chin on the

wood floor. R. at 193-94. There is no testimony C.C.'s arms were behind her back as she fell, nor that Appellant was still holding her hands. C.C. claimed the alleged injuries from falling on her left knee and chin are depicted in Prosecution Exhibit 1. R. at 197. C.C. testified Appellant then placed his knee onto her back, in between her shoulder blades, which is the charged conduct. R. at 194-95, EOJ. C.C. testified she immediately left for work after this incident. R. at 195.

C.C. testified she took the pictures in Prosecution Exhibit 1, purportedly evincing the injuries to her chin and knee that immediately preceded the charged conduct, after returning home at approximately 10 p.m. on 21 May 2021, or 2200 hours on a 24-hour clock. R. at 197. But C.C. confirmed the time stamps on the photos in Prosecution Exhibit 1 show they were taken on the morning of 21 May 2021. R. at 218-19. C.C.'s phone was on a 24-hour clock. R. at 218. The time stamp on the photo documenting a bruise on a knee is 1058 on 21 May 2021—not around 1400 hours when she claimed the charged conduct occurred or 2200 hours when she returned home and claimed she took the pictures. *Compare* R. at 192, 195-96, *with* R. at 197. The time stamp on the photo documenting injury to C.C.'s chin was 1104 on 21 May 2021. R. at 198. There is no evidence in the record to document whether bruising would be immediate or appear as depicted in Prosecution Exhibit 1.

One witness is purported to have seen an injury on C.C. between April and June 2021. C.S., who worked with C.C. between April and June 2021, testified she saw a bruise on C.C.'s chin once during the time they worked together. R. at 263-64, 267. She was never asked to compare what she saw with the injury depicted in Prosecution Exhibit 1. *See* R. at 263-69.

Two witnesses who knew C.C. and Appellant, and lived next to them in Surprise, Arizona, never saw any altercations or any bruising on C.C. R.L., a neighbor who knew both Appellant and C.C., testified he never saw any arguments between C.C. and Appellant nor bruising on C.C. R. at 330-33. Similarly, C. H.-W., another neighbor who knew both Appellant and CC and spoke regularly with C.C., testified she never saw any bruising on C.C., abuse of C.C. by Appellant, nor heard any fights or arguments. R. at 326-30.

Specification 3

Specification 3 involved testimony from C.C. that, in January 2021, Appellant bit her arm and left a bruise. R. at 177, 180. The altercation started, according to C.C., because Appellant commented on a women's large breasts on television and C.C. asked him, "[W]hy are you with me if you wanted somebody with large breasts[?]" or words to that effect. R. at 178. According to C.C., Appellant leaned over and bit C.C. on the right forearm. *Id.* C.C. testified there was a bruise, and she thought the bruise lasted 1-2 weeks. R. at 180. C.C. knew this bite happened in January, because it was before her sister visited around 17 January 2021.[2] R. at 181.

Five witnesses saw C.C. during the charged timeframe for specification 3. As described below, each was asked about whether they saw bruising. R. at 295, 303, 311-13, 326-33. Only one did.

Similar to specification 2, R.L., and C.H.W., neighbors of Appellant and C.C.

[2] Greater specificity on how C.C. identified the timeframe of her sister's visit is set out in the record but not included here to comport with Rule 17.2(c)(1)(H) of this Court's Rules of Practice and Procedure.

did not witness any arguments between Appellant and C.C., nor any injury to C.C. during January 2021. R. at 326-33.

A1C A.A. testified he lived with C.C. and Appellant from the end of September/early October 2020 until mid to late January 2021 or early February. R. at 291, 294. A1C A.A. never saw a bite or any bruising on C.C.'s arm. R. at 295.

Cay. C.[3], C.C.'s sister, testified she visited C.C. and Appellant for four days to celebrate a birthday.[4] R. at 300. Cay. C. testified that A1C A.A. was living with C.C. and Appellant when she visited. R. at 302. Like A1C A.A., Cay. C. observed no bruises or bite marks on C.C. R. at 295, 303.

S.M. testified she started working with C.C. in a backroom for Kohl's, a retail store, in November 2020 and worked with her into mid-January 2021. R. at 311-12. This work included moving boxes, packing boxes, and putting them on pallets. R. at 312. S.M. testified C.C. came in with "a few bruises." R. at 311. S.M. testified she would see these bruises "throughout periodically." R. at 313. According to S.M., C.C. specifically denied any abuse by Appellant. *Id.* While S.M. testified she saw bruising on C.C.'s arms, she did not describe seeing any bite mark nor could she provide a specific date to correlate these bruises to the charged timeframe for specification 3, which was January 2021, when she still worked with C.C. *Id.* She did not testify she saw a bruise on C.C.'s right forearm, which is the alleged area of injury at issue in

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[3] Consistent with Rule 17.2 of this Court's Rules of Practice and Procedure, initials are used to identify witnesses. However, C.C., the named victim, and her sister share the same initials. Thus, for clarity, additional letters are included for Cay. C.

[4] Greater specificity about whose birthday and its timing is set out in the record but not included here to comport with Rule 17.2(c)(1)(H) of this Court's Rules of Practice and Procedure.

specification 3. *Id*. She also did not regularly see C.C.'s arms at work because C.C. was wearing long sleeves or a jacket during the time they worked together between November and January. *Id*.

At one point in S.M.'s testimony, she was asked, "[D]id the bruises that you saw C.C. display appear consistent with the work that you guys were doing?" R. at 314. S.M. answered, "No, not really." *Id.* S.M.'s testimony revealed she had neither medical training nor qualifications. *See* R. at 310-16. Her experience seeing bruises that might inform her opinion–either generally or over a baseline timeframe for C.C.—was not discussed. *See id.* Her experience informing her understanding about how bruises might arise was not discussed. *See id.* S.M. was not qualified as an expert. *See id.* Trial defense counsel did not object to this testimony. *See id.*

The Prosecution's Argument

Circuit Trial Counsel (CTC) provided the Government's argument on findings. R. at 376. CTC asked the panel to focus on one thing with all specifications: "whether this actually happened." R. at 389. CTC focused on C.C.'s credibility and, more precisely for specifications 2 and 3, on the alleged bruising, the photographs, and the testimony of C.S. and S.M. R. at 390-93.

With regard to credibility, CTC argued: "[Y]ou have a credible witness. You have a victim, C.C., who came up here and took the stand and she was credible. She doesn't have a reason to lie. She doesn't have any reason to make this up." R. at. 379. CTC went on: "She's telling the truth. What does she have to gain by not telling the truth?" R. at 395. But beyond addressing the evidence concerning C.C., he turned to the defense's case: "You have not been provided with any reasonable explanation

as to why defense just wants to get up here and say it's a lie, it's a lie, it's all lies." R. at 396.

CTC argument about C.C.'s credibility went on:

> Think about the benefits for C.C. of reporting a domestic violence claim. She has to do these investigative interviews, which you've heard briefly about from the Office of Special Investigations. Yeah, that's really fun to go and put your entire marital life – your failed marriage to these law enforcement officials. She's had to go through prosecutor interviews, defense interviews, her courtroom testimony in front of you, the direct and cross-examinations sitting up here for hours on the stand as we dig through any text messages she might have ever had and confront her on all those things. Members, it's not for the faint of heart to testify in court. It is a long, drawn-out, difficult experience for C.C. What possible motivation does she have? [. . .] [Y]ou saw her and you saw her credibility, and you saw the credibility of the other witnesses.
>
> . . .
>
> The defense needs to get up here and say that all of these people are just lying to you; that it's all one giant conspiracy theory [in reference to the bruising] None of it makes sense. Members, what they're going to do with that is trying to tell you that if there's any doubt at all, if there's any conspiracy theory they can sell then you need to find him not guilty. That is not true.

R. at. 396-97.

CTC also argued, in reference to why C.C. testified: "[I]t is the concern that he might go out and do this to someone else; that that can happen." R. at 396. This explanation was not part of any witness' testimony.

CTC also argued: "There has been no evidence provided that she wasn't [married] and they talked about the fact they were married." R. at 388.

Beyond C.C.'s credibility, CTC emphasized the importance of the fact the members "had two specific witnesses get up here and say they had seen bruising." R.

at 391; *see also* R. at 392-92.[5] CTC reenacted the alleged conduct that precipitated specification 2. Appendix A, Motion to Attach, 28 May 2024. CTC argued the only way the bruising to the chin occurred was if C.C.'s arms were behind her back. R. at 413. CTC argued the defense had not provided an alternate explanation. *Id.*

CTC's rebuttal focused on whether the defense provided the members a reasonable explanation for the bruises: "What you have not been given is any reasonable explanation for where this came from, what these are about." R. at 412. He continued, "Defense hasn't given you any explanation but think about where an explanation might be of how someone might get that" (speaking about injury to C.C.'s chin depicted in Prosecution Exhibit 1). R. at 413.

CTC's rebuttal also renewed the earlier line of argument after trial defense counsel argued C.C.'s motive to fabricate based on her testimony that "[Appellant] took away my dream of being a wife now it's only fair that he loses his dream; that he doesn't get to be a pilot." R. at 402-03, 414. Specifically, CTC argued:

> For a woman who has been abused over the course of many months, how is she supposed to feel? How is a victim supposed to feel when she's asked by the Legal Office about what sort of outcome she might want from this? Is she supposed to say no accountability; nothing should happen to him? Those are the words of a victim. Those are the words of someone who has been abused over the course of many months and did lose her marriage because of this, and told countless people that that's why she lost her marriage, because of the abuse. . . . You know she's telling the truth. You know her sincerity and you have the evidence to back it up.

[5] CTC went on to argue: "You have two corroborating witnesses for the two exact bruises that the victim identified the incidents that happened to her." R. at 392. In reference to the bruising: "You absolutely have all the corroboration you need to know what's happened here." R. at 393.

R. at. 414.

Trial defense counsel made no objections to any of these arguments. The military judge did not issue any curative instructions and offered the standard instructions including the standard instructions on findings argument. R. at 366-376.

ARGUMENT

I.

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

Standard of Review

This Court reviews prosecutorial misconduct and improper argument de novo, and where no objection is made, it is reviewed for plain error. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018).

Plain error occurs when (1) there is error, (2), the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused. *Id.* at 401. (internal quotation marks omitted) (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). The burden of proof under plain error review is on the appellant. *Andrews*, 77 M.J. at 398 (citing *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017)).

If the error is of a constitutional dimension, such as shifting the burden of proof to the defense, the standard shifts to the Government to show the error was harmless beyond a reasonable doubt. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004).

This Court reviews the issue of whether a constitutional error was harmless beyond a reasonable doubt de novo. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005).

Law and Analysis

Burden-shift

The government always has the burden of proof to produce evidence on every element and to persuade the members of guilt beyond a reasonable doubt. *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995). The burden of proof never shifts to the defense. *United States v. Berri*, 33 M.J. 337, 342-43 (C.M.A. 1991) (citations omitted). A trial counsel's suggestion that an accused may have an obligation to produce evidence of his or her own innocence is "error of constitutional dimension." *Mason*, 59 M.J. at 424. This Court has concluded that it was "clear error for the CTC to make comments suggesting the appellant had a duty to offer evidence to prove his innocence," and that it was "clear error when the military judge failed to sua sponte instruct the court members that the appellant had no duty to call witnesses or put on evidence." *United States v. Crosser*, No. ACM 35590, 2005 CCA LEXIS 412, *14 (A.F. Ct. Crim. App. Dec. 23, 2005) (unpub. op.).

The first error in the Government's argument is burden-shifting, and because it is of constitutional dimension, any error here must be reviewed for whether the Government can show it was harmless beyond a reasonable doubt. *Mason*, 59 M.J. at 424. There are three areas where the Government shifted the burden of proof to the defense.

First, the Government shifted to the burden to the defense as to whether the members had been provided any evidence that C.C. was not married. R. at 388. While it may appear of little significance whether C.C. and Appellant were married, as it was not disputed at trial, establishing C.C. and Appellant were married was an element of each specification, and the burden to prove it remained solely with the Government. App. Ex. XVIII, page 1-2. CTC shifted this burden to the defense by arguing to the members that the defense must prove Appellant was not married to C.C. during the charged timeframe versus arguing the Government had established that element with the evidence of their marriage. R. at 388. That burden-shift to defense to negate an element of the offense is error. As will be discussed below, it is not harmless beyond a reasonable doubt.

The burden-shifting errors continued. The second area of argument that was error is the burden-shift to defense to provide an alternate explanation for bruising on C.C. In rebuttal, CTC focused the Government's argument on the fact that *defense* did not provide any reasonable explanation for where the bruises came from or what they were about. R. at 412-13 (emphasis added). "Defense hasn't given you any explanation but think about where an explanation might be of how someone might get that" (speaking about injury to C.C.'s chin depicted in Prosecution Exhibit 1). R. at 413. It is an error of constitutional dimension to state that Appellant had an obligation to produce evidence of his innocence (in this case, a non-criminal explanation for the bruise to C.C.'s chin, arm, or knee). *Mason*, 59 M.J. at 424. Further, it is error to imply Appellant had an obligation to put on a witness or

evidence to explain alternate sources of that injury. *Crosser*, 2005 CCA LEXIS 412 at *13.

Third, CTC made the central question of the case "whether this actually happened." R. at 389. He argued "If so, these other issues, the legal matters are met." *Id.* Rather than focusing on the affirmative proof introduced by the prosecution, CTC focused on what the defense *was required to do* in order to *disprove* it. CTC did so by critiquing the defense's failure to "provide [the members] with any reasonable explanation as to why [. . .] it's a lie, it's a lie, it's all lies." R. at 396. CTC continued to shift the burden, doubling down on the requirements for the defense to get an acquittal: "The defense needs to get up here and say that all these people are just lying to you; that it's all one giant conspiracy theory." R. at 397. CTC was persistent in this line of attack, when he returned in rebuttal and again argued defense gave no "reasonable explanation for where this came from, what these [bruises] are about." R. at 412. He continued, "Defense hasn't given you any explanation, but think about where an explanation might be of how someone might get that [the bruise on C.C.'s chin]." R. at 413.

Taking these arguments both in isolation and together—asserting the defense was required to provide proof of innocence, show C.C. was lying, or offer evidence establishing an alternative basis for the evidence of bruising—the Government cannot now show that they were harmless beyond a reasonable doubt. "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the [accused's] conviction or sentence." *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020)

(citations omitted). The harmless beyond a reasonable doubt standard "is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *United States v. Tovarchavez*, 78 M.J. 458, 460 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). "[W]here a court cannot be certain that the [error] did not taint the proceedings or otherwise contribute to the defendant's conviction or sentence, there is prejudice." *Prasad*, 80 M.J. at 29 (citing *United States v. Williams*, 77 M.J. 459, 464 (C.A.A.F. 2018); *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016)) (alterations from original). "Where constitutional error contributes to a conviction, the conviction cannot stand. *Id*. (citations and internal quotations omitted).

The Government cannot make such a showing here because its purportedly corroborative evidence of C.C.'s in-question credibility was thin. The pictures supposedly backing up the claim for specification 2 predated the well-settled timeframe of the charged conduct. And, for specification 3, S.M. could not correlate the timing or type of injury to the charged conduct. Yet this weak corroboration, when paired with CTC's argument, proved to be a difference-maker, as Appellant was only convicted of the two specifications where the Government had evidence of bruising—through the testimony of C.C., the photographs at Prosecution Exhibit 1, and the testimony of C.S. and S.M. The Government's arguments tasked the defense with the obligation to disprove all those pieces of evidence, as well as whether C.C. and Appellant were married.

The collective potency of the Government's three lines of improper argument is illustrated by comparison with specifications 1 and 4, of which Appellant was not

convicted. EOJ; R. at 421. For both of those specifications, the Government did not have any corroborating photographic or physical evidence, nor was any support found in testimony from a witness other than C.C. about bruising or injury. R. at 181-91. As such, even if the defense were able to fend off two of the Government's three improper burden-shifts for these specifications—those related to the need to show C.C. was lying and Appellant's marital status, the latter which admittedly might be shown harmless in isolation given it was not a fact in dispute but is emblematic of the prevalence of CTC's prosecutorial misconduct—the remaining burden-shift to disprove the basis of bruises purportedly captured in both photograph and witness testimony for specifications 2 and 3 was supported by evidence less susceptible to a motive to fabricate and bias than C.C. and thereby proved too much to avoid conviction.

The severity of the improper argument leveraged by CTC, as well as the inability of the Government to now show its harmlessness, is underscored when the repeated and explicit shifts to the defense here are compared to *Mason*. In *Mason,* an isolated burden-shift through improper redirect examination of a DNA expert about whether either side asked for re-testing was deemed harmless error because the Court found the DNA evidence overwhelming, the military judge gave the proper instructions before deliberation, and this error occurred at no point other than redirect examination. *Mason*, 59 M.J. at 425. In contrast, here the burden-shift was pervasive throughout findings and rebuttal argument, the military judge issued no curative instructions, and this involved three separate areas: an element of the

offense (the marriage of C.C. and Appellant), an obligation for Appellant to produce evidence of innocence, and an obligation to offer an explanation for bruising.

CTC's arguments were explicit in placing the Government's burden squarely on Appellant's shoulders. The relative weakness of the underlying corroborating evidence is highlighted by the misplaced fervor of CTC's argument. The Government could not point to any witness who saw these altercations. Faced with a weak set of evidence, CTC turned the members toward the defense to compensate for the Government's deficiencies. Such persistent, pervasive, and case-changing errors of constitutional dimension warrant relief.

Improper Bolstering, Vouching, Conduct, and Disparaging Defense

It is improper for trial counsel to attempt to win favor with the members by maligning defense counsel. *See Fletcher*, 62 M.J. at 181-82. In *Voorhees*, it was clear, obvious error to accuse defense counsel of misplaced lying and making the defense theory of the case seem fantastical. *United States v. Voorhees*, 79 M.J. 5, 5 (C.A.A.F. 2019). At risk is that members could have been convinced to decide the case based on which lawyer they liked better. *Fletcher*, 62 M.J., at 181-82.

While a prosecutor may argue that the evidence establishes an accused's guilt beyond a reasonable doubt, he is prohibited from expressing his personal opinion that the accused is guilty. *See United States v. Young*, 470 U.S. 1, 7 (1985). The error here is akin to the clear and obvious errors noted by the Court of Appeals of the Armed Forces in *Voorhees*. There, it was error to argue that a witness was an outstanding airman, to state that the witnesses' perception was the truth, that the members could rely on the credibility of one witness because "that airman is credible", to state "she

testified credibly; she told you what happened to her," "[Senior Airman HB's] not lying. It's the truth. It's what happened." *Voorhees*, 79 M.J. at 9-10.

As in *Voorhees*, when CTC bolstered and vouched for the credibility of witnesses and expressed his personal opinions, it constituted plain and obvious error. Here, CTC argued: "you have a credible witness," "she was credible," "she's telling the truth," "you have not been provided with any reasonable explanation as to why the defense wants to get up here and say it's a lie, it's a lie, it's all lies." [6] R. at 379, 395-96.

CTC also injected facts not known to the members. A court-martial "must reach a decision based only on the facts in evidence." *Fletcher,* 62 M.J. at 183 (citing *United States v. Bouie*, 9 C.M.A. 228, 233 (1958). CTC's errant demonstration of the allegation leading to injury with an assertion there is "no other explanation for these injuries," is error. Appendix A, Motion to Attach, 28 May 2024. CTC's demonstration of how he believed Appellant held C.C.'s arms behind her back argued facts not in evidence, and when he asserted this was the only way for the injury to occur to C.C.'s chin, he imposed his personal views and interpretation of the evidence on the members given there was no factual basis for his demonstration within the record. A conviction must be based solely on the facts in evidence, and arguing hypotheticals with no basis in evidence is error. *Norwood*, 81 M.J. at 21, *see also, Voorhees*, 70 M.J.

[6] This last argument is discussed both here and in the preceding section regarding the burden shift. It is not unintentionally duplicative. Rather, CTC committed two errors with one improper argument. The prevalence of these improprieties is pertinent to this Court's analysis. *See United States v. Norwood*, 81 M.J. 12, 20 (C.A.A.F. 2021).

at 14-15. This demonstration is akin to an argument with a hypothetical that has no basis in evidence and as such, is error.

CTC continued to interject facts not in evidence with argument about the nature and complexity or burden of the investigative process on C.C. and then coupled it with argument to improperly bolster her credibility. He argued that because she undertook the investigative process, she must be telling the truth. "It's not for the faint of heart to testify in court. It is a long, drawn-out, difficult experience for C.C." "What possible motivation does she have?" "You saw her and you saw her credibility." R. at 396. However, no evidence of the difficulty in testifying nor the investigative process was ever admitted at trial. This supplantation of his own views on C.C.'s credibility and the basis for it with facts not known to the members demonstrate the members were invited to reach a decision with evidence outside of the record, which is error. *Fletcher,* 62 M.J. at 183.

To further compound this series of errors, CTC equated defense's case as "all one giant conspiracy theory." R. at 397. Finally, CTC also improperly influenced the members with his comment that the motivation for C.C. coming forward, in reference to having proof to find Appellant guilty, was rooted in concern he (Appellant) may go out and do this to someone else; that that can happen. R. at 396. C.C. never testified that is why she came forward.

CTC improperly bolstered and voucher for C.C.'s testimony, injected his own personal credibility assessment onto the members, and disparaged defense's theory as fantastical—as a conspiracy theory. In light of *Voorhees* and *Fletcher*, this argument invited members to make a decision on something other than the evidence,

whether it was a decision based on which counsel they may prefer, or based on counsel's interpretation of events. *Voorhees,* 79 M.J. at 9-10, and *Fletcher*, 62 M.J. at 183. This error is clear and obvious, and thus the next question is whether the errors were prejudicial. *Fletcher*, 62 M.J. at 179.

To determine prejudice, the court must examine the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial. *Fletcher,* 62 M.J. at 184. The three factors are (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of evidence supporting the conviction. *Id.*

The first factor, the severity of the misconduct, is consistent with what the Court of Appeals for the Armed Forces determined was severe in *Voorhees* and *Fletcher*. 79 M.J. at 10, 62 M.J. at 184-85. Here, like *Voorhees*, the misconduct was sustained throughout both findings and rebuttal argument, and the offending arguments were made with juxtaposition to the characterization of defense theory as "lies" and "conspiracy theories." Similar to *Fletcher*, these improper comments permeated the entire argument. *Fletcher*, 62 M.J. at 185. CTC supplanted his view of the credibility of C.C. on the members, gave members additional evidence to consider for her truthfulness, misrepresented the way the injury to C.C.'s chin occurred, held out there was no other explanation possible by this demonstration, and told the members they could hold it against Appellant when defense did not supply evidence they were not married and did not explain the source of injury to C.C.'s chin, knee, or arm.

The second factor, the measures adopted to cure the misconduct, weighs in favor of Appellant even though trial defense counsel did not object. Like in *Fletcher*, no curative efforts were made by the military judge and only the standard instruction was given, stating arguments by counsel were not evidence. R. at 375-76, *Fletcher*, 62 M.J. at 185. The Court in *Fletcher* noted that there should have been corrective instructions given earlier to overcome the misconduct. *Id*.

The third factor, the weight of the evidence supporting the conviction, unlike *Voorhees*, weighs in favor of Appellant. Here, as outlined above, the thrust of this argument—that the bruising was defense's burden to explain differently—was unique to those specifications of which Appellant was found guilty. Stated differently, when the members were left with just the testimony of C.C. and were not asked to demand answers from the defense about the bruising because specifications 1 and 4 did not have documented injury, they acquitted Appellant. That is because the evidence corroborating the alleged bruising was not particularly strong for either specification of which Appellant was convicted. As to specification 3, S.M. could not correlate any bruising she saw on Appellant's arms to C.C.'s right forearm, to a bite mark or bite injury, nor to the charged timeframe in January 2021 for specification 3. R. at 310-316. S.M. worked with C.C. moving and packing boxes, around pallets and in the backroom of a retail store, which could be a source of bruising. R. at 311-12. Neighbors, their roommate, and C.C.'s sister never saw any bruising on C.C. in January 2021. R. at 330-33, 326-30, 295, 303. For specification 2, while C.S. saw a bruise on C.C.'s chin once during the time they worked together between April and June 2021, there is no testimony that what she saw was consistent with the injury

depicted in Prosecution Exhibit 1 nor as described by C.C. R. at 263-69. C.S. was not a witness to what caused that injury. *Id.* Similarly, neighbors never saw these injuries in May 2021. R. at 330-33, 326-30. C.C. visited with her sister twice in-person during the charged timeframe for specification 3 and near the time for specification 2, and Cay. C. never saw any injury. R. at 303, EOJ.

Because all three factors are in Appellant's favor, the errors were materially prejudicial to Appellant's substantial rights and the findings and sentence must be reversed. *Fletcher*, 62 M.J. at 185.

WHEREFORE, Appellant requests his convictions and sentence be set aside.

II.

IT WAS PLAIN ERROR FOR THE MILITARY JUDGE TO ADMIT LAY WITNESS TESTIMONY ON THE NATURE OF BRUISING AND, IN THE ALTERNATIVE, APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL FAILED TO OBJECT TO LAY WITNESS TESTIMONY ON THE NATURE OF BRUISING.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Fetrow*, 76 M.J. 181, 185 (C.A.A.F. 2017) (citation omitted). Failure to object to the admission of evidence forfeits appellate review absent plain error. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citations omitted).

In order to prevail under a plain error analysis, an appellant must demonstrate that "(1) there was an error; (2) it was plain or obvious; and (3) the error materially

prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citations omitted).

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Carter*, 79 M.J. 478, 480 (C.A.A.F. 2020).

Law and Analysis

Plain Error

Under Mil. R. Evid. 701, it is error to allow a lay witness to testify in an area based on something other than their own perception given lay witnesses are excluded from testifying about areas requiring scientific, technical, or other specialized knowledge. Mil. R. Evid. 701(c). This type of testimony requires expert testimony, as illustrated by *United States v. Rameshk*, No. ACM 39319, 2018 CCA LEXIS 520 (A.F. Ct. Crim. App. Oct 29, 2018) (unpub. op.).[7] While *Rameshk* dealt with whether the expert had the requisite qualifications to offer testimony that explained the age of bruising, the facts explored there through that expert highlight the testimony about the nature of bruising is one requiring specialized knowledge, skill, experience, training or education. *Rameshk*, 2018 CCA LEXIS 520 at *17-18. The witness in *Rameshk* testified that the bruises were new based on her 20 years of experience in assessing, documenting, and assisting in the treatment of injuries, with an estimate of seeing potentially thousands patients with bruises and had assisted in treatment

[7] *See also United States v. York*, 600 F.3d 347, 361 (5th Cir. 2010) (citing caselaw underlying Fed. R. Evid. 701 for the proposition that medical causation testimony about the cause of bruises and their time to develop require expert testimony); *United States v. White*, 492 F.3d 380, 401 (6th Cir. 2007) (discussing similar distinctions between testimony reserved for lay versus expert witnesses).

of those injuries. *Id.* In contrast, when S.M. testified that bruising on C.C. was not consistent with the work in the retail backroom and working with moving boxes, she lacked the foundation to provide such an opinion.

This error is plain and obvious. *Erickson*, 65 M.J. at 223. S.M. lacked the foundation to provide the expert testimony called for by the question, and her testimony on the nature of bruising is not rationally based on her own perceptions. S.M. was a co-worker of C.C., who worked in retail. R. at 311-12. This work included work moving and packing boxes. R. at 312. The offending testimony came on redirect examination, when Government counsel asked if the bruises she saw on C.C. appeared consistent with the work they were doing. R. at 314. There was no foundation for S.M. to testify that she would know if the work they were doing could cause the bruising she saw on C.C. or any other person. Moreover, S.M. did not even describe where any bruising was nor what it looked like for it to be either consistent with or inconsistent with what the work they did. Further, S.M. did not know what bruising C.C. testified to, which was a bite to the right forearm with a bruise lasting two weeks. R. at 178, 180. S.M. also did not testify she saw a bruise on C.C.'s right forearm nor did she testify she saw a bite mark. R. at 313. Thus, the perceptions of S.M., and the nature of what she saw being either consistent or inconsistent with the work they did is barely probative, if at all, to whether Appellant bit C.C. as charged, given S.M. could not even testify she saw an injury consistent with the testimony of C.C.

Third, the error materially prejudiced a substantial right of Appellant. *Erickson*, 65 M.J. at 223. The test is whether the error had a substantial influence

on the findings. *United States v. Walker*, 57 M.J. 174, 178 (C.A.A.F. 2002). Four factors are considered: "(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." *United States v. Clark,* 62 M.J. 195, 200-02 (C.A.A.F. 2005) (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

This testimony had a substantial influence on the findings at to specification 3; Appellant was only convicted of the two specifications involving any allegations of "bruising" and other evidence regarding the presence of a bruise. EOJ; R. at 193, 263-64, 267, 245, 310-15; Pros. Ex. 1. The first factor weighs in favor of Appellant. The evidence itself corroborating C.C.'s testimony as to specification 3 was marginal. Only C.C. witnessed this bite that caused the bruise purported to be observed by S.M., although she could not describe a bruise or bite mark on C.C.'s right forearm, nor tie it to the charged timeframe specifically. R. at 313. Four other witnesses who saw C.C. in January 2021, two of whom stayed in the home with C.C. during that timeframe did not see any bruising or bite marks. R. at 330-33, 326-30, 291, 294-95. Specifically, Cay. C., C.C.'s sister, testified she visited C.C. and Appellant for four days to celebrate C.C.'s birthday on 17 January 2021 and she did not observe any bruising or bite marks on C.C. R. at 300, 303. The relative weakness of the Government's case answers the second factor in favor of Appellant as the Defense case was to highlight the absence of evidence corroborating C.C.'s testimony.

As to the third and fourth factors, the source of these bruises on C.C.'s arm were material to the outcome, and S.M.'s testimony they were not consistent with work activity foreclosed the defense's only line of attack on the one witness who

actually saw this bruise. The fourth factor is neutral, not favoring either the Government or the defense given the testimony was limited to that one question and came without any foundation.

Given the failure to object to lay witness testimony was forfeited and not waived, and all three factors are met to establish plain error because it is error to admit lay witness testimony that required scientific, technical, or other specialized knowledge, the lack of foundation for the opinion was clear and obvious, and the error materially prejudiced a substantial right of Appellant, relief is warranted.

Ineffective Assistance of Counsel

In the alternative, Appellant received ineffective assistance of counsel when trial defense counsel failed to object to lay witness testimony regarding the appearance of bruising on C.C.'s arm. R. at 314. The arguments, above, establishing error that was plain and obvious are not repeated here. However, because Mil. R. Evid. 701(c) clarifies that lay witness testimony must not be based on scientific, technical, or other specialized knowledge and S.M. lacked the foundation to provide expert testimony and her testimony on the nature of bruising is not rationally based on her own perceptions, failure to object to this testimony constitutes an unreasonable decision, that was neither strategic or tactical.

To establish ineffective assistance of counsel, Appellant must demonstrate both deficient performance and prejudice. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted). "[A] challenger must demonstrate 'a reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different.'" *United States v. Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022)

(quoting *Strickland v. Washington*, 466 U.S. 668, 689, 694 (1984)) (second alteration in original) (internal quotation marks omitted)). In assessing claims of ineffective assistance of counsel, the "reviewing court 'indulge[s] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (quoting *Strickland*, 466 U.S. at 689).

This Court can find ineffective assistance of counsel in these circumstances, where that strategic or tactical decision is unreasonable. *See United States v. Davis*, 60 M.J. 469, 474 (C.A.A.F. 2005). In *Davis*, it was not a strategic or tactical decision to give flawed advice when that advice was the direct result of not investigating the meaning of a regulation*. Id.* Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Similarly, there is no strategic or tactical decision here to allow a lay witness to offer testimony that would require scientific, technical, or other specialized knowledge, in direct contravention to Mil. R. Evid. 701. Familiarity with the applicable law – here the Mil. R. Evid., is a fundamental responsibility of defense counsel and this error in not objecting was unreasonable.

Prejudice is established given the outcome of the dispositive nature of the evidence at issue with the deficient performance. As discussed *supra*, it was central to the Government's presentation and argument on specification 3. To establish prejudice, Appellant must demonstrate a reasonable probability that but for the error by counsel, the result of the proceeding would be different. *Harrington v. Richter*, 562 U.S. 86, 104 (2011). Trial defense counsel's failure to object presented the

factfinder, through S.M., with the veneer that alternative causes of the bruising purportedly corroborating the alleged bite had been eliminated and thereby limited the source to Appellant. Thus, when Appellant was only convicted of the specifications involving bruising, S.M. testified as to the nature of bruising without any expertise, knowledge, or foundation for her lay opinion, the failure to defend that evidence changed the outcome of the proceeding as to specification 3.

In terms of the outcome of the trial, Appellant was only convicted of the two specifications involving any allegations of "bruising" and other evidence regarding the presence of a bruise. EOJ; R. at 193, 263-64, 267, 245, 310-15; Pros. Ex. 1. Without this errant evidence of the bruising related to specification 3, it is likely the outcome would have been different. The evidence itself corroborating C.C.'s testimony as to specification 3 was marginal. Only C.C. witnessed this bite that caused the bruise purported to be observed by S.M., although she could not describe a bruise or bite mark on C.C.'s right forearm, nor tie it to the charged timeframe specifically. R. at 313. Four other witnesses who saw C.C. in January 2021, two of whom stayed in the home with C.C. during that timeframe did not see any bruising or bite marks. R. at 330-33, 326-30, 291, 294-95. Specifically, Cay. C., C.C.'s sister, testified she visited C.C. and Appellant for four days to celebrate C.C.'s birthday on 17 January 2021 and she did not observe any bruising or bite marks on C.C. R. at 300, 303.

With this minimal evidence to corroborate C.C.'s testimony, without this improper lay witness testimony, the members would have acquitted Appellant on Specification 3. This is consistent with the verdict, wherein Appellant was acquitted

of charges with no corroborating evidence of injury. Stated differently, when the members were left with just the testimony of C.C. and were not provided any independent evidence of bruising, they acquitted Appellant. EOJ, R. at 181-91, 421. The outcome itself demonstrates how dispositive this evidence was to the trial.

The deficiency in trial defense counsel's performance was so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment and their performance fell measurably below an objective standard of reasonableness when they allowed lay witness testimony about the nature of bruising. This deficient performance prejudiced Appellant with errors so serious as to deprive the defendant of a fair trial. And finally, but for this error, the outcome of the trial would be different. Because prejudice is established, and the conduct was so deficient and was without a tactical or strategic reason, relief is warranted.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the conviction to specification 3 and reassess the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 May 2024.

Respectfully submitted,

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APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, by and through counsel, personally requests that this Court consider the following matters:

III.

THE MITLIARY JUDGE ABUSED HIS DISCRETION IN ALLOWING AIRMAN FIRST CLASS A.A. TO TESTIFY TO "OTHER BAD ACTS."

Additional Facts

Trial defense counsel argued for the exclusion of evidence under Mil. R. Evid. 404(b), both prior to trial on the merits and prior to the admission of testimony by A1C A.A. Appellate Exhibit (App. Ex.) VI; R. at 18-47, 271-89. The military judge granted defense's written motion. App. Ex. VIII. However, the military judge ruled the Government could introduce testimony from A1C A.A. that amounted to "other bad acts." R. at 280-81.

The "other bad acts" are as follows: A1C A.A. testified Appellant started arguments with C.C. when Appellant got home from work and that fights were daily. R. at. 292. The majority of the time A1C A.A. heard fights about finances. *Id*. A1C A.A. also testified that Appellant told A1C A.A. to only go through Appellant if he [A1C A.A.] wanted to talk to C.C. R. at 293.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013).

Law and Analysis

Evidence of other crimes, wrongs, or acts is generally not admissible, but may be used to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Mil. R. Evid. 404(b). Evidence introduced under Mil. R. Evid. 404(b) must still be admissible under Mil. R. Evid. 403; its probative value must not be substantially outweighed by the danger of unfair prejudice. *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

"A military judge abuses his discretion when (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)).

The three-part test for admissibility of evidence under Mil. R. Evid. 404(b) asks, (1) Does the evidence reasonably support a finding by the factfinder that Appellant committed other crimes, wrongs or acts? (2) Does the evidence of the other act make a fact of consequence to the instant offense more or less probable? and (3) Is the probative value of the evidence of the other act substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403? *Reynolds*, 29 M.J. at 109.

In analyzing this evidence, the military judge committed the third category of abuse of discretion identified in *Ellis*, applying the correct legal principles to the facts in a manner that was clearly unreasonable. *Ellis*, 68 M.J. at 344. Specifically, the military judge's determination of the facts under the second prong of the *Reynolds*

test failed to make a fact of consequence relevant to the charged conduct more or less probable.

The military judge's application of the *Reynolds* test was clearly unreasonable as applied to A1C A.A.'s testimony. A1C A.A. testified that Appellant "picked fights" or "started fights about finances" with C.C. almost instantly when Appellant came home from work. R. at 292. No other witness, other than A1C A.A., testified that financial arguments were present in the marriage of C.C. and Appellant. This was conceded by the Government. R. at 274. A1C A.A. was also allowed to testify that Appellant asked A1C A.A. not to talk to his wife, C.C., but to go through Appellant if he needed to talk with her. R. at 293. The fact that there were arguments about finances or that Appellant told A1C A.A. not to speak directly to C.C. does not make it more or less likely that Appellant would commit assault consummated by a battery against his spouse. This evidence should have been inadmissible under *Reynolds*.

The clear unreasonableness of the military judge's decision is illustrated in light of *United States v. Franklin*, which highlighted the fact that courts find it "often difficult or impossible to differentiate between intent to do an act and the predisposition to do it." 35 M.J. 311, 316-17 (C.A.A.F. 1992). Despite citing *Franklin* in his earlier ruling on Mil. R. Evid. 404(b)[1], the military judge here articulated on the record the evidence of financial arguments would be allowed because "at the very least, some animosity or conflict in the marriage would make it more likely that someone might commit an act of violence against another person if they harbor ill

[1] App. Ex. VIII, p. 10.

will or ill feelings against that person because of disagreements about things." R. at 280.

As a predicate matter, the permissive, non-propensity use the military judge instructed for this evidence was whether it showed Appellant's motive. R. at 371. Under the right facts, a contentious marriage might tend to show an accused meant to later abuse his wife, which is essentially what the military judge determined here. This determination was unsupported by *this* record. Both specifications 2 and 3 arose from arguments unrelated to the matters which A1C A.A. was permitted to testify: arguments about finances or limitations A1C A.A. was perceived to have imposed on C.C. Rather, both specifications arose from C.C. critiquing Appellant's perceived amorous interests in women outside of their relationship. *See* R. at 178, 193. On these facts, any arguments between C.C. and Appellant related to finances shed no insight on whether he assaulted her as charged. As such, not only does this fail the second prong of the *Reynolds* test but also, given its absence of probative value to any valid consideration, the third prong related to Mil. R. Evid. 403.

Because the members were instructed in error that they could consider A1C A.A.'s testimony to conclude Appellant had motive to commit an assault consummated by a battery upon his spouse and Appellant was convicted of two acts of assault consummated by a battery upon his spouse, relief is warranted. App. Ex. XVIII at 4. The genesis for the disputes at issue made Appellant out to be an uncommitted partner to C.C., and the irrelevant evidence offered by A1C A.A. only served to show him as employing a double-standard and endeavoring to limit C.C.'s

freedom in their relationship. This only served to broadly paint Appellant as a bad person. The military judge abused his discretion in admitting the evidence of other bad acts from A1C A.A. While the military judge applied the correct standard of law, it is clearly unreasonable as applied to the facts in this case.

WHEREFORE, Appellant respectfully requests his convictions and sentence be set aside.

IV.

THE MILITARY JUDGE ABUSED HIS DISRETION IN DENYING DEFENSE AN ALIBI INSTRUCTION.

Additional Facts

Trial defense counsel argued for an alibi instruction related to specification 2 of the Charge. R. at 361. Trial defense argued that the evidence raised a reasonable inference of an alibi and thus the instruction should be given. R. at 362. In ruling against trial defense counsel, the military judge asserted the following facts on the record: C.C. testified that the offense on 21 May 2021 occurred in the afternoon before she left for work around 1400. R. at 362. C.C. testified Appellant would normally leave for work by 1430 and would often sleep until 1400. R. at 363. Based on those facts, and the testimony that Appellant would have started work at 1500 that day, the military judge denied the instruction. R. at 363. He determined, based on the allegation of when the alleged offense occurred, there was no evidence Appellant was at another location. *Id*.

The military judge did not articulate if he considered or how he considered the other evidence in the record. Specifically, the military judge did not consider

the time the photographs documenting the injury prior to conduct at issue with specification 2 were taken, nor the alleged conduct and conversations just prior to the assault consummated by a battery to determine if both Appellant and C.C. were present at the time and place of the offense. R. at 362-63.

Standard of Review

A military judge's denial of a requested instruction is reviewed for abuse of discretion. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993).

Law and Analysis

Whether failure to give a requested instruction is error involves a three-prong test: (1) whether the requested instruction is correct; (2) whether it is not substantially covered in the main instructions; and (3) if it is on such a vital point in the case that failure to give it deprived the accused of a defense or seriously impaired its effective presentation. *United States v. Gibson*, 58 M.J. 1, 7 (C.A.A.F. 2003).

The alibi instruction was requested by the trial defense counsel given the established timeline of when specification 2 occurred and Appellant's work-sleep schedule. Specification 2 was charged with having occurred on 21 May 2021 at their house in Surprise, Arizona, and C.C. testified she knew it happened on 21 May 2021 because of the photographs entered as Prosecution Exhibit 1. R. at 192, 196; EOJ. Appellant was on swing shift. R. at 216, 323-24; Def. Ex. E. C.C. also confirmed when Appellant was on swing shift, he would sleep until 2 pm. R. at 216. C.C. confirmed not only did this injury and altercation take place in the afternoon, but that also immediately after she left to go to work. R. at 195-96.

While traditionally the instruction of alibi is given when Appellant is not at the time or place alleged – here C.C. was not at the time or place alleged for this injury to have occurred as she testified and as the Government charged. Appellant usually woke at 2 pm, per C.C.'s testimony, and C.C. left for work at 2 pm. R. at 196, 216. Appellant would leave for work at 2:30 pm, and Appellant worked on 21 May 2021 for a shift that started at 3 pm. R. at 216, 323-24; Def. Ex. E. While Appellant may have been at the home in Surprise Arizona, in the afternoon of 21 May 2021 as charged, C.C. was not.

Therefore, this instruction was clearly raised by the evidence and would have been correct, with modifications. It is significant this instruction was requested for the fact surrounding specification 2, which is the only specification charged with a specific date – and the evidence at Prosecution Exhibit 1 calls that date further into scrutiny. Bruising and injury to C.C.'s knee and chin was apparently photographed in the morning of 21 May 2021, which meant the alleged conduct causing it, if it was this altercation C.C. testified to, may not have even occurred on 21 May 2021. This instruction, whether C.C. was home at the time she testified this injury occurred, was dispositive of whether Appellant committed this offense or even had opportunity to commit this offense.

While the military judge made a presumption that it is the later work schedule of Appellant's that was the alibi, Prosecution Exhibit 1 and the underlying explanation of that exhibit was not considered and showed that C.C.'s testimony prevented her from being home at the place and time she claimed the assault

occurred. The alternative is that C.C.'s testimony itself established this conduct had to have occurred in the early morning hours when Appellant was asleep.

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

Alibi is a complete defense—and as such is vital. Not explaining C.C.'s lack of presence at the home with Appellant the afternoon of 21 May 2021 would be a complete defense is such that failure to give it deprived the accused of a defense. *Gibson*, 58 M.J. at 7. Thus, the third prong is met.

WHEREFORE, Appellant respectfully requests his conviction to specification 2 of the Charge be set aside, and the sentence reassessed.

V.

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL FAILED TO SEEK ASSISTANCE FROM AN EXPERT TO EXPLAIN WHETHER THE DOCUMENTED INJURIES WERE CONSISTENT WITH THE ALLEGATIONS.

Standard of Review

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Carter*, 79 M.J. 478, 480 (C.A.A.F. 2020).

Law and Analysis

The law applicable to ineffective assistance of counsel is set out in Issue II, *supra*, and adopted here.

Appellant received ineffective assistance of counsel when trial defense counsel did not seek expert witness assistance in analyzing the bruising on C.C.'s forearm due to a bite and the photographic evidence of the bruising to C.C.'s chin and knee, documented in Prosecution Exhibit 1.

Trial defense counsel's failure to utilize expert assistance was unreasonable considering all the circumstances. *See Strickland*, 466 U.S. at 688. First, this failure left several areas unaddressed or inadequately explained at trial: (1) whether the bruises in Prosecution Exhibit 1 were consistent with the injury described by C.C., which was the corroboration for the charge encompassed by specification 2, (2) whether the bruises depicted in Prosecution Exhibit 1 were consistent with the charged timeframe in specification 2 and the date and time the photograph was taken, and (3) whether the bite as described for specification 3 would cause a bruise, or a bruise that would last for two weeks but not break skin or otherwise required no treatment.

Not having this assistance from an expert hampered Appellant's ability to put on a full defense. It was objectively reasonable to request assistance of an expert to clarify the impacts and meaning of the alleged physical injury caused by the alleged assault consummated by a battery as described by C.C., to evaluate the injury depicted in Prosecution Exhibit 1, and, to develop a line of cross examination for S.M., who witnessed "bruising" on C.C.'s arms between November 2020 and January 2021

to determine if it consistent with what C.C. described as a bite with a bruise lasting two weeks in January 2021.

There appears to be no strategic basis nor tactical decision not to seek expert assistance here in order to understand the nature of injury as charged by the Government, especially when the Government produced photographic evidence depicting injury. This Court can find ineffective assistance of counsel in limited circumstances, for example, where a strategic or tactical decision is unreasonable. *See United States v. Davis*, 60 M.J. 469, 475 (C.A.A.F. 2005). In *Davis*, it was not a strategic or tactical decision to give flawed advice when that advice was the direct result of not investigating the meaning of a regulation*. Id.* Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Like *Davis*, not fully understanding the applicable facts here, when familiarity with the facts is a fundamental responsibility of defense counsel, gives rise to ineffective assistance. Forgoing the assistance of expert altogether, when the Government's evidence includes both testimony and photographic evidence of bruising in an assault consummated by a battery case would also then be objectively unreasonable if it was without a tactical or strategic basis because it does not allow trial defense counsel to fully understand all the applicable facts of this case.

Prejudice is established given the outcome of trial and the dispositive nature of the evidence at issue with the deficient performance in this area. Appellant was only convicted of the two specifications involving any allegations of "bruising" and

other evidence regarding the presence of a bruise. EOJ; R. at 193, 263-64, 267, 245, 310-15; Pros. Ex. 1. To establish prejudice, Appellant must demonstrate a reasonable probability that but for the error by counsel, the result of the proceeding would be different. *Harrington v. Richter*, 562 U.S. 86, 104 (2011).

Not having assistance in evaluating the testimony of C.C. regarding her alleged injury at Appellant's hands in light of what was depicted in Prosecution Exhibit 1, the testimony of S.M., and the work both C.C. and S.M. engaged in, left Appellant with limited ability to present evidence or impeach the Government's evidence. Without this assistance, Appellant was left with no basis to impeach C.C.'s version of injury for either specification of which he was convicted because there was no way to contradict C.C.'s testimony other than by arguing in the negative, the absence of evidence. There were no witnesses to these altercations and no specific observations of injury as described by C.C. during the specific time described by C.C. The facts show C.C. was the only witness to what caused the chin and knee bruise and the only witness who testified she had a bite mark on her own forearm. R. at 193, 303, 295, 330-30, 326-30, 313. While C.S. saw the chin bruise, she did not know what caused it and she did not testify she saw that chin bruise on 21 May 2021. R. at 263-64, 267. S.M. saw "bruising" on C.C.'s arms, but not necessarily tied to January 2021, and C.C. told S.M. Appellant had "pinched her," not bit her. R. at 245, 313. S.M. did not see a bite mark. R. at 310-15.

Alternatively, had trial defense counsel sought expert assistance, they would have been able to argue more than the absence of evidence. They could have argued

inconsistencies in C.C.'s description with Prosecution Exhibit 1 based on expert counsel or advice, challenged the charged conduct based on the nature of the bruising described or depicted, and could have had more than lay witness testimony about injuries in this case.

The outcome of the trial, with the split finding on the specifications demonstrates how dispositive this evidence involving bruising or injury was to the trial. The testimony of bruising that occurred as a result of the charged misconduct was unique to those specifications of which Appellant was found guilty. Stated differently, when the members were left with just the testimony of C.C. and were not provided any independent evidence of bruising, they acquitted Appellant. EOJ, R. at 181-91, 421.

The deficiency in trial defense counsels' performance was so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment and their performance fell measurably below an objective standard of reasonableness when they did not seek expert assistance to understand and explain the photographic evidence of bruising and the testimony about injury from the charged conduct. This deficient performance prejudiced Appellant with errors so serious as to deprive the defendant of a fair trial. And finally, but for this error, the outcome of the trial would be different. Because prejudice is established, and the conduct was so deficient and was without a tactical or strategic reason, relief is warranted.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the convictions and sentence.

VI.

APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS GUILTY VERDICT.

Additional Facts

Prior to entry of pleas, trial defense counsel filed a motion for appropriate relief for a unanimous verdict. App. Ex. III. No hearing on the matter was requested. *Id.* The military judge denied the motion. App. Ex. V.

Standard of Review

"The constitutionality of a statute is a question of law, therefore the standard of review is *de novo*." *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

The United States Court of Appeals for the Armed Forces decided in *United States v. Anderson* that a military accused does not "have a right to unanimous guilty verdict under the Sixth Amendment, the Fifth Amendment Due Process Clause, or the Fifth Amendment component of equal protection." 83 M.J. 291, 293 (C.A.A.F. 2023), *cert. denied*, 92 U.S.L.W. 3206 (U.S. Feb. 20, 2024) (No. 23-437); *See also United States v. Martinez*, 83 M.J. 439 (C.A.A.F. 2023), *cert. denied*, 92 U.S.L.W. 3206 (U.S. Feb. 20, 2024) (No. 23-242); *United States v. Cunningham*, 83 M.J. 367 (C.A.A.F. 2023), *cert. denied*, 92 U.S.L.W. 3246 (U.S. Mar. 25, 2024) (No. 23-666). Despite these decisions, the potential for resolution of this issue at a higher court remains.

Appellant preserved this issue for appeal. App. Ex. III. Appellant respectfully contends he was deprived of his constitutional right to a unanimous verdict.

WHEREFORE, Appellant requests his convictions and sentence be set aside and the specifications of which he was convicted be dismissed with prejudice.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant.*	**MOTION TO ATTACH DOCUMENTS** Before Panel No. 3 Case No. ACM 22072 28 May 2024

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to attach the following document to the Record of Trial:

Declaration of Airman Basic John P. Matti, 1 page, 17 May 2024 (Appendix A).

Appendix A is an affidavit from the Appellant that provides details regarding the conduct of the Government counsel during findings argument that is relevant to the issue of whether there was prosecutorial misconduct. Because the record does not document what Government counsel acted out during closing argument, which was part of a larger misstatement of facts and improper argument by Government counsel, this declaration is needed to resolve the issues of whether Government counsel's actions and words during closing argument amounted to prosecutorial misconduct.

These matters may be attached for this Court's consideration pursuant to Article 66, UCMJ, as these declarations supplement matters raised in the record –

that is, whether the conduct and argument by Government counsel during findings and rebuttal argument were erroneous - and the issue is of central importance in determining whether the conduct as alleged by Appellant was of a nature to establish prosecutorial misconduct. One of the factors in evaluating prosecutorial misconduct is whether the conduct at issue was severe and pervasive. Because this conduct is not documented, there is no other way for this Court to consider the extent to which Government counsel's argument violated the standards of conduct. This is not fully resolvable by the record without this declaration. *See United States v. Jessie,* 79 M.J. 437,445 (C.A.A.F. 2020).

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the motion to attach.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 28 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant.*	)))))))))	**UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO ATTACH** Before Panel No. 3 No. ACM 22072 6 June 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Under Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's motion to attach Appendix A – his declaration signed 17 May 2024.

A panel of members found Appellant guilty of two specifications of assault consummated by a battery in violation of Article 128, UCMJ. The specification at issue in Appellant's motion to attach is Specification 2 of the Charge for which Appellant was found guilty of unlawfully pressing his knee on CC's back. (App. Mot. Appendix A; *Entry of Judgement*, 28 July 2022, ROT, Vol. 1.)

In Assignment of Error I, Appellant claims that circuit trial counsel (CTC) committed prosecutorial misconduct during his findings argument through improper use of facts not in evidence. (App. Br. at 11.) In his declaration, Appellant asserts that CTC, "acted out a version of what he thought happened prior to specification 2 of the Charge," and that this enactment was not captured on the record. (App. Mot. Appendix A.) Appellant's declaration described that CTC kneeled on both of his knees after he stated, "how does someone fall on their chin." (Id.) Next, Appellant explained that CTC:

> Placed his arms behind his back, with his hands mid-waist, and touching as if he were at parade rest and proceeding to lean forward with his chin pointed out as if he was falling. He then stops himself from falling too forward and says "when they've got their hands pulled behind their back." This act happens during the "- -" on line 11 of page 413 and is not in the transcript.

(Id.)

Appellant concedes there was no objection to this part of trial counsel's argument, so the issue would be reviewed for plain error. (App. Br. at 11.) This Court should deny Appellant's motion to attach Appendix A because Appellant's declaration does not account for any new facts for this Court to consider. Given that Appellant's claim of improper argument was never raised at trial, it was never raised in the record. CAAF has allowed Court of Criminal Appeals (CCAs) to accept affidavits regarding issues and claims that "are raised by the record but are not fully resolvable by the materials in the record." United States v. Jessie, 79 M.J. 437, 443 (C.A.A.F. 2020). And in these cases, the CCAs have accepted affidavits or ordered hearings *to determine additional facts*. *See* id. at 442. (emphasis added).

Here, the issue contested in Appellant's declaration was not raised by the record because he never objected at trial and claimed improper argument. Because the issue of improper argument was not raised in the record, Appellant should not get the opportunity to provide this Court with additional facts. *See* id. at 442. Appellant has not cited any authority that allows him to attach a declaration explaining CTC's enactment during the finding's argument. Appellant simply cited to Jessie for the premise that CTC's enactment and impermissible findings argument "is not resolvable by the record without this declaration." (App. Mot. at 2.)

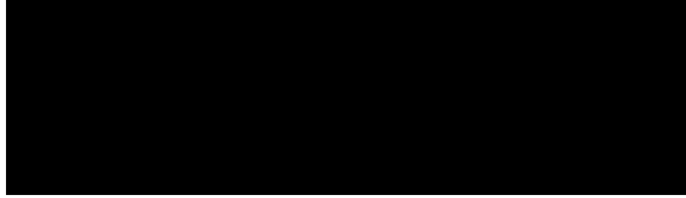
But Appellant fails to acknowledge that this Court can resolve the ultimate issue of whether CTC committed prosecutorial misconduct without his declaration. CTC's enactment, assuming CTC enacted the assault, mirrored his verbal findings argument. According to

Appellant, CTC mentioned "how does someone fall on their chin," and CTC proceeded to kneel on both knees before the members. (App. Mot. Appendix A.) Next, CTC placed his arms behind his back while he stated, "when they've got their hands pulled behind their back." (Id.) Thus, Appellant's declaration does not account for any new substantive facts for this Court to consider. CTC was merely acting out his findings argument. This Court can compare CTC's findings argument, which was transcribed verbatim, with the evidence presented at trial, such as CC's testimony, to determine whether he improperly argued facts not in evidence. Further, this Court has access to the entire record that includes the record of trial, allied papers, briefs containing government and defense arguments. *See* Jessie, 79 M.J. at 441-42. Thus, this Court does not need Appendix A to resolve Assignments of Error I.

Appellant in his motion to attach claims that Appendix A "provides details regarding the conduct of the Government counsel during findings argument that is relevant to the issue of whether there was prosecutorial misconduct." (App. Mot. at 1.) Appellant also argues that "[b]ecause this conduct is not documented, there is no other way for this Court to consider the extent to which Government counsel's argument violated the standards of conduct." (Id. at 2.) But for this Court to decide whether prosecutorial misconduct occurred, it does not need additional facts, such as Appellant's version of CTC's enactment during findings argument. The premise of Appellant's argument in his assignment of error is that CTC's explanation of how he believed Appellant held CC's arms behind her back were not supported by facts in evidence. (App. Br. at 18.) Appellant's main point is that CTC's argument did not match with CC's testimony in which Appellant claims that CC never testified that she fell to her knees with her hands behind her back. (App. Mot. Appendix A.) In any event, to determine whether CTC's argument relied on facts supported by the evidence, this Court can compare CTC's findings

argument with CC's testimony. This Court does not need additional facts contained in Appendix A regarding CTC's enactment of the assault. Thus, Appendix A is not "necessary for resolving issues raised by materials in the record." *See* Jessie, 79 M.J. at 444.

WHEREFORE, the United States respectfully requests this Court deny Appellant's motion to attach Appendix A.



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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 June 2024.

VANESSA BAIROS, Capt, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No.ACM 22072**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John P. MATTI	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel3**

On 28 May 2024, Appellant submitted a motion to attach the following document to the record:

Declaration of Airman Basic John P. Matti, dated 17 May2024 (1 page).

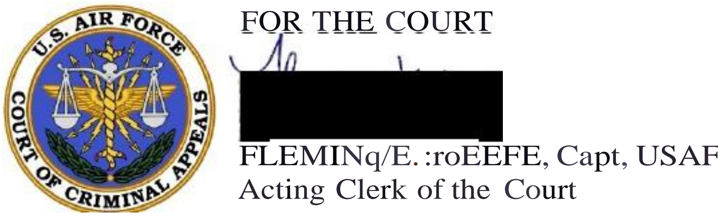
The Government did not submit any opposition.

The court has considered Appellant's motion, the lack of Government's opposition, and the applicable law, specifically *United States v. Jessie,* 79 M.J. 437 (C.A.A.F. 2020). The court grants Appellant's motion; however, it specifically defers consideration of the applicability of *Jessie* and related case law to the attachment until it completes its Article 66, Uniform Code of Military Justice, review of Appellant's entire case.

Accordingly, it is by the court on this 30th day of May 2024,

ORDERED:

Appellant's Motion to Attach is **GRANTED.**



FOR THE COURT

FLEMINq/E. :roEEFE, Capt, USAF
Acting Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No.ACM 22072**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John P. MATTI	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel3**

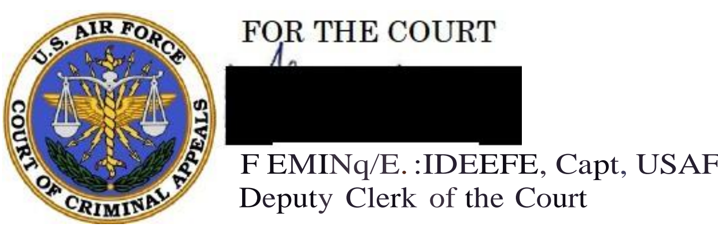
On 28 May 2024, Appellant submitted a motion to attach a declaration to the record. On 30 May 2024, we prematurely ruled on Appellant's motion prior to the seven-day opposition period expiring. *See* A.F. Ct. Crim. App. R. 23(c). No later than 6 June 2024, Government may submit any such opposition to Appellant's 28 May 2024 motion.

At that time, the court will determine whether any corrective action is required to its 30 May 2024 order.

Accordingly, it is by the court on this 31st day of May, 2024,

ORDERED:

Not later than 6 June 2024, Government may file any opposition to Appellant's motion to attach.



FOR THE COURT

F EMINq/E. :IDEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant.*	)))))))))	**UNITED STATES' MOTION TO COMPEL DECLARATIONS** Before Panel No. 3 No. ACM 22072 5 June 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court compel each of Appellant's trial defense counsel, Maj WF and Capt NW, to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel. In his assignments of error, Appellant claims he "received ineffective assistance of counsel when trial defense counsel failed to object to lay witness testimony regarding the appearing of bruising on CC's arm." (App. Br. at 26.) Finally, in his assignment of error filed under United States v. Grostefon, 12 M.J. 431 (C.M.A.1982), Appellant claims he "received ineffective assistance of counsel when trial defense counsel did not seek expert witness assistance in analyzing the bruising on CC's forearm due to a bite and the photographic evidence of the bruising to CC's chin and knee, documented in Prosecution Exhibit 1." (App. Br. Appx. at 8.)

On 3 June 2024, Maj FW and Capt NW responded to undersigned counsel stating that they would only provide an affidavit or declaration pursuant to an order from this Court. To prepare an answer under the test set out in United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide an

affidavit or declaration. Appellant is alleging his trial defense counsel failed to object to lay testimony regarding the victims' injuries and failed to seek expert witness testimony in analyzing injuries the victim sustained. A statement from Appellant's counsel is necessary because the record is insufficient to determine the strategy trial defense counsel used during the presentation of the government's case – why they chose not to object to certain testimony and why they did not seek expert assistance. Thus, the United States requires statements from both trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

Accordingly, the United States respectfully requests this Court order each trial defense counsel to provide a declaration, containing specific and factual responses to Appellant's allegations of ineffective assistance of counsel, within 30 days of this Court's order.

WHEREFORE, the United States respectfully requests that this Honorable Court grant this motion to compel declarations.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 June 2024.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**UNITED STATES' MOTION**
Appellee,	)	**FOR AN ENLARGEMENT OF**
	)	**TIME**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
JOHN P. MATTI	)	No. ACM 22072
United States Air Force	)	
Appellant.	)	5 June 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(5) of this Court's Rules of Practice and Procedure, the United States respectfully requests an enlargement of time to adequately respond to Appellant's assignments of error in which he alleges two claims of ineffective assistance of counsel against his trial defense counsel. Filed in conjunction with this motion, the United States filed a Motion to Compel Declarations and asked this court to order Appellant's trial defense counsel, Maj WF and Capt NW, to each provide a declaration in response to Appellant's ineffective assistance of counsel claims. The United States seeks a 14-day enlargement of time following the Court's receipt of Maj WF's and Capt NW's declarations to respond properly and completely to Appellant's brief.

The United States' Answer to Appellant's Assignment of Errors brief is currently due to the Court on 27 June 2024. Good cause exists to grant this request. Undersigned counsel will require a reasonable amount of time after the submission of declarations to address properly Appellant's ineffective assistance of counsel claims. Thus, the United States believes 14 days is sufficient to prepare a proper and responsive brief on this issue and to secure supervisory review once the ordered declarations are received.

This case was docketed with the Court on 15 August 2023. Since docketing, Appellant has been granted four enlargements of time. This is the United States' first request for an enlargement of time. As of the date of this request, 295 days have elapsed. If this Court grants the United States' request, the United States asks that this Court set a specific due date for the brief to avoid any confusion.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 June 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**OPPOSITION TO UNITED STATES' MOTION FOR ENLARGEMENT OF TIME**
Appellee,	)	
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
JOHN P. MATTI,	)	No. ACM 22072
United States Air Force,	)	
Appellant.	)	7 June 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Airman First Class (A1C) John P. Matti (Appellant), hereby requests this Court deny the Government's request. Appellant asserts his right to speedy appellate review. The issue of ineffective assistance of counsel (IAC), the subject of the declarations that are driving this request, affect two (2) of the six (6) issued raised. Further, one assertion of IAC is raised only in the alternative, and one is raised pursuant to *United States v. Grostefon*. Thus, five of the issues raised can be addressed now, independent of any declarations.

WHEREFORE, Appellant respectfully requests that this Honorable Court deny the requested enlargement of time.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 June 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant.*	**MOTION TO ATTACH DOCUMENTS** Before Panel No. 3 Case No. ACM 22072 28 May 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to attach the following document to the Record of Trial:

Declaration of Airman Basic John P. Matti, 1 page, 17 May 2024 (Appendix A).

Appendix A is an affidavit from the Appellant that provides details regarding the conduct of the Government counsel during findings argument that is relevant to the issue of whether there was prosecutorial misconduct. Because the record does not document what Government counsel acted out during closing argument, which was part of a larger misstatement of facts and improper argument by Government counsel, this declaration is needed to resolve the issues of whether Government counsel's actions and words during closing argument amounted to prosecutorial misconduct.

These matters may be attached for this Court's consideration pursuant to Article 66, UCMJ, as these declarations supplement matters raised in the record –

that is, whether the conduct and argument by Government counsel during findings and rebuttal argument were erroneous – and the issue is of central importance in determining whether the conduct as alleged by Appellant was of a nature to establish prosecutorial misconduct. One of the factors in evaluating prosecutorial misconduct is whether the conduct at issue was severe and pervasive. Because this conduct is not documented, there is no other way for this Court to consider the extent to which Government counsel's argument violated the standards of conduct. This is not fully resolvable by the record without this declaration. *See United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020).

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the motion to attach.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 28 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant.*	)))))))))	**UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO ATTACH** Before Panel No. 3 No. ACM 22072 6 June 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Under Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's motion to attach Appendix A – his declaration signed 17 May 2024.

A panel of members found Appellant guilty of two specifications of assault consummated by a battery in violation of Article 128, UCMJ. The specification at issue in Appellant's motion to attach is Specification 2 of the Charge for which Appellant was found guilty of unlawfully pressing his knee on CC's back. (App. Mot. Appendix A; *Entry of Judgement*, 28 July 2022, ROT, Vol. 1.)

In Assignment of Error I, Appellant claims that circuit trial counsel (CTC) committed prosecutorial misconduct during his findings argument through improper use of facts not in evidence. (App. Br. at 11.) In his declaration, Appellant asserts that CTC, "acted out a version of what he thought happened prior to specification 2 of the Charge," and that this enactment was not captured on the record. (App. Mot. Appendix A.) Appellant's declaration described that CTC kneeled on both of his knees after he stated, "how does someone fall on their chin." (Id.) Next, Appellant explained that CTC:

> Placed his arms behind his back, with his hands mid-waist, and touching as if he were at parade rest and proceeding to lean forward with his chin pointed out as if he was falling. He then stops himself from falling too forward and says "when they've got their hands pulled behind their back." This act happens during the "- -" on line 11 of page 413 and is not in the transcript.

(Id.)

Appellant concedes there was no objection to this part of trial counsel's argument, so the issue would be reviewed for plain error. (App. Br. at 11.) This Court should deny Appellant's motion to attach Appendix A because Appellant's declaration does not account for any new facts for this Court to consider. Given that Appellant's claim of improper argument was never raised at trial, it was never raised in the record. CAAF has allowed Court of Criminal Appeals (CCAs) to accept affidavits regarding issues and claims that "are raised by the record but are not fully resolvable by the materials in the record." United States v. Jessie, 79 M.J. 437, 443 (C.A.A.F. 2020). And in these cases, the CCAs have accepted affidavits or ordered hearings *to determine additional facts*. *See* id. at 442. (emphasis added).

Here, the issue contested in Appellant's declaration was not raised by the record because he never objected at trial and claimed improper argument. Because the issue of improper argument was not raised in the record, Appellant should not get the opportunity to provide this Court with additional facts. *See* id. at 442. Appellant has not cited any authority that allows him to attach a declaration explaining CTC's enactment during the finding's argument. Appellant simply cited to Jessie for the premise that CTC's enactment and impermissible findings argument "is not resolvable by the record without this declaration." (App. Mot. at 2.)

But Appellant fails to acknowledge that this Court can resolve the ultimate issue of whether CTC committed prosecutorial misconduct without his declaration. CTC's enactment, assuming CTC enacted the assault, mirrored his verbal findings argument. According to

Appellant, CTC mentioned "how does someone fall on their chin," and CTC proceeded to kneel on both knees before the members. (App. Mot. Appendix A.) Next, CTC placed his arms behind his back while he stated, "when they've got their hands pulled behind their back." (Id.) Thus, Appellant's declaration does not account for any new substantive facts for this Court to consider. CTC was merely acting out his findings argument. This Court can compare CTC's findings argument, which was transcribed verbatim, with the evidence presented at trial, such as CC's testimony, to determine whether he improperly argued facts not in evidence. Further, this Court has access to the entire record that includes the record of trial, allied papers, briefs containing government and defense arguments. *See* Jessie, 79 M.J. at 441-42. Thus, this Court does not need Appendix A to resolve Assignments of Error I.

Appellant in his motion to attach claims that Appendix A "provides details regarding the conduct of the Government counsel during findings argument that is relevant to the issue of whether there was prosecutorial misconduct." (App. Mot. at 1.) Appellant also argues that "[b]ecause this conduct is not documented, there is no other way for this Court to consider the extent to which Government counsel's argument violated the standards of conduct." (Id. at 2.) But for this Court to decide whether prosecutorial misconduct occurred, it does not need additional facts, such as Appellant's version of CTC's enactment during findings argument. The premise of Appellant's argument in his assignment of error is that CTC's explanation of how he believed Appellant held CC's arms behind her back were not supported by facts in evidence. (App. Br. at 18.) Appellant's main point is that CTC's argument did not match with CC's testimony in which Appellant claims that CC never testified that she fell to her knees with her hands behind her back. (App. Mot. Appendix A.) In any event, to determine whether CTC's argument relied on facts supported by the evidence, this Court can compare CTC's findings

argument with CC's testimony. This Court does not need additional facts contained in Appendix A regarding CTC's enactment of the assault. Thus, Appendix A is not "necessary for resolving issues raised by materials in the record." *See* Jessie, 79 M.J. at 444.

WHEREFORE, the United States respectfully requests this Court deny Appellant's motion to attach Appendix A.

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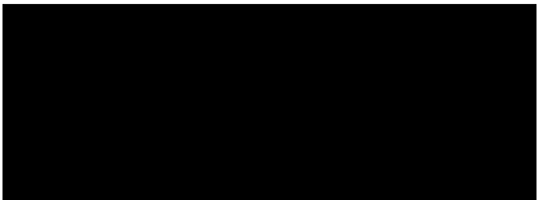
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 June 2024.



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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22072**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John P. MATTI	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 28 May 2024, Appellant, through counsel, submitted an assignments of error brief. In the brief, Appellant alleges, *inter alia*, that trial defense counsel were ineffective in that they: (1) failed to object to lay witness testimony regarding the appearance of bruising on a named victim's arm (Appellant's then spouse, CC) in a case in which Appellant was ultimately convicted of assault consummated by a battery against that same victim; and (2) trial defense counsel did not seek expert witness assistance in analyzing the bruising on CC's forearm, chin, and knee (photographs of which were admitted at trial as Prosecution Exhibit 1).[1,2]

On 5 June 2024, the Government filed a Motion to Compel Declarations and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Maj William M. Fuller and Capt Nathan M. Wiebenga, to provide affidavits or declarations in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide an affidavit or declaration upon order by this court. In the motion for enlargement of time, the Government requests 14 days after the court's receipt of declarations or affidavits to submit its answer. Appellant did not file a

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[1] Appellant personally asserts this second allegation of ineffective assistance of counsel pursuant *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] Additionally, on 28 May 2024, Appellant submitted a motion to attach a declaration to the record. On 30 May 2024, this court prematurely ruled in favor of Appellant's motion prior to the seven-day opposition period expiring. Therefore, the court issued an order on 31 May 2024, affording Government the opportunity to submit any opposition to Appellant's motion to attach. On 6 June 2024, the Government opposed the motion. We take no corrective action on this matter.

response to the motion to compel but on 7 June 2024 did file an opposition to the enlargement of time request.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense counsel. Moreover, in light of the court's order, it finds the Government's requested enlargement of time is appropriate.

Accordingly, after considering the Government's motions and the deficiencies alleged by Appellant, it is by the court on this 21st day of June, 2024,

ORDERED:

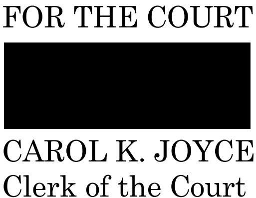
The Government's Motion to Compel Declarations is **GRANTED**. Maj William M. Fuller and Capt Nathan M. Wiebenga are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claims that they were ineffective indicating that they (1) failed to object to the lay witness testimony regarding the appearance of bruising on CC's arm; and (2) that they did not seek expert witness assistance in analyzing the photographs of bruising on CC's forearm, chin, and knee.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **21 July 2024.** The Government shall deliver a copy of the responsive affidavits or declarations to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **4 August 2024**.

FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO ATTACH**
	)	
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant.*	)	No. ACM 22072 22 July 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure, the United States hereby moves this Court to attach the following documents to this motion:

- Appendix A – Major William M. Fuller Declaration, dated 16 July 2024
- Appendix B – Captain Nathan M. Wiebenga Declaration, dated 21 July 2024

The attached declarations are responsive to this Court's order directing Maj Fuller and Capt Wiebenga to provide declarations responsive to Appellant's Assignments of Error concerning whether he received ineffective assistance of counsel. (*Court Order*, dated 21 June 2024.)

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Accordingly, the attached

documents are relevant and necessary to address this Court's order and Appellant's Assignments of Error.

WHEREFORE, the United States requests this Court grant this Motion to Attach Documents.

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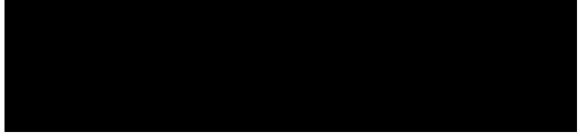

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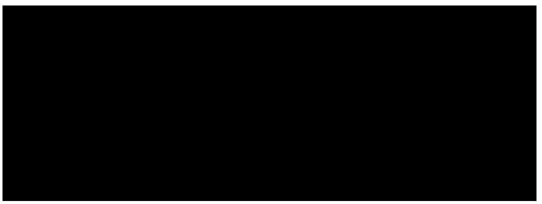
I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 22 July 2024.



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No.ACM 22072**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John P. MATTI	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel3**

On 22 July 2024, the Government submitted a motion to attach the following documents to the record: post-trial declarations form each of Appellant's trial defense counsel, Maj WF and Capt NB. The Government avers that these declarations are responsive to this court's 21 June 2024 order, directing those counsel to provide declarations responsive to Appellant's assignments of error concerning whether he received ineffective assistance of counsel at trial. Appellant did not oppose the motion.

The court has considered the Government's motion, and the applicable law. The court grants the Government's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie,* 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachments until it completes its Article 66, UCMJ, review of Appellant's entire case.

Accordingly, it is by the court on this 30th day of July 2024,

ORDERED:

The Government's Motion to Attach is **GRANTED.**

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant.*	)))))))))	**ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 3 No. ACM 22072 4 August 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 3
Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant.*	)	No. ACM 22072 4 August 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

ISSUES PRESENTED

I.

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

II.

WHETHER IT WAS PLAIN ERROR FOR THE MILITARY JUDGE TO ADMIT LAY WITNESS TESTIMONY ON THE NATURE OF BRUISING AND IN THE ALTERNATIVE, WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL FAILED TO OBJECT TO LAY WITNESS TESTIMONY ON THE NATURE OF BRUISING.

III.[1]

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING AIRMAN FIRST CLASS AA TO TESTIFY TO "OTHER BAD ACTS."

[1] Appellant raised Issues III through VI in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING DEFENSE AN ALIBI INSTRUCTION.

V.

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL FAILED TO SEEK ASSISTANCE FROM AN EXPERT TO EXPLAIN WHETHER THE DOCUMENTED INJURIES WERE CONSISTENT WITH THE ALLEGATIONS.

VI.

WHETHER APPELLANT'S CONVICTION AND SENTENCE SHOULD BE SET ASIDE BECAUSE APPELLANT WAS ENTITLED TO A UNANIMOUS VERDICT.

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case.

STATEMENT OF FACTS

Appellant's Crimes

Appellant and CC started dating in December 2019. (R. at 171.) In March 2020, Appellant joined the Air Force. (R. at 172.) While Appellant was at technical training, he and CC got married in June 2020. (R. at 171, 207.) CC moved to Surprise, Arizona to live with Appellant in August 2020. (R. at 175-76.) Although their marriage started off as fun, Appellant and CC would argue about cleaning up after Appellant's puppy or cleaning up other matters. (R. at 176.) From October 2020 to January 2021, Appellant and CC lived with A1C AA. (R. at 176-77.) A1C AA helped pay the rent. (R. at 177.) A1C AA saw Appellant and CC argue. (R. at

177.) Once A1C AA no longer lived with Appellant and CC, "things got worse. The arguments got worse and [Appellant] became physical." (Id.)

A. <u>Appellant bit CC's arm (Specification 3).</u>

In January 2021, Appellant bit CC's arm. (R. at 177.) Before the incident, Appellant and CC were watching a show, and Appellant commented that a woman had large breasts. (R. at 178.) CC then said, "why are you with me if you wanted someone with large breasts." (Id.) CC wanted to understand "why he married [her] if what he wanted wasn't [her]." (Id.) Then Appellant leaned over and bit her forearm. (Id.) CC explained that Appellant's bite on her forearm was "pretty painful" and she "started to cry." (R. at 179.) Appellant's bite was not a playful bite because he was upset with CC for saying something that he did not like. (R. at 180.) Appellant's bite left a bruise that lasted one to two weeks. (Id.)

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

SM worked with CC at Kohl's from November 2020 through January 2021. (R. at 311.) In early 2021, SM noticed that CC "came [into work] with a few bruises." (R. at 310-11.) In June 2021, CC told SM that Appellant gave her the bruises. (R. at 311.) On cross-examination, SM told trial defense counsel that she and CC worked overnight at Kohl's moving and packing boxes. On redirect examination, trial counsel asked, "Did the bruises that you saw [CC] display appear consistent with the work that you guys were doing?" (R. at 314.) SM responded, "No, not really." (Id.)

B. Appellant pressed his knee against CC's back (Specification 2).

On 21 May 2021, Appellant pressed his knee against CC's back. On this day, Appellant took CC's phone to use her Amazon account. (R. at 193.) Appellant often used CC's Amazon account to purchase supplies for his car detailing business. (Id.) CC told Appellant that he needed to use his own money to purchase his supplies. (Id.) Appellant laughed and CC tried to grab her phone. (Id.) Appellant then ran to the garage with her phone. (Id.) CC returned to the kitchen, sat on the barstool, and looked through Appellant's phone. (Id.) CC viewed Appellant's Snapchat. (Id.) CC saw that Appellant connected with a woman who had posted a story of her in lingerie. (Id.) CC confronted Appellant, faced the phone towards Appellant, and said, "do you think she's cute?" (Id.) CC then described Appellant's response:

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

(R. at 193.) CC hit her knee and chin on hardwood floor. (R. at 194.) The fall hurt CC's chin "a lot." (Id.) While CC was on the floor, in pain, Appellant put his knee on her back in between her shoulder blades. (Id.) CC screamed, "let go of me" and Appellant said, "no." (Id.) CC then said, "you're hurting me." (Id.) Appellant responded, "I don't care." (Id.) CC and Appellant continued to argue while Appellant had his knee on her back. (Id.) Appellant put most of his body weight on CC's back. (R. at 195.) This was very painful for CC. Once CC stopped pleading for Appellant to stop, Appellant stopped. (Id.)

CC testified that the assault occurred sometime in the afternoon on 21 May 2021. (Id.) And after the assault, CC went to work around 1430-1500. (Id.) CC worked at Harley Davidson about 20-25 minutes from her residence. (R. at 195-96.) CC worked until 1910 that day, and after work, went to her coworker's, CS, house. (R. at 196.) Once she returned home around 2200, CC testified that she took pictures of her leg and chin. (R. at 196-97.) But the timestamps of the photos revealed that CC took the photos of her injures at 1058 and 1104 on 21 May 2021. (R. at 198; Pros. Ex. 1.)

CC did confront Appellant the next day about her injuries. CC said, "you left a bruise on my knee and it hurt me." (R. at 199.) Appellant responded, "you hurt my eyes and my ears…by talking and I have to look at you." (Id.) This comment hurt CC's feelings. (Id.)

CS testified that he noticed that CC "came into work with a bruise on her chin once." (R. at 263.) CS explained that he saw CC's bruise around middle to the end of May 2021. (R. at 264.) CS then explained that when he saw CC's bruise it was between April and June, during the timeframe in which CC and CS worked together. (R. at 267.) CS believed that he saw the bruise closer to when CC left for Florida, which was in June. (R. at 268.) CS also remembered CC coming to his house on 21 May 2021. (Id.) Around this timeframe, CC told CS that Appellant physically abused her. (Id.)

Following this assault, Appellant did not physically hurt CC anymore because she left him. (R. at 199-200.) CC left because the fights and physical abuse kept "getting worse." (R. at 200.) Once CC returned to Florida, she reported Appellant's crimes to law enforcement. (R. at 201.) In August 2021, CC told Appellant that she wanted to file for divorce. (R. at 202.) CC and Appellant's divorce was finalized on 28 December 2021. (R. at 203.)

<u>ARGUMENT</u>

I.

APPELLANT HAS NOT DEMONSTRATED PLAIN ERROR IN CIRCUIT TRIAL COUNSEL'S FINDINGS ARGUMENT.

Additional Facts

Throughout the government's case-in-chief, trial defense counsel attacked the credibility of witnesses, including CC. Part of defense's theory throughout the case was that CC was upset because Appellant kept looking at other women often. (R. at 228.) Further, trial defense counsel questioned CC extensively on the timestamps shown in Prosecution Exhibit 1 – once again attacking her credibility. (R. at 218-19.) Circuit trial counsel (CTC) gave the government's findings argument. (R. at 376.) At the onset of his argument, CTC stated that this case was much more than Appellant looking at other women online. (R. at 377.) During the findings argument, CTC told the panel that defense raised and "will continue to raise all these sorts of issues that really what this case is about – really all the motivations of what's going on here are just about [CC] being mad about [Appellant] connecting with some women online." (R. at 376.) Throughout the argument, CTC connected the government's theory of the case to evidence presented at trial, responded to trial defense counsel's theory, and correctly referred to the military judge's instructions. Additional relevant facts are included in the analysis below.

Standard of Review

This Court reviews "prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, [] review[s] for plain error." <u>United States v. Voorhees</u>, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing <u>United States v. Andrews</u>, 77 M.J. 393, 398 (C.A.A.F. 2018)).

Under a plain error analysis, Appellant has the burden to prove that: (1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused. Id. (quoting United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005)). For prejudice, the test is whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 9 (quoting United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017)). The comments must be so damaging that this Court "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).

A plain error review of a failure to object to an argument at the time of trial rule exists:

> to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important to encourage all trial participants to seek a fair and accurate trial the first time around.

United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999) (internal quotations omitted).

Law and Analysis

Trial counsel is "charged with being as zealous an advocate for the government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied,* 23 M.J. 266 (C.M.A. 1986). Arguments may be based on the evidence, as well as reasonable inferences drawn therefrom. United States v. Nelson, 1 M.J. 235, 239 (C.M.A. 1975). Trial counsel "may strike hard blows but they must be fair." United States v. Doctor, 21 C.M.R. 252, 256 (C.M.A. 1956).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation but on the argument as

'viewed in context.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting United States v. Young, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. As quoted by our superior Court in Baer, "[i]f every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." 53 M.J. at 238 (quoting Dunlop v. United States, 165 U.S. 486, 498 (1897)).

CTC did not commit prosecutorial misconduct during his findings argument. But now, Appellant carves out snippets from CTC's findings argument that garnered no objection at trial, and now declares that CTC committed prosecutorial misconduct. (App. Br. at 11.) Such a tactic is an example of surgical carving out a portion of an argument without regard for context, which is frowned upon by our Superior Court, and should be dismissed by this Court. When viewed within the entire court-martial, or simply within the context of the findings argument itself, CTC did not commit prosecutorial misconduct.

A. CTC did not shift the burden; instead, he fairly responded to the defense's theory of the case.

Appellant first claims that CTC "shifted the burden to the defense as to whether the members had been provided any evidence that CC was not married." (App. Br. at 13.) Appellant also states that CTC shifted this burden to the defense by arguing to the members that the "defense must approve Appellant was not married to CC during the charged timeframe." (App. Br. at 13.) But Appellant takes CTC's statement out of context. CTC said, "There has been no evidence provided that [CC] wasn't [married] and they talked about the fact that they were married." (R. at 388.) At no point did CTC mention that trial defense counsel "must prove" that Appellant was not married. Throughout the argument, CTC never mentioned what,

if anything, the defense must prove. CTC correctly stated that there was no evidence provided to the members that suggested that Appellant and CC were not married at the time of the assaults. There was no error in CTC's statements. In United States v. Dennis, the court noted that "a bare statement to the effect that the prosecution's evidence generally, or that of a particular witness or witnesses, is uncontradicted or denied, is not an improper reference to the accused's refusal to testify." 39 M.J. 623, 625 (N.N. Ct. Crim. App. 1993). Likewise, CTC here highlighted the lack of evidence to prove that Appellant and CC were not married, which emphasized the uncontradicted evidence that Appellant and CC were married. CC stated that their divorce finalized 28 December 2021, after Appellant's crimes. (R. at 203.) Lastly, even Appellant in his assignments of error stated that marriage was of little significance as it was not disputed at trial. For these reasons, CTC's statement was proper argument.

Next, Appellant claims that CTC shifted the burden to defense to provide an alternative explanation for bruising on CC. (App. Br. at 13.) Appellant states that in rebuttal argument, CTC focused the government's argument on the fact that defense did not provide any reasonable explanation for where the bruises came from, related to Specification 2. (Id.) Once again, Appellant takes this CTC's statement out of context. Trial defense counsel argued that there was no corroborating evidence that Appellant injured CC with his knee: trial defense counsel strongly challenged how could CC obtain an injury to her chin when Appellant placed his knee on CC's back:

> As [CC] describes it, she was placed on the ground for minutes with almost all of his entire body weight through his knee onto her already injured back. That was her testimony. If that occurred, there would be some type of record of that injury; a picture of maybe a bruise on her back. She took images and she took her pictures in the bathroom. It wouldn't be that hard to take a picture over your shoulder. Or if she was truly already injured, she would have sought medical attention and then there would be records. But you don't

> have any of those things because the offense as charged and generally didn't occur.

(R. at 405.) CTC's statement that "[d]efense hasn't given you any explanation but think about where an explanation might be of how someone might get that [injury to chin]" was in response to one of the defense's theories of the case – that the assault never occurred. (R. at 413.) Even with this said, CTC never implied that Appellant had an obligation to put on evidence to explain alternate sources of injuries regarding Specification 2 to disprove his guilt. CTC just merely commented on the fact that defense brought up inconsistencies to support their theory of the case, but that there has not been a "reasonable explanation" for defense's assertions. A trial counsel is permitted to make a "fair response" to claims made by the defense, even when a constitutional right is at stake. United States v. Gilley, 56 M.J. 113, 120 (C.A.A.F. 2001). With this said, trial counsel can attack the defense's theory of the case, which does not constitute burden shifting. United States v. Vandyke, 56 M.J. 812, 817 (N.M. Ct. Crim. App. 2002). In Vandyke, trial counsel argued that the defense did not deliver on what they promised in opening statements, which was evidence to prove that the appellant did not have the intent to deceive. Id. at 816-17. In findings argument, trial counsel said, ["d]id you hear evidence that would support that [intent not to deceive]?" Id. at 816. The court found that this argument was "aimed at attacking the defense theory of the case, not at shifting the burden of proof." Id. at 817. Our Superior Court has found it permissible for trial counsel "to comment on the defense's failure to refute government evidence or to support its own claims." United States v. Paige, 67 M.J. 442, 448 (C.A.A.F. 2009). CTC properly commented on defense's failure to support their theory of how CC got her injuries without shifting the burden of proof. CTC's comments about CC's injuries as for specification 2 were proper argument.

Lastly, Appellant asserts that "CTC focused on what the defense was required to do in order to disprove [the allegations]" (App. Br. at 14.) To support this contention, Appellant points to various comments made by CTC, such as "You have not been provided with any reasonable explanation as to why defense just wants to get up here and say it's a lie, it's a lie, it's all lies." (App. Br. at 14 citing R. at 396.) Appellant also states that CTC shifted the burden when CTC said that "The defense needs to get up here and say that that all of these people are just lying to you; that it's all one giant conspiracy theory." (App. Br. at 14 citing R. at 397.) But again, Appellant takes CTC's statements out of context. Instead, CTC's argument stated the following:

> The defense needs to get up here and say that all of these people are just lying to you; that it's all one giant conspiracy theory. None of it makes sense. Members, what they're going to do with that is trying to tell you that if there's any doubt at all, if there's any conspiracy theory they can sell then you need to find him not guilty. That is not true. The judge instructed you on the reasonable doubt standard and what that means, and you will have these instructions so read over them carefully. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty and in criminal cases the law does not require proof that overcomes every possible doubt. That is not the burden. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged, you must find him guilty. The defense can get up here and give you all sorts of doubts, all sorts of possible doubts, possible explanations, possible reasons why this might all just be a conspiracy theory, how [CC] months before reporting this was getting bruises just to show people and they just happen to all notice and have concern that she was being physically abused, that she was laying little breadcrumbs talking to all sorts of different people, [CS], her dad, her sister, later the accused's parents, and all of this was a part of an elaborate scheme that I'm going to be prepared after I leave you to potentially report you for a crime, a crime that I have nothing to gain from. Is that a doubt? Is that an explanation? Maybe. Is it reasonable; absolutely not. Members, you absolutely should be firmly convinced that you know what's happened here, that this is the case of a woman who has endured multiple abuses, physical control from her husband,

> and he absolutely must be held accountable for what he's done, which is why the government asks that you find him guilty of all specifications.

(R. at 397-98.) CTC did not shift the burden on the defense to disprove the government's case. CTC was commenting on the defense's theory of the case presented during trial in which the defense attacked the credibility of witnesses, undermined the government's evidence, and suggested that that was all a conspiracy theory because CC had a motive to fabricate given her jealousy and anger at Appellant for looking at other woman online. CTC's comment regarding any conspiracy theory, or doubt, were a fair response to the defense's theory of the case. *See* Paige, 67 M.J. at 448; *see also* United States v. Roberts, ACM 40139, 2023 CCA LEXIS 17, at *26 (A.F. Ct. Crim. App. 20 January 2023) (unpub. op.) (finding no error when trial counsel commented about the appellant's refusal to apologize; thus, trial counsel's comment was a fair response to the defense's theory of the case that attacked the victim's credibility). CTC properly argued the standard for beyond a reasonable doubt, referred to the military judge's instructions, and correctly told the members that the burden does not require proof that overcomes all doubt but reasonable doubt. CTC argued that the defense's explanations of doubt – CC's conspiracy theory of an elaborate scheme to report a crime after she left Appellant, undermining the sources of injuries, and CC's motive to fabricate – were not reasonable explanations under the reasonable doubt standard articulated by the military judge. CTC's argument was not improper, but a correct assessment of the defense's propositions made at trial, along with the correct reading of the military judges' instructions.

CTC never asserted that the defense needed to provide proof of innocence. When read in context, CTC never mentioned any elements of any specifications or insinuated any indication that Appellant carried the burden of proof on guilt. Instead, CTC focused on defense's theory of

the case – CC was a liar who had a motive to fabricate – and detailing why this theory was not persuasive. CTC's comments were in the context of a "fair response to the defense's theory of the case." *See* Roberts, unpub. op. at *6. Thus, CTC did not shift the burden on defense to disprove any elements of the specifications. Appellant fails to prove clear or obvious error.

1. Assuming constitutional error, CTC's comments were harmless beyond a reasonable doubt.

"[W]here a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in Chapman v. California, 386 U.S. 18 (1967)." United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing United States v. Jones, 78 M.J. 37, 45 (C.A.A.F. 2018)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006) (internal quotations omitted). Assuming any error was clear or obvious and constituted constitutional error, CTC's statements were harmless beyond a reasonable doubt. CTC's findings argument did not contribute to Appellant's convictions. In fact, the members returned mixed findings, acquitting Appellant on two out of the four specifications of the single charge, which showed that the members were not impacted by any alleged errors by CTC – if CTC's arguments had been so impactful, one would have expected the members to convict on all specifications.

Appellant's asserts that the government cannot make a showing that CTC's improper statements were not harmless beyond a reasonable doubt because the corroborative evidence of CC's credibility was thin. (App. Br. at 15.) Essentially, Appellant argues that because there was weak corroborating evidence, the only reason the panel convicted him was because of CTC's improper argument. That was not the case. For Specification 2, the government provided the

factfinder with photos of CC's injuries. (Pros. Ex. 1.) Appellant asserts that the pictures of the injures predated the timeframe of the charged conduct and therefore weak corroborating evidence. (App. Br. at 15.) Although CC's testimony indicated that the assault occurred in the afternoon (R. at 216), the photos showed that the assault occurred before 1000, which was still at some point before CC went to work, consistent with her testimony. *See* United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013) (Pros. Ex. 1.) CS stated that he saw the injury to CC's chin. (R. at 263.)

As for Specification 3, SM testified that she saw bruising on CC's arms. (R. at 313.) Appellant's arguments fail because the panel members could have convicted Appellant just based on CC's testimony alone. But the fact that the panel members convicted Appellant on specifications that had corroborating evidence showed that the members convicted based on the evidence presented at trial and not based on CTC's findings argument. Appellant's arguments lack merit. CTC never turned the members toward "the defense to compensate for the Government's deficiencies." (App. Br. at 17.)

Appellant states that the military judge issued no curative instruction. (App. Br. at 16.) The military judge could have sua sponte given a curative instruction. But the lack of instruction or interruption from the military judge is indicative that CTC's comments were not clear and obvious. United States v. Burton, 67 M.J. 150, 154 (C.A.A.F. 2009). In Burton, the Court found that trial counsel's argument did not rise to the level of plain error that would require the miliary judge to sua sponte to instruct on the proper use of propensity evidence or give other remedial measures. Id. Here, the military judge did, however, instruct the panel that arguments are not evidence and that the members must "base the determination of the issues in the case on the evidence as [they remembered] it and apply the law [instructed]." (R. at 376.) The panel did just

that. The panel returned a mixed verdict, which revealed that they looked at the evidence and applied the law to render a verdict independent of trial counsel's argument. Members here were presumed to have followed the military judge's instructions. *See* United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000). "Absent evidence to the contrary, this Court may presume that members follow the military judge's instructions." Id. Here, there was no evidence that demonstrated that the members did not follow the military judge's instructions.

Lastly, Appellant cites Untied States v. Mason, 59 M.J. 416 (C.A.A.F. 2004) to compare the "severity of the improper argument leveraged by CTC." (App. Br. at 16.) In Mason, our Superior Court found that trial counsel's question about whether either side requested retesting of the DNA samples shifted the burden of proof, but it was harmless beyond a reasonable doubt because the DNA evidence was overwhelming, and the military judge gave instructions about the burden of proof. Id. at 425-26. A similar argument can be made for this case. There was corroborating evidence that supported Appellant's convictions. Next, the military judge here told the members that "the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government." (R. at 374.) Thus, CTC's argument did not contribute to the conviction, and any error (if it constituted constitutional error) was harmless beyond a reasonable doubt.

B. CTC did not commit improper bolstering or vouching.

Appellant asserts that the following CTC's statements – "you have a credible witness," "she was credible," "she's telling the truth," and "you have not been provided with any reasonable explanation as to why the defense wants to get up here and say it's a lie, it's a lie, it's all lies" – are like the arguments counsel made in Voorhees. (App. Br. at 18.) In Voorhees, our

Superior Court found improper argument, but held that the appellant suffered no prejudice as a result of trial counsel's improper argument. 79 M.J. at 14.

Voorhees is an example in which trial counsel bolstered and vouched for the credibility of the witness by stating:

> Technical Sergeant [BR] is an outstanding airman; an outstanding noncommissioned officer in the United States Air Force.
>
> And if there is any doubt in your mind as to that point or the quality of the United States evidence on this charge, rely entirely on Senior Airman [HB's] credibility. Hang your hat there, because you can. Because that airman is credible. She testified credibly; she told you what happened to her.
>
> Members, I don't—I don't go TDY and leave my family 250 days a year to sell you a story. I don't do that. And I don't stand up here and try to appeal to your emotions. I think I made that clear in talking about the government's presentation of evidence.
>
> [W]e win. Clearly.

Voorhees, 79 M.J. at 11-12. Vouching for a witness's credibility occurs when a trial counsel "places the prestige of the government behind a witness through personal assurances of the witness's veracity." Fletcher, 62 M.J. at 182 (quoting United States v. Neceochea, 968 F.2d 1273, 1276 (9th Cir. 1994)). Unlike Voorhees, CTC did not bolster and did not vouch for the credibility of CC by expressing his personal opinions. CTC addressed the defense's theory of the case that attacked the credibility of witnesses, in particular CC, throughout opening statements, the government's case-in-chief, and findings argument. In opening statements, trial defense counsel began attacking CC's credibility, stating CC was looking for a reason why her marriage failed. (R. at 166.) In findings argument trial defense counsel continued this theory by arguing that CC had a motive to fabricate and that this case was not about assaults but rather how Appellant and CC's marriage "unraveled." (R. at 411.) CTC on the other hand rebutted trial

defense counsel's assertions and argued that CC was a credible witness and that she was telling the truth by referring to the evidence presented at trial. *See* Halpin, 71 M.J. at 479. For example, CTC argued that CC had nothing to gain from Appellant's court-martial given that she already received a divorce and had no financial incentive. (R. at 202-203; 396.)

CTC never placed the prestige of the government behind CC assuring her credibility. CTC was allowed to argue that the panel should find CC to be credible and explain why defense's attacks against her credibility were unpersuasive. *See* United States v. Blackburn, ACM 40403, 2024 CCA LEXIS 129 (A.F. Ct. Crim. App. 4 April 2024) (unpub. op.) (finding a trial counsel did not vouch for a victim's credibility when the trial counsel argued in general that the victim was a credible witness, highlighted the evidence and testimony supporting this conclusion, and the argument responded to the trial defense counsel's focused attacks against the victim's credibility). The context of CTC's argument showed that he simply rebutted a theory the defense made throughout trial – that CC lied and she was mad at Appellant for looking at other women, in other words CC had a motive to fabricate. CTC never vouched for CC's credibility and even mentioned to the members that they had the "absolute responsibility to determine the credibility of witness[es]." (R. at 395.) Then CTC explained that CC was telling the truth because she had nothing to gain by telling the truth. (Id.) CTC said that was no incentive for CC to participate in Appellant's court-martial. (R. at 395-96.) Also, to support that CC was telling the truth, CTC pointed to corroborating evidence, such as CC's bruises. (R. at 379, 390; Pros. Ex 1.) CTC's comments about CC's credibility were based on the evidence and did not amount to plain error.

Next, Appellant asserts that CTC injected facts not in evidence, such as demonstrating how CTC believed Appellant held CC's arms behind her back leading up to specification 2.

(App. Br. at 18.) CTC's demonstration on rebuttal describing how CC could get an injury on her chin while Appellant pressed his knee behind her back was proper argument because trial counsel can make fair inferences from the evidence presented at trial. *See* Halpin, 71 M.J. at 479; Nelson, 1 M.J. at 239. Trial defense counsel first argued:

> The government has the burden to prove the charge that they've made against A1C Matti. What they are alleging is that A1C Matti injured [CC] using his knee. That's what the charge reads. There is no corroborating evidence of that. As she describes it, she was placed on the ground for minutes with almost all of his entire body weight through his knee onto her already injured back. That was her testimony. If that occurred, there would be some type of record 23 of that injury; a picture of maybe a bruise on her back. She took images and she took her pictures in the bathroom. It wouldn't be that hard to take a picture over your shoulder. Or if she was truly already injured, she would have sought medical attention and then there would be records.

(R. at 405.) So it was fair for CTC, in rebuttal, to comment on how CC could have obtained the injury to her chin – in particular demonstrating how CC could have fallen with her hands pulled behind her back and injured her chin while Appellant pressed his hand behind her back. (R. at 413.) Contrary to Appellant's beliefs, CTC never "asserted this was the only way for the injury to occur," but rather CTC responded to defense's argument that Specification 2 did not happen at all. (App. Br. at 18.)

Appellant cites United States v. Norwood,81 M.J. 12 (C.A.A.F. 2021) for the proposition that CTC argued hypotheticals with no basis in evidence and therefore his statements were error. But in Norwood the trial counsel during sentencing argument "pressured the members to consider how their fellow service-members would judge them and the sentence they adjudged instead of the evidence at hand." 81 M.J. at 21. In Appellant's case, CTC did not argue an inflammatory hypothetical scenario. Instead, CTC's demonstration, during rebuttal, showed the members how CC could have sustained an injury to her chin based on her testimony presented at

trial – after trial defense counsel challenged how CC could have sustained an injury on her chin. CTC's demonstration and argument were reasonably tied to evidence presented at trial.

Appellant claims that CTC continued to argue facts not in evidence related to "the nature and complexity or burden of the investigation process on CC" to bolster her credibility. (App. Br. at 19.) Once again, Appellant takes this out of context. CTC referred to the investigations process that came out through testimony, and that CC had to talk about her failed marriage to law enforcements and the panel members. (R. at 396.) CTC made a reasonable inference when he argued "it's not for the faint of heart to testify in court. It is a long drawn-out, difficult experience for [CC]." (Id.) CTC's statements about CC's motivation and credibility were not a "supplantation of his own views on CC's credibility." (App. Br. at 19.) Instead, there was a factual basis in the record for CTC to make this statement since there was evidence presented regarding CC's involvement in the investigation process and CC's testimony in which she had to discuss her failed marriage. Based on that evidence, it was a fair inference that CC would not endure these difficulties just to make a false allegation against Appellant.

Finally, Appellant argues that CTC influenced the members with the statement that Appellant "might go out and do this to someone else." (App. Br. at 19.) Appellant states that CC never testified that was why she came forward, and therefore it was improper argument by CTC. (Id.) Appellant failed to look at CTC's entire statement and once again takes this statement out of context. CTC mentioned that CC already obtained a divorce from Appellant, she had nothing financial to gain from this case. (R. at 396.) As a rhetorical question to the members, CTC then mentioned that perhaps that concern (motivation to report) was that Appellant might go out and do this to someone else. (Id.) CTC then mentioned that Appellant needs to be held accountable. CTC's statements were reasonable inferences drawn from the

evidence. CC never stated nor implied that she had any improper motive to press charges against Appellant. *See* Halpin, 71 M.J. at 479; Nelson, 1 M.J. at 239. Given that defense attacked CC's credibility as for her motivation to report the crimes against Appellant, CTC's comments were also a fair response. *See* Roberts, unpub. op. at *6.

For these reasons, CTC's statements were not plain error, and were a proper findings argument.

1. Assuming plain error, Appellant suffered no prejudice because of CTC's findings argument.

CTC's statements were not improper arguments. But even assuming error, Appellant failed to meet his burden of proving that CTC's arguments were clear and obvious error under the plain error standard. And Appellant failed to show that CTC's argument caused prejudice. To determine prejudice, for improper arguments, there are three factors this Court considers: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of evidence supporting the conviction. Fletcher, 62 M.J. at 184.

i. The severity of the misconduct

Here, the severity of the misconduct was low. First, Appellant and his trial defense counsel never objected to any of CTC's statements. This lack of a defense objection is "'some measure of the minimal impact' of a prosecutor's improper comment." Gilley, 56 M.J. at 123 (quoting United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)).

Second, the panel's mixed findings showed that CTC errors, if any, did not impact the verdict in the case. The panel acquitted Appellant of two specifications, showing that the panel reviewed every offense alleged against Appellant individually, and made their own determinations independent of CTC's argument. The fact that the panel returned a mixed verdict demonstrated that the panel was not swayed in any fashion. CTC's arguments were not

pervasive, and the mixed findings highlighted this. Contrary to Appellant's assertions that the misconduct here was severe as in Vorhees and Fletcher, the severity of the misconduct, if any, was minimal. (App. Br. at 20.) This factor favors the government.

ii. Curative measures

Trial defense counsel never objected to CTC's argument and therefore the military judge and counsel did not take any curative measures. But the military judge did instruct the members "that arguments of counsel are not evidence." (R. 376.) Further, CTC in his argument told the members that they have "the absolute responsibility to determine the credibility of witness[es]," and reiterated the military judge's instructions on credibility. (R. at 395.) CTC emphasized that the military judge's instructions about the reasonable doubt standard, which "is proof that leaves your firmly convinced of the accused's guilt." (R. at 397.) Even trial defense counsel reiterated this high burden during their argument. (R. at 403.) Throughout findings arguments and the military judge's instructions, the panel were well versed on the law and burdens of proof to apply in Appellant's case. While there were no curative measures given the lack of objections, the members, who were presumed to follow the military judge's instructions, were reminded of the correct law to apply diminishing any impact of any improper argument, however minimal. *See* Taylor, 53 M.J. at 198. This factor favors the government.

iii. Weight of the evidence supporting the conviction

This factor, like in Voorhees, also favors the government. Along with CC's credible testimony, the panel convicted Appellant of the crimes in which there was corroborating evidence. In United States v. Sewell, our Superior Court found that the panel's mixed findings further reassured the Court that the panel weighed the evidence at trial without regard to trial counsel's arguments. 76 M.J. 14, 19 (C.A.A.F. 2017). In Sewell, the appellant was acquitted of

all specifications for which there was no corroborating evidence. Id. Likewise, the panel here weighed the evidence at trial to come to an independent determination of the facts, showing that they were firmly convinced of Appellant's guilt. *See* id. CC's testimony, along with the corroborating evidence describing her injuries, as well as the photos of her injuries, demonstrated that the evidence supported Appellant's convictions.

Appellant asserts that the core of CTC's improper argument was "unique to those specifications of which Appellant was found guilty," along with the fact that the corroborating evidence was not strong for Specifications 2 and 3. (App. Br. at 21.) Appellant focuses on the lack of witnesses who saw bruising for the injury related to Specification 3 and mentions that there was no testimony consistent with the injury depicted in Prosecution Exhibit 1. (App. Br. at 21-22.)

As for Specification 2, CC took photos of her injuries consistent with her testimony – despite the minor variances of when she took the photos. (Pros. Ex. 1.) Although the photos of the injuries were taken in the morning and not later in the day – per CC's testimony, CTC explained this inconsistency – a statement that is uncontested in Appellant's Assignments of Error I. CTC explained to the panel that CC got the timing wrong. (R. at 391.) The pictures still showed the bruising on her knee and chin. (Pros. Ex. 1.) CC took the pictures on 21 May 2021, which aligned with CC's testimony. (R. at 195, 216.) The photos of the injuries corroborate Specification 2. Further, CS explained that he saw CC's bruise on her chin around middle to the end of May 202, during the timeframe of the assault. (R. at 264.) As for Specification 2, CC's testimony, photos of the injuries, and witness testimony describing the bruise on CC's chin were substantial evidence to support the conviction.

As for Specification 3, SM noticed that in early 2021 CC "came [into work] with a few bruises." (R. at 310-11.) In June 2021, CC told SM that Appellant gave her the bruises. (Id.) Not only did SM see bruising on CC's arm, corroborating CC's testimony that Appellant bit her, but also CC told SM about the assault – a prior consistent statement. (R. at 311.) Together with CC's credible testimony, for which she did not have a motivation to lie, both specifications for which Appellant was found guilty of either had testimony attesting to CC's injuries or photos of CC's injuries. For these reasons the weight of the evidence supports the conviction. This factor favors the government.

CTC's findings argument was not improper. Assuming plain and obvious error, it did not result in prejudice. The panel weighed the evidence and made an independent determination to find Appellant guilty. This Court should deny this assignment of error.

II.

IT WAS NOT PLAIN ERROR FOR THE MILITARY JUDGE TO ADMIT LAY WITNESS TESTIMONY ON THE NATURE OF BRUISING AND, IN THE ALTERNATIVE, APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL DID NOT OBJECT TO LAY TESTIMONY ON THE NATURE OF BRUISING.

Additional Facts

On redirect examination, trial counsel asked SM, "Did the bruises that you saw [CC] display appear consistent with the work that you guys were doing?" (R. at 314.) SM responded, "No, not really." (Id.) CTC asked SM this question in response to trial defense counsel's line of inquiry about SM and CC "moving boxes around, packing boxing, putting them on pallets" at Kohl's during their night shift. (R. at 312.)

Maj WF did not object to SM's testimony because he believed it was lay person opinion based on SM's perception consistent with Mil. R. Evid. 701.[2] (*Maj WF Declaration*, 16 July 2024.) SM was not testifying as an expert defined under Mil. R. Evid. 702. (Id.) Maj WF remembered SM as CC's coworker. (Id.) SM testified that her work was moderately physical as it involved movement of boxes and clothing, as well as unloading a truck with retail goods. (Id.) SM testified that she saw bruising on CC's arm. (Id.) Maj FW explained that SM's answer – that the bruising she observed was inconsistent with the work they performed at the store – was rationally based on her perception of both the work that SM experienced and the bruising that SM saw. (Id.) Thus, SM's testimony complied with Mil. R. Evid. 701(a). Lastly, SM's testimony was not based on scientific, technical, or other specialized knowledge. (Id.)

Capt NW would not have raised an objection either. (*Capt NW Declaration*, 21 July 2024.) It was the defense's strategy with SM to illicit that SM and CC did manual labor in their job. (Id.) As a result, Capt NW believed that the defense opened the door to questions about bruising and manual labor. (Id.) Further, Capt NW believed that SM was "fairly able to comment on whether she or other employees received similar bruises from the work" they do compared to the bruising SM saw on CC. (Id.) Lastly, Capt NW believed that objecting to a question that the defense had opened the door would have drawn more attention to the issue, and the defense wanted to focus of the case to be on CC's inconsistencies and her motives to fabricate. (Id.)

[2] It appears Maj WF's declaration inadvertently switched CC's and SM's initials when discussing the two claims of ineffective assistance of counsel in the declaration.

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019). But "[f]ailure to object to admission of evidence at trial forfeits appellate review absent plain error." United States v. Eslinger, 70 M.J. 193 (C.A.A.F. 2011). "[W]hen an appellant has forfeited a right by failing to raise it at trial, [this Court] review[s] for plain error." Lopez, 76 M.J. at 154. Thus, Appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. Id.

This Court reviews claims of ineffective assistance of counsel de novo. United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007).

Law and Analysis

SM's answer to one question about bruising on redirect examination did not amount to expert testimony and therefore did not amount to error, plain or otherwise. Trial defense counsel was not ineffective when they did not object to trial counsel's sole question on redirect examination about bruising.

A. Appellant failed to meet his burden of proving plain error.

SM's testimony about whether the bruising on CC's arm was consistent with the work that they performed at Kohl's – warehouse work – was lay testimony. Lay opinion testimony is admissible if: (1) "the opinion is rationally based on the witness's perception;" and (2) "the opinion is 'either helpful to an understanding of the testimony on the stand or to the determination of a fact in issue.'" Lopez, 76 M.J. 151 at 156 (internal citations omitted). On the other hand, expert testimony is admissible when "scientific, technical, or other specialized

knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." United States v. Brooks, 64 M.J. 325, 326 (C.A.A.F. 2007) (quoting Mil. R. Evid. 702).

SM's testimony was not expert testimony. She answered one question about whether her job responsibilities would give bruises consistent with the bruises she saw on CC's arm. The lay opinion here was rationally based on SM's perception. SM testified that when she and CC worked at Kohl's, it was more like a "warehouse operation." (R. at 312.) SM and CC moved boxes around and unloaded trucks. (Id.) SM having worked at Kohl's for some time had the knowledge and personal experience to testify to the fact that her job would not have caused bruising consistent with the bruising she saw on CC's arm. SM's answer helped the factfinder determine a fact in issue – whether Appellant caused the bruising on CC's arms rather than performing warehouse work at Kohl's. SM did not expand on the nature of bruising.

Appellant contends that testimony on bruising requires expert testimony. (App. Br. at 23.) Appellant relies on United States v. Rameshk, ACM 39319, 2018 CCA LEXIS 520 (A.F. Ct. Crim. App. 29 October 2018) (unpub. op) in which an expert witness properly testified about bruising. But Rameshk is distinguishable from Appellant's case. In Rameshk, the expert witness provided expert testimony on the lifecycle of bruises and how they change in appearance over time. Id. at *14. Testimony about the lifecycle of bruises and how their appearance changes over time is scientific and technical testimony that requires specialized knowledge. *See* id. at *15. In Appellant's case, SM did not testify about the specific appearance of the bruise, just that she saw bruising on CC's arm, which was not a result of warehouse work. There was nothing in SM's testimony that was scientific and technical in nature. No specialized knowledge was required for SM's testimony.

Contrary to Appellant's argument, SM did have the proper foundation to testify that her duties at Kohl's were not consistent with the bruising she saw on CC's arm. Appellant argues that "there was no foundation for SM to testify that she would know if the work they were doing could cause the bruising she saw on CC or any other person." (App. Br. at 24.) SM did not testify on the causation of the injuries – just that, based on SM's experiences, her job at Kohl's would not cause bruising consistent with what she saw on CC. Appellant cites United States v. York, 600 F.3d 347, 361 (5th Cir. 2010), which held that medical causation testimony about the cause of the bruise and their development required expert testimony. Again, SM did not testify about specifics of CC's bruising, such as the causation or the time it would take for a bruise to develop. Instead, SM testified that CC's bruise was not consistent with what SM experienced working at Kohl's – a type of lay "opinion that one could reach as a process of everyday reasoning." *See* id. at 361.

Courts have allowed a lay witnesses to talk about the bruises they have observed. In United States v. Valez, a lay witness was competent to testify that the bruises observed "looked like fingers." NMCM 94 00959, 1996 CCA LEXIS 422 at *24 (N.M. Ct. Crim. App 31 July 1996) (unpub.op.). A lay witness with personal experience is allowed to testify that a substance appeared to be blood, but allowing a lay witness to testify that bruising is indicative of head trauma is not allowed. United States v. Perkins, 470 F.3d 150, 155 (4th Cir. 2006) (referencing Fed. R. Evid. 701 advisory committee notes). An expert witness is not always necessary when the testimony is of a specialized or technical nature. United States v. Fulton, 837 F.3d 281, 301 (3d Cir. 2016). When a lay witness has knowledge by virtue of her experience, the witness may testify even if the subject may appear specialized or technical because the testimony was based upon the layperson's personal knowledge rather than specialized knowledge within the scope of

Fed. R. Evid. 702. Id. Here, SM testified based on her personal knowledge of her and CC's duties at Kohl's.

For these reasons, allowing SM to answer one question about whether CC's bruising was consistent with their job duties at Kohl's did not result in plain error. It was not plain error to allow SM to testify about her own perception. Assuming error, this error was not clear and obvious as evidence by the lack of objection at trial. Appellant has failed to prove that SM's testimony impacted his substantial rights.

B. Appellant did not receive ineffective assistance of counsel when trial defense counsel did not object to lay witness testimony on the nature of bruising.

Appellant's trial defense counsel were not ineffective. The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; Gilley, 56 M.J. at 124. In assessing the effectiveness of counsel, courts apply the standard from Strickland v. Washington, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658 (1984).

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). The Strickland standard is "stringent." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012).

Military courts apply the following three-part test in assessing whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions;" (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance…[ordinarily expected] of fallible lawyers;" and (3) if defense counsel were ineffective, is there a "reasonable probability

that, absent the errors," there would have been a different result? United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration and omission in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

An appellant who claims ineffective assistance of counsel "must surmount a very high hurdle." United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000) (citations and quotation marks omitted). Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." Id. (citing Strickland, 466 U.S. at 689).

This Court does "not look at the success of a criminal defense attorney's trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." United States v. Thompson, ACM 32630, 1998 CCA LEXIS 163, at *7 (A.F. Ct. Crim. App. 5 February 1998) (unpub. op.). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

1. Trial defense counsel had a reasonable explanation for their actions, and their conduct fell within the wide range of reasonable professional assistance.

The Court evaluates ineffective assistance of counsel using the three-part test set out in Gooch. First, Appellant's allegations are true – trial defense counsel did not object to SM's testimony on the nature of CC's bruising. (R. at 314.) But defense counsel provided "a reasonable explanation for counsel's actions." Trial defense counsel explained that he did not object to SM's testimony because he believed SM's testimony was lay person opinion:

> I also did not feel that [S.M.'s] testimony constituted impermissible expert testimony. Nothing about [SM] marked her as an expert witness consistent with MRE 702. [SM] was a young (appearing to

> be in her early twenties), nightshift, retail worker. She did not claim to have any expert, professional, or academic qualifications. Nor did she claim to have any special knowledge. Her testimony was not based on gathered data or facts, nor did it rely on scientific or academic principles or methods. No member of the jury could have interpreted her statement as constituting expert opinion. I did not object, in part, because I was confident that her testimony would not be misconstrued as expert testimony.

(*Maj WF Declaration*, 16 July 2024.) Maj WF recalled SM's statement being equivocal. (Id.) Ultimately, Maj WF "did not want to draw attention to the fact that a bite mark may be inconsistent with a bruise caused by moving a box." (Id.) Choosing to withhold an objection was "within range of reasonable professional assistance." *See* Strickland, 466 U.S. at 689. As explained above, SM's testimony was not expert testimony under Mil. R. Evid. 702. SM's testimony did not require any scientific knowledge or other expertise. Second, her testimony on redirect examination about the bruising was not extensive, it was a simple answer "No, not really." (R. at 314.)

Second, trial defense counsel's level of advocacy did not "fall measurably below the performance…[ordinarily expected] of fallible lawyers" because his choice not to object was a strategic one. Gooch, 69 M.J. at 362. Maj WF understood the ramifications that could have arisen had he objected to SM's equivocal statement. It would have drawn more attention to trial counsel's single question on the nature of bruising during redirect examination. Thus, this strategic choice not to object is "virtually unchallengeable." *See* Dewrell, 55 M.J. at 133.

Third, and finally, if this Court determined that trial defense counsel were ineffective, there was not a "reasonable probability that, absent the errors," there would have been a different result. Gooch, 69 M.J. at 362. Appellant was not prejudiced when SM answered "No, not really" when asked if the bruising was consistent with the work at Kohl's. SM's testimony about bruising was miniscule. Even without SM's testimony about whether the bruises were consistent

with her job, the members could still have rejected Appellant's implication that CC sustained the injuries working in the warehouse.

Appellant argues that there would be a different outcome because SM's testimony was the only corroborating evidence regarding Specification 3 – the bite mark. "Without this improper lay witness testimony, the members would have acquitted Appellant on Speciation 3." (App. Br. at 28.) But Appellant fails to acknowledge other corroborating evidence that supports Specification 3. SM saw bruising on CC's arm, and CC told SM that Appellant gave her that bruise – a prior consistent statement. (R. at 311.) Thus, members could have convicted Appellant had they not heard of this line of testimony from SM. For these reasons, Appellant was not prejudiced because there was no reasonable probability that there could have been a different result absent the errors. *See* Gooch, 69 M.J. at 362.

To establish deficient performance by defense counsel, Appellant fails to overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *See* Strickland, 466 U.S. at 689. Thus, trial defense counsel were not ineffective, and Appellant was not prejudiced by trial defense counsel's strategic decision. This Court should deny this assignment of error.

III.[3]

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE ALLOWED A1C AA TO TESTIFY TO "OTHER BAD ACTS."

Additional Facts

A1C AA lived with Appellant and CC in Arizona from end of September 2020 to January 2021. (R. at 291.) After living with CC and Appellant for a week, A1C AA noticed that Appellant and CC "argued nonstop." From what A1C AA could hear, they argued daily mostly about financial struggles. (Id.) Appellant started the arguments. (Id.) One day after A1C AA asked CC if she needed anything from the store, Appellant told A1C AA that if A1C AA needed to talk to CC to go through Appellant. (Id.) As a result, A1C AA never had any contact with CC via any phone calls or text messages while he lived with CC and Appellant. (Id.)

Trial defense counsel objected to trial counsel introducing testimony from A1C AA about arguments between Appellant and CC regarding financial issues under Mil. R. Evid. 404(b). (R. at 271-89.) After conducting the three-prong analysis under United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989), the military judge ruled that the government could introduce testimony from A1C AA. (R. at 281.) Regarding the first prong under Reynolds, the military judge ruled that he only had a proffer from trial counsel about what the witness would testify to – such as A1C AA's observations between Appellant and CC. (R. at 280.) The military judge said that the members could reasonably find whatever facts the witness testified to. (Id.) As to the second prong, "the existence of conflict within a marriage or arguments is at least relevant to the question of whether the [Appellant] committed any of the charged offenses…" (Id.) The military judge also concluded that "at the very least the existence of some sort of animosity or

[3] Issues III was raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

conflict in the marriage would make it more likely that someone might commit an act of violence against another person if they harbor ill will or a ill feelings against that person because of disagreements about things." (Id.) When the military judge analyzed the third Reynolds prong, the required balancing test under Mil. R. Evid. 403, he found that the probative value was not substantially outweighed by any of the dangers enumerated in that rule. (R. at 281.) The military judge noted that there had already been "evidence elicited regarding arguments or disagreements between [Appellant] and [CC] so [he did not] think that the members will be confused as to the issues before them or be misled." (Id.) Lastly, the military judge found that there was no danger of unfair prejudice given that "the existence of conflict between the spouses provide possible explanation or motive for [Appellant] to commit the charged offenses." (Id.) Thus, the military judge allowed A1C CC to testify as to "other bad acts."

Standard of Review

This Court reviews a military judge's decision to admit evidence under Mil. R. Evid. 404(b) for an abuse of discretion. United States v. Hyppolite, 79 M.J. 161, 164 (C.A.A.F. 2019). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable. United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008)). "When judicial action is taken in a discretionary matter, such action can not be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." Id. (quoting United States v. Sanchez, 65 M.J. 145, 148 (C.A.A.F. 2007) (internal citations and quotations omitted).

Law and Analysis

Evidence of crimes, wrongs, or other acts may not be used to establish character or propensity, but may be admissible for other purposes, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident. Hyppolite, 79 M.J. at 165. Here, the military judge found that the existence of arguments between Appellant and CC provided an explanation or motive for Appellant to commit the charged offenses. (R. at 281.)

Courts test the admissibility of uncharged misconduct under Mil. R. Evid 404(b) under a three-prong test: (1) does the evidence reasonably support a finding by the factfinder that an appellant committed prior crimes, wrongs, or acts; (2) does the evidence make a fact of consequence more or less probable; and (3) does the probative value survive a Mil. R. Evid 403 balancing test – is the evidence substantially outweighed by the danger of under prejudice. Reynolds, 29 M.J. at 109.

Appellant contests that the military judge applied "the correct legal principles to the facts in a manner that was clearly unreasonable." (App. Br. Appendix at 2.) Appellant argues that "the military judge's determination of the facts under the second prong of the Reynold's test failed to make a fact of consequence relevant to the charged conduct more or less probable. (App. Br. Appendix at 2-3.)

But the military judge's application of Reynolds was not clearly unreasonable as applied to A1C AA's testimony. Appellant argues that the "fact that there were arguments about finances or that Appellant told A1C AA not to speak directly to CC does not make it more or less likely that Appellant would commit assault consummated by a battery against his spouse." (Id. at 3.) This argument fails. In fact, the initial argument preceding Specification 2 was first about

finances. Appellant often used CC's Amazon account to purchase supplies for his car detailing business. (R. at 193.) On the day Appellant committed the offense in Specification 2, the tension between CC and Appellant began when Appellant asked CC to purchase car detailing supplies, and CC said no. (Id.) CC also told Appellant that he needed to use his own money to pay for his supplies. (Id.) CC tried to retrieve her phone so Appellant would not make a purchase. (Id.) Appellant then ran to the garage with CC's phone. (Id.) When Appellant returned from the garage, that was when the tension between Appellant and CC escalated resulting in the assault – Specification 2. Appellant and CC did argue about finances before one of the assaults. Thus, evidence about financial arguments and any animosity Appellant had towards CC was relevant to show whether Appellant had a motive to assault his wife.

Moreover, the military judge's reasoning in allowing A1C AA's testimony was not unreasonable. The existence of conflict according to the military judge was "at least relevant to the question of whether the accused committed any of the charged offenses." (R. at 280.) And the financial disagreements were "at the very least the existence of some sort of animosity or conflict in the marriage would make it more likely that someone might commit an act of violence against another person." (R. at 280.) Contrary to Appellant's assertions that A1C AA's testimony "served only to paint Appellant as a bad person," A1C AA's testimony made a fact in consequence more probable – Appellant and CC argued and had a turbulent marriage, which ultimately led to the physical assaults. In United States v. Watkins, our Superior Court held that Mil. R. Evid. 404(b) evidence was properly admitted against the appellant during his rape prosecution because the testimony – discussing the use of the appellant's physical violence against different women – helped establish a motive for committing the charged crimes. 71 M.J. 224, 227 (C.M.A. 1986). Our Superior Court added that the evidence showed an "outlet" for the

appellant to vent his emotions and that outlet existed during both the charged and extrinsic offenses. Id. Just like Watkins, the 404(b) evidence here also occurred during the charged timeframe and established that Appellant would get mad at CC and arguments led to the physical assaults – an outlet for Appellant to vent out his emotions. *See* id.

Many jurisdictions have recognized that in domestic violence cases, evidence of prior hostility or animosity between spouses were relevant to show motive. *See* United States v. Jenkins, 48 M.J. 594, 599 (A. Ct. Crim. App. 1998) (citing Garibay v. United States, 634 A.2d 946 (D.C. 1993)). Even the Supreme Court upheld admissibility of evidence of ill treatment by a husband of his spouse when the husband was charged with murder. Thiede v. Utah, 159 U.S. 510, 517-18 (1895). In Flowers v. State, the court found that prior difficulties in a marriage were admissible for a permissible, non-character purpose, such as motive for murdering a spouse. 837 S.E.2d 824, 827-28 (Ga. 2020).

Here, there was no dispute that Appellant and CC had difficulties in their marriage – financial arguments, as well as Appellant connecting with other women on social media. A1C AA's testimony highlighted frequent arguments between Appellant and CC, which made a fact more probable in that Appellant and CC argued throughout their marriage. And their arguments preceded Appellant's crimes against CC. For these reasons, the military judge did not abuse his discretion when he held that A1C AA's testimony about the hostility between Appellant and CC were admissible under Mil. R. Evid. 404(b).

Lastly, A1C AA's testimony was not outweighed by and danger of unfair prejudice, waste of time, or misleading the factfinder. As the military judge correctly stated, there was already evidence before the members revealing arguments and disagreements between Appellant and CC. The panel members were already tracking the animosity between Appellant and CC.

A1C AA was the only witness who testified as to the "other bad acts" and therefore not a waste of time. Further, A1C AA's testimony did not mislead the factfinder because there was other evidence that showed arguments and disagreements between Appellant and CC. Thus, members would not have been misled or confused as to the issues. The probative value of A1C AA's testimony was not outweighed by the danger of unfair prejudice because his testimony explained the animosity between Appellant and CC, and provided a motive, an explanation, for Appellant to commit the charged offenses. And since similar evidence had already been admitted, there was nothing unfair about additional evidence on that point. Thus, A1C AA's testimony survived the Mil. R. Evid. 403 balancing test.

For these reasons, the military judge reasonably tied the law to the facts established in the record. The military judge did not abuse his discretion in allowing A1C AA to testify as to "other bad acts." Appellant did not suffer prejudice because the members were already aware that Appellant and CC had a turbulent marriage. Even if it were error for A1C AA to testify about other arguments Appellant and CC had, there was other evidence before the members that showed Appellant and CC often argued. This Court should deny this assignment of error.

IV.[4]

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT AN ALIBI INSTRUCTION.

Additional Facts

Trial defense counsel requested an alibi instruction and argued that "the evidence in this case raises a reasonable inference of alibi…" (R. at 362.) The military judge denied the defense's request. (R. at 363.) For the following reasons, the military judge found that the evidence did not reveal that Appellant "was at a place other than the location of the alleged offense." (Id.) CC's testimony revealed that the offense (Specification 2) occurred before she left for work around 1400. (R. at 362.) Appellant left for work around 1430. (Id.) On the day of the crime, Appellant would have started work at 1500. (Id.) Thus, the military judge denied the instruction because there was no evidence indicating that Appellant was at another location other than his residence before 1400 on the day in question. (Id.)

Standard of Review

This Court reviews a military judge's denial of a requested instruction under an abuse of discretion standard. Unted States v. Rasnick, 58 M.J. 9, 10 (C.A.A.F. 2003) (citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993)).

Law and Analysis

To determine whether the military judge's denial of the requested alibi instruction was error, this Court applies the following three-prong test: (1) whether the requested instruction was correct; (2) whether the requested instruction was covered in the standard instructions; and (3) "it is on such a vital point in the case that the failure to give it deprived defendant of a

[4] Issues IV was raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

defense or seriously impaired its effective presentation." Damatta-Olivera, 37 M.J. at 478. The term alibi means that an accused was elsewhere at the time of the offense. United States v. Brooks, 25 M.J. 175, 178 (C.M.A. 1987). Even though alibi is not an affirmative defense, which excuses, justifies, or mitigates an accused's action, if it is raised the instruction should be given. Id. In Brooks, the military judge erred in failing to give the panel an alibi instruction for one of the specifications. The appellant's own testimony and other witness testimony revealed that the appellant was in a different area of the building where the government claimed the alleged crime occurred. Id. at 179.

Here, the requested instruction was not correct. An alibi instruction is warranted only when the evidence raises an inference that an accused was not present where the government alleged where the crime occurred. Id. at 179. There was no evidence presented at trial that revealed that Appellant was not home – where the government claimed Specification 2 occurred. Appellant, on 21 May 2021, worked a swing shift that started at 1500 (R. at 216; Def. Ex. E.). Although there were inconsistencies regarding CC's testimony about the time of the assault – when she took photos of her injuries – CC's testimony still revealed that the assault occurred before she went to work that afternoon before 1400. (R. at 195-96.) Although the timestamps suggested that the assault happened earlier, Appellant still would have been home at the time of the assault because this timeframe was before Appellant would have left his residence to attend his work shift in the afternoon. Appellant went to work around 1430 before his shift started at 1500. These facts undercut Appellant's argument that an alibi instruction was warranted in this case. Appellant was home during the timeframe of the assault and had the opportunity to assault CC. Unlike Brooks, where the appellant was in another location during the alleged time of the offense, the evidence here revealed that Appellant was home – where the offense was alleged to

have occurred. *See* Brooks, 25 M.J. at 179.

Appellant argues that "traditionally the instruction of alibi is given when Appellant is not at the time or place alleged – here CC was not at the time or place alleged for this injury to have occurred…." (App. Br. Appendix at 7.) Thus, Appellant argues that the instruction would have been correct with modifications. (App. Br. Appendix at 7.) But this is not how the alibi defense instruction works. The focus of an alibi instruction is on the location of an accused not the victim. Appellant was home during the time of the offense – before CC went to work. Alternatively, Appellant argues that he was asleep. (App. Br. Appendix at 8.) Still, that did not trigger the alibi defense. Appellant was still home and had the opportunity to commit the crime.

The alibi defense was not covered by the standard instructions. Yet Appellant argues that the military judge should have given a tailored instruction because at the time of the assault, CC was not present. (Id.) This did not require a tailored instruction for reasons discussed above. And trial defense counsel could have argued this point that CC was not home during the alleged crime during findings argument without an instruction from the military judge.

The alibi instruction was not a vital point in the case. While the lack of instruction deprived Appellant of the alibi defense, he was not entitled to this defense because the evidence did not raise it. The facts showed that Appellant was home in Surprise, Arizona at the date and time alleged. There was no testimony or evidence to show that Appellant was not home during the morning or early afternoon on 21 May 2021. CC's testimony revealed that she left for work at 1400. As a result, CC and Appellant on 21 May 2021 were both located at their residence during the morning and early afternoon. And they were both home when CC took pictures of her injuries. (Pros. Ex. 1.) The evidence negated any reason for the military judge to give the panel an alibi instruction or other tailored instructions. The military judge did not abuse his discretion

because the evidence did not raise the defense of alibi. This Court should deny this assignment of error.

V.[5]

APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL DID NOT SEEK ASSISTANCE FROM AN EXPERT TO EXPLAIN WHETHER THE DOCUMENTED INJURIES WERE CONSISTENT WITH THE ALLEGATIONS.

Additional Facts

Trial defense counsel did not seek expert assistance to explain whether the documented injuries were consistent with CC's allegations. *(Maj WF Declaration*, 16 July 2024.) Trial defense counsel did not obtain medical expert assistance because based on the evidence, an expert would not have benefitted Appellant's case. (Id.) CC did not seek medical attention after the assaults. As a result, an expert would have no evidence to review other than the pictures of CC's chin and leg. (Id.) Had trial defense counsel called an expert witness to testify as to the nature of CC's bruising, the expert would not have been unable to withstand cross-examination without harming Appellant's case. (Id.) Trial defense counsel was confident that the expert witness would be unable to rule out domestic violence as a source of injury. (Id.) Based on discussions with supervision and their own experience, trial defense counsel concluded that analyzing bruising is difficult to do from photographs available in Appellant's case. (*Capt NW Declaration*, 21 July 2024.) Because the defense had a strong argument that CC had a motive to fabricate the allegations, trial defense counsel decided to focus on CC's credibility rather than call an expert witness to explain CC's bruising. (Id.)

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[5] Issues V was raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. Tippit, 65 M.J. at 76.

Law and Analysis

Trial defense counsel were not ineffective when they did not seek expert assistance to determine whether the injuries conflicted with the charged allegations of domestic violence. Military courts apply the following three-part test in assessing whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions;" (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance…[ordinarily expected] of fallible lawyers;" and (3) if defense counsel were ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result? Gooch, 69 M.J. at 362 (alteration and omission in original) (quoting Polk, 32 M.J. at 153). The relevant law here is the same as outlined in Issue II, subheading B.

This Court evaluates ineffective assistance of counsel using the three-part test outlined in Gooch. First, Appellant's allegations are true – trial defense counsel did not seek expert assistance to analyze CC's bruising. But trial defense counsel explained that he chose not to seek assistance or have an expert testify because it could harm Appellant's case:

> There were no medical documents or reports for an export to analyze or explain for the benefit of our team. Meanwhile, in our experience, there is limited information that a medical expert can provide with respect to minor bruising. For example, we felt that an expert would not be able to opine as to the source of the bruising. We were concerned that this inability would weaken our case if we asked our expert to testify. We were confident that the Prosecution would ask whether the expert could rule out domestic violence as the source of injury and that they would not be able to do so. Ultimately, we were concerned that the Prosecution would argue that our own expert

> could not rule out the possibility of a crime having occurred. Accordingly, because we felt that a medical expert would have no impact, or even potentially harm our case, we decided against acquiring such an expert and instead we focused on [CC's] lack of credibility including her motive to fabricate and inconsistencies with her recollection of events.

(*Maj FW Declaration*, 16 July 2024.) Choosing to forego seeking expert assistance in Appellant's case was "within the wide range of reasonable professional assistance" especially when expert testimony would have no impact or even harmful effect on Appellant's case. *See* Strickland, 466 U.S. at 689.

Second, trial defense counsel's level of advocacy did not "fall measurably below the performance….[ordinarily expected] of fallible lawyers" because the choice not to seek expert assistance and have an expert testify was a strategic one. Had the expert testify and offered an opinion on the source of injury, the expert witness would be unable to rule out domestic violence as a source of injury. Thus, it was a strategic decision not to seek expert assistance that would not have benefitted Appellant's case. Instead, trial defense counsel focused on attacking CC's credibility and motive to fabricate. (*Maj FW Declaration*, 16 July 2024; *Capt NW Declaration*, 21 July 2024.) This strategic choice by trial defense counsel to forgo expert assistance and instead focus on CC's credibility was "virtually unchallengeable." Dewrell, 55 M.J. at 133.

Appellant argues that not seeking expert assistance hindered his ability to put on a full defense and was unreasonable for the following three reasons (1) it prevented him from determining whether the bruises in Prosecution 1 were consistent with the injury described by CC (2) it prevented him from determining whether the bruises shown in Prosecution Exhibit 1 were consistent with the charged timeframe and the date and time the photographs were taken; and (3) it prevented him from determining whether a bite would have caused a bruise that would have lasted about two weeks.. (App. Br. Appendix at 9.) Appellant's arguments fail. As both

trial defense counsel noted, there was very little information an expert could dissect for CC's bruise, and therefore an expert witness would not have been of any assistance to Appellant's defense. CC took photographs of her injuries, related to Specification 2, with her cell phone, and the bruises are not fully visible given the lack of lighting in which the photographs were taken. (Pros. Ex. 1.) Although one can see bruising in the photographs, it is difficult to see the details of CC's bruises. (Pros. Ex. 1.) Thus, it would have been difficult for an expert to discern the extent of the injuries from the photographs alone. Additionally, there were no medical reports nor any medical history documenting CC's injuries. Thus, there would be very little for an expert to clarify, and very little information for an expert witness to analyze to form an opinion as to CC's injuries related to Specification 2 shown in Prosecution Exhibit 1.

Appellant contends that an expert may have been able to opine on whether a bite would have caused a bruise that would have lasted about two weeks. (App. Br. Appendix at 9.) Here, there were no evidence, such as pictures of the injuries or a medical history, that an expert could have depended on to form an opinion that would have benefited Appellant's case. Trial defense counsel even noted that in his experience, "there is limited information that a medical expert can provide with respect to minor bruising." (*Maj WF Declaration,* 16 July 2024.) Given the lack of evidence about CC's bite mark and subsequent bruise – no medical report – an expert would not be able to opine with certainty as to the source of CC's injuries. With this said, trial defense counsel was concerned with an expert's inability to opine as to the source of bruising, as well as the inability to rule out domestic violence as a source of injuries. (Id.)

For the sake of argument, had an expert contended that a bite mark could not lead to a bruise that would last two weeks, that would open the door for the prosecution to challenge this opinion. The expert would have also agreed that the bite mark and its later injuries could

resemble domestic violence; which would support the government's theory of the case. This would have harmed Appellant's defense.

Appellant relies on United States v. Davis, 60 M.J. 469 (C.A.A.F. 2005). (App. Br. Appendix at 10.) In Davis, the trial defense counsel were not familiar with the applicable law and facts and therefore gave the appellant ill advice on his sentencing case strategy. Id. at 475. This case is distinguishable; trial defense counsel knew the law in Appellant's case and had a strategic reason not to have an expert clarify CC's injuries. In fact, trial defense counsel knew the facts of the case and recognized that they had very little evidence for an expert to review, just photos of "superficial bruising on [CC's] chin and leg." (*Maj FW Declaration*, 16 July 2024.) Trial defense counsel are presumed to be competent, and they even sought advice from their supervision to conclude that seeking expert testimony would not assist Appellant's case. (*Capt NW Declaration*, 16 July 2024.) This decision not to seek expert advice was not taken lightly, and trial defense counsel decided that a better strategy was to attack CC's credibility rather than focus on the nature of her injuries and bruising. Previously, CAAF upheld a trial defense counsel's strategy not to call an expert witness because calling the expert may have undermined the credibility of the defense's case. United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002). Expert testimony would have undermined Appellant's defense because it would have made the prosecution's theory of the case more probable in that the injuries could have resulted from domestic violence. *See* id. Appellant has not met his burden of proving that the strategic decision of trial defense counsel were unreasonable and "fell measurably below the performance…[ordinarily expected] of fallible lawyers." *See* Gooch, 69 M.J. at 362.

Third, and finally, if this Court determined that trial defense counsel were ineffective, there was not a "reasonable probability that, absent the errors," there would have been a different

result. Gooch, 69 M.J. at 362. Appellant claims that the "split findings on the specifications demonstrates how dispositive this evidence involving bruising or injury was to the trial." (App. Br. Appendix at 12.) But Appellant was not prejudice for the lack of expert assistance on the nature of CC's injuries or bruises. In fact, had an expert testified, the expert would have been compelled to agree with the prosecution that CC's injuries could have been consistent with domestic violence – a fact that would have harmed Appellant's case. Given the lack of evidence available to an expert for review, the expert would have not ruled out domestic violence as a source of injury. Thus, Appellant was not prejudiced by trial defense counsel's strategic decision not to open the door to this line of inquiry that would have supported the prosecution's theory of the case. This Court should deny this assignment of error.

VI.[6]

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS GUILTY VERDICT.

Additional Facts

Trial defense counsel filed a motion for appropriate relief for a unanimous verdict. (App. Ex. III.) The military judge denied the motion. (App. Ex. V.)

[6] Issues VI was raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Standard of Review

The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (citing United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members in accordance with Article 52, UCMJ. (R. at 415-16.) Appellant now argues that he was deprived of his constitutional right to a unanimous guilty verdict. (App. Br. Appendix at 13.)

In Ramos v. Louisiana, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. 590 U.S. 83 (2020). The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 90-91. The Supreme Court did not state that this interpretation extended to military courts-martial.

CAAF addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). Our Superior Court reaffirmed that servicemembers do not have a Sixth Amendment right to a jury trial. Id. at 295. CAAF rejected the same claims Appellant raises now:

> [W]e disagree that [Ramos] further held that [a unanimous verdict] is also an essential element of an impartial factfinder. In the absence of a Sixth Amendment right to a jury trial in the military justice system, Appellant had no Sixth Amendment right to a unanimous verdict in his court-martial.

Id. at 298. CAAF held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. Id. at 300. Further, our Superior Court found that non-unanimous verdicts did

not constitute an equal protection violation under the Fifth Amendment. Id. at 302. This Court should follow CAAF's binding precedent and deny Appellant's assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 4 August 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**REPLY BRIEF**
Appellee,	)	
	)	Before Panel No. 3
v.	)	
	)	No. ACM 22072
Airman First Class (E-3)	)	
JOHN P. MATTI,	)	11 August 2024
United States Air Force,	)	
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, Airman First Class (A1C) John P. Matti (Appellant), hereby files this reply to the Appellee's Answer, filed 4 August 2024 (Answer). Appellant stands on the arguments in his brief, filed 28 May 2024 (Appellant's Br.), and in reply to the Answer submits the additional argument for the issue listed below.

I.

CIRCUIT TRIAL COUNSEL[1] COMMITTED PROSECUTORIAL MISCONDUCT WITH IMPROPER BOLSERTING, IMPROPER VOUCHING, IMPROPER USE OF FACTS NOT IN EVIDENCE, AND SHIFTING THE BURDEN TO DEFENSE IN FINDINGS ARGUMENT.

1. *CTC's argument itself, even in context, amounts to plain and obvious prosecutorial misconduct.*

Regardless of the context of the argument, it is clear and obvious error to argue the defense has any obligation to produce evidence of innocence. *United States v. Mason*, 59 M.J. 416, 424

[1] Circuit Trial Counsel (CTC) here is the same senior trial counsel whose argument is at issue before this Court in *United States v. Braum*. *Compare* R. at 2, 376, *with United States v. Braum*, No. ACM 40434, R. at 3, 1091 (A.F. Ct. Crim. App.)

(C.A.A.F. 2004). Yet CTC made multiple burden-shifting arguments in this case, both in the main findings argument and in rebuttal. Appellant's Br. at 13-14. While the context of an argument can be informative as to its overall propriety, the argument itself must still adhere to the standards of proper argument, *see United States v. Baer,* 53 M.J. 235, 239 (C.A.A.F. 2000), and CTC's failure to keep within those bounds is only reinforced by its context.

The argument itself consisted of two demands for the defense to produce evidence – one on an element of the offense and one to disprove C.C. was credible. *See* R. at 388, 396. CTC implied the defense did not provide evidence they were not married, an element of the specifications of domestic violence. R. at 388. CTC also explicitly stated the members had not been provided with any reasonable explanation as to why [C.C. would make a false claim]. R. at 396.

Then, in rebuttal argument, CTC again demanded the defense needed to explain where the bruising on C.C. could come from. R. at 412. "All that defense has given you is that the time was wrong." *Id.* "What you have not been given is any reasonable explanation for where this came from, what these are about." *Id.* "Why does she have an injury on her knee and her chin? I really truly challenge you to think about that. Defense hasn't given you any explanation …" R. at 413. In closing, CTC put the weight of the United States Government behind C.C. and implied once again defense counsel should have produced evidence[2] not to believe C.C. by arguing "the Government

[2] Given the tenor of the findings and rebuttal argument, this is likely best understood as a continued characterization by the Government that the trial defense counsel's theory of the case was "conspiracy theories" and all the witnesses were liars such that the members had not been given a "reasonable" reason not to believe her. *See* R. at 391, 393, 393, 396, 397, 397-98. Regardless of whether a comment here is responsive to trial defense counsel's theory of the case or not, a burden shift is never permissive. *See United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005); *see also Mason*, 59 M.J. at 424.

absolutely asks that you believe the victim in this case because you have no reasonable reason not to. You know she's telling the truth." R. at 414.

An argument's context can show its propriety, for example, when it is responsive to a defense theory of the case. However, the Government cannot comment on Appellant's right to remain silent, even if alleged to be responsive to the defense theory centered around the credibility of the witness[es]. *Carter*, 61 M.J. at 34. Here, the Government argues CTC's arguments were proper by asserting his comments were responsive to the trial defense theory attacking the credibility of C.C. (Answer at 10), but reliance by the prosecution on what evidence the defense did not produce improperly uses Appellant's constitutional right to remain silent as a sword against him. *Id.* As the Court in *Carter* pointed out, credibility is at issue in all cases involving witness testimony. *Id.* In cases where the defendant is the sole witness who could contradict the Government's witness, if any defense challenge to a witness's credibility opens the door to comments that contradictory evidence was not presented by the defense, the "invited reply" doctrine would swallow the protections guaranteed by the Fifth Amendment. *Id.* Thus, it is improper to argue there is uncontroverted evidence to establish guilt in those cases because doing so necessarily comments on the accused's right not to testify and shifts the burden of proof. *Id.* Here, the only witness who could contradict C.C.'s allegations was Appellant. *See* R. at 192, 195-96 (describing only the two were home when the conduct from Specification 2 occurred); *see also* R. at 177, 180 (describing the conduct in Specification 3 occurring when the two were alone, at home watching television). Appellant did not testify and was constitutionally protected from having to do so.

The fact the trial defense chooses to put forth a theory attacking C.C.'s credibility does not open the door for the Government to make comments which amount to Appellant having to prove his innocence. *See id.*, *see also Mason*, 59 M.J. at 424. While admitted evidence is subject to

comment, the fact that any evidence was presented by the trial defense does not invite comment by the Government that better evidence, more evidence, or other evidence should have been presented by the defense. Further, there is no utility in allowing the Government to argue their burden is met in the negative – that because the members had been given no other evidence, the element is met. All that serves to do is leave the defense holding the burden – by not giving the members the evidence they need to acquit – which is clearly a burden shift. *Mason*, 59 M.J. at 424.

Additionally, the arguments by CTC that the defense theory was that witnesses lied and that there was a conspiracy theory, were not responsive to the trial defense theory. The trial defense theory of the case is clearly articulated and argued as the unraveling of a relationship leading to unfounded allegations. R. at 399. Not once in the trial defense argument does the trial defense counsel state any witness, including C.C., was a liar. *See* R. at 399-412. Yet, CTC characterized trial defense counsel's theory as one of a "conspiracy theory" or where witnesses were lying six times in findings argument. R. at 391, 393, 393, 396, 397, 397-98.

Further, in evaluating the context of these burden-shifting arguments, it also is clear that CTC used his position for the Government to malign defense counsel and their theory, which reinforced the severity of his burden-shifting arguments. CTC was an agent of the Government and speaking on its behalf. R. at 80-81. CTC's agency on behalf of the Government continued in argument – CTC argued the "Government absolutely asks [the members] to believe the victim." R. at 414. What is problematic here is that CTC juxtaposed his position for the Government as one of seeking justice and that the members were doing the right thing with a conviction (R. at 414) and characterized trial defense counsel theory as one of selling conspiracy theories and where all witnesses were liars six times in findings argument. *Compare* R. at 80-81, *with* R. at 391, 393, 393, 396, 397, 397-98. CTC, in characterizing the Government's argument being on the side of justice and asserting that trial

defense counsel's theory required people to tell lies and be a conspiracy theory, further establishes the plain and obvious error by both the context of the argument and the argument itself. *See United States v. Voorhees,* 79 M.J. 5, 5 (C.A.A.F. 2019) (establishing clear and obvious error to make the defense theory of the case seem fantastical). This context, when coupled with the demands for trial defense to prove innocence, served to reinforce the effectiveness of CTC's burden-shifting argument– that the defense could not and did not deliver anything more than a conspiracy theory to the members.

CTC's burden-shifting arguments were not isolated to the examples listed above. CTC also argued members could essentially presume elements were met. CTC improperly argued to the members that if they found the charged conduct actually occurred, all the other "legal matters" or elements of the offense were met. R. at 389. Further, CTC implied an element of the offense was met in part because the defense did not supply evidence to the contrary. Specifically, CTC argued that because the members were not given evidence Appellant and C.C. were unmarried, the members could find that element met. *See* R. at 388. While the second half of the argument states, "[A]nd they talked about the fact that they were married," that does not correct the error here because this is a continuous theme of CTC's argument, that the trial defense had an obligation to produce evidence to acquit. *See* R. at 389, 396, 412, 413. The context of CTC's argument was that the Government's evidence was essentially "uncontroverted," which the Court of Appeals for the Armed Forces has found improper. *See Carter*, 61 M.J. at 34.

CTC's offending arguments were not solely limited to the burden shift or disparaging trial defense counsel's theory as a conspiracy theory, but also consisted of arguing facts not in evidence to improperly bolster, and vouch for the credibility of C.C. These errors started with CTC signposting the third part of his argument on credibility, when he stated: "[y]ou have a credible

witness, you have the victim, C.C., who came up here and took the stand, she was credible." R. at 379. "She doesn't have any reason to lie, she doesn't have any reason to make this up." *Id.* There was no specific evidence tied to this initial statement about the credibility of C.C. *Id.*

When CTC argued this third point (R. at 395), there is no exposition of the facts which supported his argument. After giving the instruction on credibility of witnesses, CTC went straight into "[Y]ou have not been provided with any real reason to doubt the credibility of this witness. She's telling the truth. What does she have to gain by not telling the truth? Let's talk about what this case isn't." R. at 395. CTC listed the types of cases that this case wasn't, and then argued "[t]here are potential motivations out there for why a victim might make a false claim." *Id.* "You have not been provided with any reasonable explanation as to why defense just wants to get up here and say it's a lie, it's a lie, it's all lies." R. at 396. Next, instead of turning to actual facts from testimony, CTC asserts facts not in evidence nor reasonable inferences from the evidence. CTC argued the members should think about the benefits to C.C. in reporting a domestic violence claim, and implied that C.C. had to go put "her entire marital life – [her] failed marriage to [the Office of Special Investigations] law enforcement officials." R. at 396. He then presented the members with argument that C.C. went through prosecutor interviews, defense interviews, and that they dug through "any text messages she might ever had." R. at 396. None of this came into evidence nor are reasonable inferences from the reference to her prior testimony to OSI when confronted with an inconsistent statement, nor with being confronted with isolated sets of text messages. *See* R. at 213, 219-21, 253-54. It is not a fair assertion to make this process more onerous for C.C., implying she must be telling the truth because this process was so difficult, when the members had no evidence upon which to assess just how onerous this process was or was not for her. CTC did not stop extrapolating from the scant reference to OSI and the process of testifying in general – rather he, as

an agent of the Government, stepped behind C.C. to prop her up when he argued "it is not for the faint of heart to testify in court." R. at 396. There was no basis for this characterization in any facts before the members, other than CTC's beliefs on the onerous burden of the court-martial process and that it should bolster C.C.'s credibility. Look to C.C.'s testimony in court – it was not particularly combative, did not last more than a couple hours[3], nor did the record show need for breaks or tearfulness. R. at 166-204 (direct examination); R. at 206-262 (cross and re-direct examination). Finally, at the end of this portion of argument, CTC pointed half-heartedly to some evidence to get to C.C.'s lack of bias – that she got divorced and she testified to no financial incentives given she was divorced. R. at 396. Unfortunately, CTC did not end the argument there, but rallied to inject the Government's charge to the members that, as the Government was cloaked in the "zealous pursuit of justice," the members could find C.C. credible given she testified because of "the concern that [Appellant] might go out and do this to someone else; that can happen." R. at 396. That comment was in no way responsive to the trial defense theory that domestic violence never occurred nor based in any fact in evidence.

In sum, the context of CTC's burden-shifting argument here is one of additional prosecutorial misconduct, where the Government cloaks itself and central witness in the armor of justice against trial defense peddling lies and conspiracy theories. These additional improprieties are problematic on their own, (Appellant's Br. at 17-20), and fail to cleanse the prosecution's offense on Appellant's constitutional right to remain silent. This Court has concluded that it was "clear error for the CTC to make comments suggesting the appellant had a duty to offer evidence to prove his innocence," and that it was "clear error when the military judge failed to sua sponte instruct the court members

[3] Opening statements began at 0830 and C.C.'s was the first witness; her testimony concluded at 1207 hours, with some adjournments between. *See* R. at 156, 250, 262.

that the appellant had no duty to call witnesses or put on evidence." *United States v. Crosser*, No. ACM 35590, 2005 CCA LEXIS 412, *14 (A.F. Ct. Crim. App. Dec. 23, 2005) (unpub. op.). The error is plain, obvious, and should have been corrected sua sponte by the military judge. Yet, this, and the entirely improper context of CTC's argument remained unchecked, which operated to the prejudice of Appellant.

2. *CTC's burden shift to the Defense is not harmless beyond a reasonable doubt and resulted in prejudice to Appellant*

Because the burden-shifting arguments were of a constitutional dimension, the Government must show the error was harmless beyond a reasonable doubt. *Mason*, 59 M.J. at 424. The Government cannot show the burden-shifting arguments were harmless beyond a reasonable doubt because the crux of the burden-shifting arguments focused on the alternate theories for bruising that the defense did not provide, and when the members considered those arguments, alongside the evidence, the members only found him guilty of the specifications where bruising was ever alleged. *See* R. at 421, EOJ.

Further, in evaluating whether the burden-shifting arguments, in context, were harmless beyond a reasonable doubt, consider the, the placement of the most explicit burden-shifting argument. CTC explicitly placed the Government's burden squarely on Appellant's shoulders in rebuttal– the last exposition of the facts and the law before the members closed to deliberate. R. at 412-13. In this capstone to his errant argument, CTC emphasized there was no witness to these alleged crimes to contradict C.C. other than Appellant (who had the constitutional right not to testify), in contravention of well-established law. *Carter*, 61 M.J. at 34. The mixed findings here show this final charge to the panel, after couching the trial defense counsel theory as a conspiracy theory throughout argument, after propping up C.C. and her credibility, and after alleviating the

Government of the burden of proof on all elements, was too much for trial defense counsel to overcome. This burden-shift, which was of a constitutional dimension, was not an eITor that was hannless beyond a reasonable doubt.

While the Government asse1is the members were not swayed by the burden-shifting argument othe1wise there would be convictions on all specifications (Answer at 13), it is exactly the mixed-findings here that illustrate the impact of this argument. When CTC argued Appellant had to prove innocence by proving he was not maITied, by proving a non-criminal source of the bmising, and when his theo1y at trial was cast as a conspiracy theo1y requiring all witnesses to be lying, it was simply too much to overcome. Trial defense counsel did not offer evidence to disprove brnising came from some other source because the only witness that could endeavor to do so was Appellant, Appellant had a right not to testify, and Appellant did not testify. As a result, Appellant was convicted only on those specifications where the trial defense had to overcome all three issues and could not because Appellant exercised the constitutional right to remain silent that CTC weaponized against him.

WHEREFORE, Appellant respectfully requests that this Honorable Comi set aside the conviction and the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I ce1tify that the original and copies of the foregoing were sent via email to the Comt and served on the Government Trial and Appellate Operations Division on **11** August 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**AMENDED ANSWER TO**
Appellee,	)	**ASSIGNMENTS OF ERROR**
	)	
v.	)	Before Panel No. 3
	)	
Airman First Class (E-3)	)	No. ACM 22072
JOHN P. MATTI	)	
United States Air Force	)	22 August 2024
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)))	**AMENDED ANSWER TO ASSIGNMENTS OF ERROR**
v.	))	Before Panel No. 3
Airman First Class (E-3) **JOHN P. MATTI**	))	No. ACM 22072
United States Air Force *Appellant.*	))	22 August 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

ISSUES PRESENTED

I.

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

II.

WHETHER IT WAS PLAIN ERROR FOR THE MILITARY JUDGE TO ADMIT LAY WITNESS TESTIMONY ON THE NATURE OF BRUISING AND IN THE ALTERNATIVE, WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL FAILED TO OBJECT TO LAY WITNESS TESTIMONY ON THE NATURE OF BRUISING.

III.[1]

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING AIRMAN FIRST CLASS AA TO TESTIFY TO "OTHER BAD ACTS."

[1] Appellant raised Issues III through VI in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING DEFENSE AN ALIBI INSTRUCTION.

V.

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL FAILED TO SEEK ASSISTANCE FROM AN EXPERT TO EXPLAIN WHETHER THE DOCUMENTED INJURIES WERE CONSISTENT WITH THE ALLEGATIONS.

VI.

WHETHER APPELLANT'S CONVICTION AND SENTENCE SHOULD BE SET ASIDE BECAUSE APPELLANT WAS ENTITLED TO A UNANIMOUS VERDICT.

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case. Appellant received Article 65(d) review on 9 September 2022. Thus, his court-martial was final under Article 57(c)(1) before the 23 December 2022 change to Article 66 that would purportedly give this Court jurisdiction over his court-martial. *See* Pub. L. No. 117-263, § 544(b)(1)(A), 136 Stat. 2395, 2582 (23 Dec. 2022). The United States asserts that this Court has no jurisdiction to review Appellant's case, but recognizes this Court's contrary, published decision in United States v. Vanzant, ___M.J. ______(A.F. Ct. Crim. App. 28 May 2024). The United States continues to assert this position regarding lack of jurisdiction in case of additional litigation at our superior Court.

STATEMENT OF FACTS

Appellant's Crimes

Appellant and CC started dating in December 2019. (R. at 171.) In March 2020, Appellant joined the Air Force. (R. at 172.) While Appellant was at technical training, he and CC got married in June 2020. (R. at 171, 207.) CC moved to Surprise, Arizona to live with Appellant in August 2020. (R. at 175-76.) Although their marriage started off as fun, Appellant and CC would argue about cleaning up after Appellant's puppy or cleaning up other matters. (R. at 176.) From October 2020 to January 2021, Appellant and CC lived with A1C AA. (R. at 176-77.) A1C AA helped pay the rent. (R. at 177.) A1C AA saw Appellant and CC argue. (R. at 177.) Once A1C AA no longer lived with Appellant and CC, "things got worse. The arguments got worse and [Appellant] became physical." (Id.)

A. Appellant bit CC's arm (Specification 3).

In January 2021, Appellant bit CC's arm. (R. at 177.) Before the incident, Appellant and CC were watching a show, and Appellant commented that a woman had large breasts. (R. at 178.) CC then said, "why are you with me if you wanted someone with large breasts." (Id.) CC wanted to understand "why he married [her] if what he wanted wasn't [her]." (Id.) Then Appellant leaned over and bit her forearm. (Id.) CC explained that Appellant's bite on her forearm was "pretty painful" and she "started to cry." (R. at 179.) Appellant's bite was not a playful bite because he was upset with CC for saying something that he did not like. (R. at 180.) Appellant's bite left a bruise that lasted one to two weeks. (Id.)

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

SM worked with CC at Kohl's from November 2020 through January 2021. (R. at 311.) In early 2021, SM noticed that CC "came [into work] with a few bruises." (R. at 310-11.) In June 2021, CC told SM that Appellant gave her the bruises. (R. at 311.) On cross-examination, SM told trial defense counsel that she and CC worked overnight at Kohl's moving and packing boxes. On redirect examination, trial counsel asked, "Did the bruises that you saw [CC] display appear consistent with the work that you guys were doing?" (R. at 314.) SM responded, "No, not really." (Id.)

B. <u>Appellant pressed his knee against CC's back (Specification 2).</u>

On 21 May 2021, Appellant pressed his knee against CC's back. On this day, Appellant took CC's phone to use her Amazon account. (R. at 193.) Appellant often used CC's Amazon account to purchase supplies for his car detailing business. (Id.) CC told Appellant that he needed to use his own money to purchase his supplies. (Id.) Appellant laughed and CC tried to grab her phone. (Id.) Appellant then ran to the garage with her phone. (Id.) CC returned to the kitchen, sat on the barstool, and looked through Appellant's phone. (Id.) CC viewed Appellant's Snapchat. (Id.) CC saw that Appellant connected with a woman who had posted a story of her in lingerie. (Id.) CC confronted Appellant, faced the phone towards Appellant, and said, "do you think she's cute?" (Id.) CC then described Appellant's response:

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

(R. at 193.) CC hit her knee and chin on hardwood floor. (R. at 194.) The fall hurt CC's chin "a lot." (Id.) While CC was on the floor, in pain, Appellant put his knee on her back in between her shoulder blades. (Id.) CC screamed, "let go of me" and Appellant said, "no." (Id.) CC then said, "you're hurting me." (Id.) Appellant responded, "I don't care." (Id.) CC and Appellant continued to argue while Appellant had his knee on her back. (Id.) Appellant put most of his body weight on CC's back. (R. at 195.) This was very painful for CC. Once CC stopped pleading for Appellant to stop, Appellant stopped. (Id.)

CC testified that the assault occurred sometime in the afternoon on 21 May 2021. (Id.) And after the assault, CC went to work around 1430-1500. (Id.) CC worked at Harley Davidson about 20-25 minutes from her residence. (R. at 195-96.) CC worked until 1910 that day, and after work, went to her coworker's, CS, house. (R. at 196.) Once she returned home around 2200, CC testified that she took pictures of her leg and chin. (R. at 196-97.) But the timestamps of the photos revealed that CC took the photos of her injures at 1058 and 1104 on 21 May 2021. (R. at 198; Pros Ex. 1.)

CC did confront Appellant the next day about her injuries. CC said, "you left a bruise on my knee and it hurt me." (R. at 199.) Appellant responded, "you hurt my eyes and my ears…by talking and I have to look at you." (Id.) This comment hurt CC's feelings. (Id.)

CS testified that he noticed that CC "came into work with a bruise on her chin once." (R. at 263.) CS explained that he saw CC's bruise around middle to the end of May 2021. (R. at 264.) CS then explained that when he saw CC's bruise it was between April and June, during the timeframe in which CC and CS worked together. (R. at 267.) CS believed that he saw the bruise closer to when CC left for Florida, which was in June. (R. at 268.) CS also remembered CC

coming to his house on 21 May 2021. (Id.) Around this timeframe, CC told CS that Appellant physically abused her. (Id.)

Following this assault, Appellant did not physically hurt CC anymore because she left him. (R. at 199-200.) CC left because the fights and physical abuse kept "getting worse." (R. at 200.) Once CC returned to Florida, she reported Appellant's crimes to law enforcement. (R. at 201.) In August 2021, CC told Appellant that she wanted to file for divorce. (R. at 202.) CC and Appellant's divorce was finalized on 28 December 2021. (R. at 203.)

ARGUMENT

I.

APPELLANT HAS NOT DEMONSTRATED PLAIN ERROR IN CIRCUIT TRIAL COUNSEL'S FINDINGS ARGUMENT.

Additional Facts

Throughout the government's case-in-chief, trial defense counsel attacked the credibility of witnesses, including CC. Part of defense's theory throughout the case was that CC was upset because Appellant kept looking at other women often. (R. at 228.) Further, trial defense counsel questioned CC extensively on the timestamps shown in Prosecution Exhibit 1 – once again attacking her credibility. (R. at 218-19.) Circuit trial counsel (CTC) gave the government's findings argument. (R. at 376.) At the onset of his argument, CTC stated that this case was much more than Appellant looking at other women online. (R. at 377.) During the findings argument, CTC told the panel that defense raised and "will continue to raise all these sorts of issues that really what this case is about – really all the motivations of what's going on here are just about [CC] being mad about [Appellant] connecting with some women online." (R. at 376.) Throughout the argument, CTC connected the government's theory of the case to evidence

presented at trial, responded to trial defense counsel's theory, and correctly referred to the military judge's instructions. Additional relevant facts are included in the analysis below.

Standard of Review

This Court reviews "prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, [] review[s] for plain error." United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)).

Under a plain error analysis, Appellant has the burden to prove that: (1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused. Id. (quoting United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005)). For prejudice, the test is whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 9 (quoting United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017)). The comments must be so damaging that this Court "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).

A plain error review of a failure to object to an argument at the time of trial rule exists:

> to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important to encourage all trial participants to seek a fair and accurate trial the first time around.

United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999) (internal quotations omitted).

Law and Analysis

Trial counsel is "charged with being as zealous an advocate for the government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied,* 23 M.J. 266 (C.M.A. 1986). Arguments may be based on the evidence, as well as reasonable inferences drawn therefrom. United States v. Nelson, 1 M.J. 235, 239 (C.M.A. 1975). Trial counsel "may strike hard blows but they must be fair." United States v. Doctor, 21 C.M.R. 252, 256 (C.M.A. 1956).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation but on the argument as 'viewed in context.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting United States v. Young, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. As quoted by our superior Court in Baer, "[i]f every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." 53 M.J. at 238 (quoting Dunlop v. United States, 165 U.S. 486, 498 (1897)).

CTC did not commit prosecutorial misconduct during his findings argument. But now, Appellant carves out snippets from CTC's findings argument that garnered no objection at trial, and now declares that CTC committed prosecutorial misconduct. (App. Br. at 11.) Such a tactic is an example of surgical carving out a portion of an argument without regard for context, which is frowned upon by our Superior Court, and should be dismissed by this Court. When viewed within the entire court-martial, or simply within the context of the findings argument itself, CTC did not commit prosecutorial misconduct.

A. <u>CTC did not shift the burden; instead, he fairly responded to the defense's theory of the case.</u>

Appellant first claims that CTC "shifted the burden to the defense as to whether the members had been provided any evidence that CC was not married." (App. Br. at 13.) Appellant also states that CTC shifted this burden to the defense by arguing to the members that the "defense must approve Appellant was not married to CC during the charged timeframe." (App. Br. at 13.) But Appellant takes CTC's statement out of context. CTC said, "There has been no evidence provided that [CC] wasn't [married] and they talked about the fact that they were married." (R. at 388.) At no point did CTC mention that trial defense counsel "must prove" that Appellant was not married. Throughout the argument, CTC never mentioned what, if anything, the defense must prove. CTC correctly stated that there was no evidence provided to the members that suggested that Appellant and CC were not married at the time of the assaults. There was no error in CTC's statements. In <u>United States v. Dennis</u>, the court noted that "a bare statement to the effect that the prosecution's evidence generally, or that of a particular witness or witnesses, is uncontradicted or denied, is not an improper reference to the accused's refusal to testify. "39 M.J. 623, 625 (N.N. Ct. Crim. App. 1993). Likewise, CTC here highlighted the lack of evidence to prove that Appellant and CC were not married, which emphasized the uncontradicted evidence that Appellant and CC were married. CC stated that their divorce finalized 28 December 2021, after Appellant's crimes. (R. at 203.) Lastly, even Appellant in his assignments of error stated that marriage was of little significance as it was not disputed at trial. For these reasons, CTC's statement was proper argument.

Next, Appellant claims that CTC shifted the burden to defense to provide an alternative explanation for bruising on CC. (App. Br. at 13.) Appellant states that in rebuttal argument, CTC focused the government's argument on the fact that defense did not provide any reasonable

explanation for where the bruises came from, related to Specification 2. (Id.) Once again, Appellant takes this CTC's statement out of context. Trial defense counsel argued that there was no corroborating evidence that Appellant injured CC with his knee: trial defense counsel strongly challenged how could CC obtain an injury to her chin when Appellant placed his knee on CC's back:

> As [CC] describes it, she was placed on the ground for minutes with almost all of his entire body weight through his knee onto her already injured back. That was her testimony. If that occurred, there would be some type of record of that injury; a picture of maybe a bruise on her back. She took images and she took her pictures in the bathroom. It wouldn't be that hard to take a picture over your shoulder. Or if she was truly already injured, she would have sought medical attention and then there would be records. But you don't have any of those things because the offense as charged and generally didn't occur.

(R. at 405.) CTC's statement that "[d]efense hasn't given you any explanation but think about where an explanation might be of how someone might get that [injury to chin]" was in response to one of the defense's theories of the case – that the assault never occurred. (R. at 413.) Even with this said, CTC never implied that Appellant had an obligation to put on evidence to explain alternate sources of injuries regarding Specification 2 to disprove his guilt. CTC just merely commented on the fact that defense brought up inconsistencies to support their theory of the case, but that there has not been a "reasonable explanation" for defense's assertions. A trial counsel is permitted to make a "fair response" to claims made by the defense, even when a constitutional right is at stake. United States v. Gilley, 56 M.J. 113, 120 (C.A.A.F. 2001). With this said, trial counsel can attack the defense's theory of the case, which does not constitute burden shifting. United States v. Vandyke, 56 M.J. 812, 817, (N.M. Ct. Crim. App. 2002). In Vandyke, trial counsel argued that the defense did not deliver on what they promised in opening statements, which was evidence to prove that the appellant did not have the intent to deceive. Id.

at 816-17. In findings argument, trial counsel said, [“d]id you hear evidence that would support that [intent not to deceive]?” Id. at 816. The court found that this argument was “aimed at attacking the defense theory of the case, not at shifting the burden of proof.” Id. at 817. Our Superior Court has found it permissible for trial counsel “to comment on the defense’s failure to refute government evidence or to support its own claims.” United States v. Paige, 67 M.J. 442, 448 (C.A.A.F. 2009). CTC properly commented on defense’s failure to support their theory of how CC got her injuries without shifting the burden of proof. CTC’s comments about CC’s injuries as for specification 2 were proper argument.

Lastly, Appellant asserts that “CTC focused on what the defense was required to do in order to disprove [the allegations]” (App. Br. at 14.) To support this contention, Appellant points to various comments made by CTC, such as “You have not been provided with any reasonable explanation as to why defense just wants to get up here and say it’s a lie, it’s a lie, it’s all lies.” (App. Br. at 14 citing R. at 396.) Appellant also states that CTC shifted the burden when CTC said that “The defense needs to get up here and say that that all of these people are just lying to you; that it’s all one giant conspiracy theory.” (App. Br. at 14 citing R. at 397.) But again, Appellant takes CTC’s statements out of context. Instead, CTC’s argument stated the following:

> The defense needs to get up here and say that all of these people are just lying to you; that it’s all one giant conspiracy theory. None of it makes sense. Members, what they’re going to do with that is trying to tell you that if there’s any doubt at all, if there’s any conspiracy theory they can sell then you need to find him not guilty. That is not true. The judge instructed you on the reasonable doubt standard and what that means, and you will have these instructions so read over them carefully. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused’s guilt. There are very few things in this world that we know with absolute certainty and in criminal cases the law does not require proof that overcomes every possible doubt. That is not the burden. If, based

> on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged, you must find him guilty. The defense can get up here and give you all sorts of doubts, all sorts of possible doubts, possible explanations, possible reasons why this might all just be a conspiracy theory, how [CC] months before reporting this was getting bruises just to show people and they just happen to all notice and have concern that she was being physically abused, that she was laying little breadcrumbs talking to all sorts of different people, [CS], her dad, her sister, later the accused's parents, and all of this was a part of an elaborate scheme that I'm going to be prepared after I leave you to potentially report you for a crime, a crime that I have nothing to gain from. Is that a doubt? Is that an explanation? Maybe. Is it reasonable; absolutely not. Members, you absolutely should be firmly convinced that you know what's happened here, that this is the case of a woman who has endured multiple abuses, physical control from her husband, and he absolutely must be held accountable for what he's done, which is why the government asks that you find him guilty of all specifications.

(R. at 397-98.) CTC did not shift the burden on the defense to disprove the government's case. CTC was commenting on the defense's theory of the case presented during trial in which the defense attacked the credibility of witnesses, undermined the government's evidence, and suggested that that was all a conspiracy theory because CC had a motive to fabricate given her jealousy and anger at Appellant for looking at other woman online. CTC's comment regarding any conspiracy theory, or doubt, were a fair response to the defense's theory of the case. *See* Paige, 67 M.J. at 448; *see also* United States v. Roberts, No. ACM 40139, 2023 CCA LEXIS 17, at *26 (A.F. Ct. Crim. App. 20 January 2023) (unpub. op.) (finding no error when trial counsel commented about the appellant's refusal to apologize; thus, trial counsel's comment was a fair response to the defense's theory of the case that attacked the victim's credibility). CTC properly argued the standard for beyond a reasonable doubt, referred to the military judge's instructions, and correctly told the members that the burden does not require proof that overcomes all doubt but reasonable doubt. CTC argued that the defense's explanations of doubt – CC's conspiracy

theory of an elaborate scheme to report a crime after she left Appellant, undermining the sources of injuries, and CC's motive to fabricate – were not reasonable explanations under the reasonable doubt standard articulated by the military judge. CTC's argument was not improper, but a correct assessment of the defense's propositions made at trial, along with the correct reading of the military judges' instructions.

CTC never asserted that the defense needed to provide proof of innocence. When read in context, CTC never mentioned any elements of any specifications or insinuated any indication that Appellant carried the burden of proof on guilt. Instead, CTC focused on defense's theory of the case – CC was a liar who had a motive to fabricate – and detailing why this theory was not persuasive. CTC's comments were in the context of a "fair response to the defense's theory of the case." *See* Roberts, unpub. op. at *6. Thus, CTC did not shift the burden on defense to disprove any elements of the specifications. Appellant fails to prove clear or obvious error.

1. Assuming constitutional error, CTC's comments were harmless beyond a reasonable doubt.

"[W]here a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in Chapman v. California, 386 U.S. 18 (1967)." United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing United States v. Jones, 78 M.J. 37, 45 (C.A.A.F. 2018)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006) (internal quotations omitted). Assuming any error was clear or obvious and constituted constitutional error, CTC's statements were harmless beyond a reasonable doubt. CTC's findings argument did not contribute to Appellant's convictions. In fact, the members returned mixed findings, acquitting

Appellant on two out of the four specifications of the single charge, which showed that the members were not impacted by any alleged errors by CTC – if CTC's arguments had been so impactful, one would have expected the members to convict on all specifications.

Appellant's asserts that the government cannot make a showing that CTC's improper statements were not harmless beyond a reasonable doubt because the corroborative evidence of CC's credibility was thin. (App. Br. at 15.) Essentially, Appellant argues that because there was weak corroborating evidence, the only reason the panel convicted him was because of CTC's improper argument. That was not the case. For Specification 2, the government provided the factfinder with photos of CC's injuries. (Pros. Ex. 1.) Appellant asserts that the pictures of the injures predated the timeframe of the charged conduct and therefore weak corroborating evidence. (App. Br. at 15.) Although CC's testimony indicated that the assault occurred in the afternoon (R. at 216), the photos showed that the assault occurred before 1000, which was still at some point before CC went to work, consistent with her testimony. *See* United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013) (Pros. Ex. 1.) CS stated that he saw the injury to CC's chin. (R. at 263.)

As for Specification 3, SM testified that she saw bruising on CC's arms. (R. at 313.) Appellant's arguments fail because the panel members could have convicted Appellant just based on CC's testimony alone. But the fact that the panel members convicted Appellant on specifications that had corroborating evidence showed that the members convicted based on the evidence presented at trial and not based on CTC's findings argument. Appellant's arguments lack merit. CTC never turned the members toward "the defense to compensate for the Government's deficiencies." (App. Br. at 17.)

Appellant states that the military judge issued no curative instruction. (App. Br. at 16.) The military judge could have sua sponte given a curative instruction. But the lack of instruction or interruption from the military judge is indicative that CTC's comments were not clear and obvious. United States v. Burton, 67 M.J. 150, 154 (C.A.A.F. 2009). In Burton, the Court found that trial counsel's argument did not rise to the level of plain error that would require the miliary judge to sua sponte to instruct on the proper use of propensity evidence or give other remedial measures. Id. Here, the military judge did, however, instruct the panel that arguments are not evidence and that the members must "base the determination of the issues in the case on the evidence as [they remembered] it and apply the law [instructed]." (R. at 376.) The panel did just that. The panel returned a mixed verdict, which revealed that they looked at the evidence and applied the law to render a verdict independent of trial counsel's argument. Members here were presumed to have followed the military judge's instructions. *See* United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000). "Absent evidence to the contrary, this Court may presume that members follow the military judge's instructions." Id. Here, there was no evidence that demonstrated that the members did not follow the military judge's instructions.

Lastly, Appellant cites Untied States v. Mason, 59 M.J. 416 (C.A.A.F. 2004) to compare the "severity of the improper argument leveraged by CTC." (App. Br. at 16.) In Mason, our Superior Court found that trial counsel's question about whether either side requested retesting of the DNA samples shifted the burden of proof, but it was harmless beyond a reasonable doubt because the DNA evidence was overwhelming, and the military judge gave instructions about the burden of proof. Id. at 425-26. A similar argument can be made for this case. There was corroborating evidence that supported Appellant's convictions. Next, the military judge here told the members that "the burden of proof to establish the guilt of the accused beyond a

reasonable doubt is on the government." (R. at 374.) Thus, CTC's argument did not contribute to the conviction, and any error (if it constituted constitutional error) was harmless beyond a reasonable doubt.

B. CTC did not commit improper bolstering or vouching.

Appellant asserts that the following CTC's statements – "you have a credible witness," "she was credible," "she's telling the truth," and "you have not been provided with any reasonable explanation as to why the defense wants to get up here and say it's a lie, it's a lie, it's all lies" – are like the arguments counsel made in Voorhees. (App. Br. at 18.) In Voorhees, our Superior Court found improper argument, but held that the appellant suffered no prejudice as a result of trial counsel's improper argument. 79 M.J. at 14.

Voorhees is an example in which trial counsel bolstered and vouched for the credibility of the witness by stating:

> Technical Sergeant [BR] is an outstanding airman; an outstanding noncommissioned officer in the United States Air Force.
>
> And if there is any doubt in your mind as to that point or the quality of the United States evidence on this charge, rely entirely on Senior Airman [HB's] credibility. Hang your hat there, because you can. Because that airman is credible. She testified credibly; she told you what happened to her.
>
> Members, I don't—I don't go TDY and leave my family 250 days a year to sell you a story. I don't do that. And I don't stand up here and try to appeal to your emotions. I think I made that clear in talking about the government's presentation of evidence.
>
> [W]e win. Clearly.

Voorhees, 79 M.J. at 11-12. Vouching for a witness's credibility occurs when a trial counsel "places the prestige of the government behind a witness through personal assurances of the witness's veracity." Fletcher, 62 M.J. at 182 (quoting United States v. Neceochea, 968 F.2d

1273, 1276 (9th Cir. 1994)). Unlike Voorhees, CTC did not bolster and did not vouch for the credibility of CC by expressing his personal opinions. CTC addressed the defense's theory of the case that attacked the credibility of witnesses, in particular CC, throughout opening statements, the government's case-in-chief, and findings argument. In opening statements, trial defense counsel began attacking CC's credibility, stating CC was looking for a reason why her marriage failed. (R. at 166.) In findings argument trial defense counsel continued this theory by arguing that CC had a motive to fabricate and that this case was not about assaults but rather how Appellant and CC's marriage "unraveled." (R. at 411.) CTC on the other hand rebutted trial defense counsel's assertions and argued that CC was a credible witness and that she was telling the truth by referring to the evidence presented at trial. *See* Halpin, 71 M.J. at 479. For example, CTC argued that CC had nothing to gain from Appellant's court-martial given that she already received a divorce and had no financial incentive. (R. at 202-203; 396.)

CTC never placed the prestige of the government behind CC assuring her credibility. CTC was allowed to argue that the panel should find CC to be credible and explain why defense's attacks against her credibility were unpersuasive. *See* United States v. Blackburn, No. ACM 40403, 2024 CCA LEXIS 129 (A.F. Ct. Crim. App. 4 April 2024) (unpub. op.) (finding a trial counsel did not vouch for a victim's credibility when the trial counsel argued in general that the victim was a credible witness, highlighted the evidence and testimony supporting this conclusion, and the argument responded to the trial defense counsel's focused attacks against the victim's credibility). The context of CTC's argument showed that he simply rebutted a theory the defense made throughout trial – that CC lied and she was mad at Appellant for looking at other women, in other words CC had a motive to fabricate. CTC never vouched for CC's credibility and even mentioned to the members that they had the "absolute responsibility to

determine the credibility of witness[es]." (R. at 395.) Then CTC explained that CC was telling the truth because she had nothing to gain by telling the truth. (Id.) CTC said that was no incentive for CC to participate in Appellant's court-martial. (R. at 395-96.) Also, to support that CC was telling the truth, CTC pointed to corroborating evidence, such as CC's bruises. (R. at 379, 390; Pros. Ex 1.) CTC's comments about CC's credibility were based on the evidence and did not amount to plain error.

Next, Appellant asserts that CTC injected facts not in evidence, such as demonstrating how CTC believed Appellant held CC's arms behind her back leading up to specification 2. (App. Br. at 18.) CTC's demonstration on rebuttal describing how CC could get an injury on her chin while Appellant pressed his knee behind her back was proper argument because trial counsel can make fair inferences from the evidence presented at trial. *See* Halpin, 71 M.J. at 479; Nelson, 1 M.J. at 239. Trial defense counsel first argued:

> The government has the burden to prove the charge that they've made against A1C Matti. What they are alleging is that A1C Matti injured [CC] using his knee. That's what the charge reads. There is no corroborating evidence of that. As she describes it, she was placed on the ground for minutes with almost all of his entire body weight through his knee onto her already injured back. That was her testimony. If that occurred, there would be some type of record 23 of that injury; a picture of maybe a bruise on her back. She took images and she took her pictures in the bathroom. It wouldn't be that hard to take a picture over your shoulder. Or if she was truly already injured, she would have sought medical attention and then there would be records.

(R. at 405.) So it was fair for CTC, in rebuttal, to comment on how CC could have obtained the injury to her chin – in particular demonstrating how CC could have fallen with her hands pulled behind her back and injured her chin while Appellant pressed his hand behind her back. (R. at 413.) Contrary to Appellant's beliefs, CTC never "asserted this was the only way for the injury

to occur," but rather CTC responded to defense's argument that Specification 2 did not happen at all. (App. Br. at 18.)

Appellant cites United States v. Norwood,81 M.J. 12 (C.A.A.F. 2021) for the proposition that CTC argued hypotheticals with no basis in evidence and therefore his statements were error. But in Norwood the trial counsel during sentencing argument "pressured the members to consider how their fellow service-members would judge them and the sentence they adjudged instead of the evidence at hand." 81 M.J. at 21. In Appellant's case, CTC did not argue an inflammatory hypothetical scenario. Instead, CTC's demonstration, during rebuttal, showed the members how CC could have sustained an injury to her chin based on her testimony presented at trial – after trial defense counsel challenged how CC could have sustained an injury on her chin. CTC's demonstration and argument were reasonably tied to evidence presented at trial.

Appellant claims that CTC continued to argue facts not in evidence related to "the nature and complexity or burden of the investigation process on CC" to bolster her credibility. (App. Br. at 19.) Once again, Appellant takes this out of context. CTC referred to the investigations process that came out through testimony, and that CC had to talk about her failed marriage to law enforcements and the panel members. (R. at 396.) CTC made a reasonable inference when he argued "it's not for the faint of heart to testify in court. It is a long drawn-out, difficult experience for [CC]." (Id.) CTC's statements about CC's motivation and credibility were not a "supplantation of his own views on CC's credibility." (App. Br. at 19.) Instead, there was a factual basis in the record for CTC to make this statement since there was evidence presented regarding CC's involvement in the investigation process and CC's testimony in which she had to discuss her failed marriage. Based on that evidence, it was a fair inference that CC would not endure these difficulties just to make a false allegation against Appellant.

Finally, Appellant argues that CTC influenced the members with the statement that Appellant "might go out and do this to someone else." (App. Br. at 19.) Appellant states that CC never testified that was why she came forward, and therefore it was improper argument by CTC. (Id.) Appellant failed to look at CTC's entire statement and once again takes this statement out of context. CTC mentioned that CC already obtained a divorce from Appellant, she had nothing financial to gain from this case. (R. at 396.) As a rhetorical question to the members, CTC then mentioned that perhaps that concern (motivation to report) was that Appellant might go out and do this to someone else. (Id.) CTC then mentioned that Appellant needs to be held accountable. CTC's statements were reasonable inferences drawn from the evidence. CC never stated nor implied that she had any improper motive to press charges against Appellant. *See* Halpin, 71 M.J. at 479; Nelson, 1 M.J. at 239. Given that defense attacked CC's credibility as for her motivation to report the crimes against Appellant, CTC's comments were also a fair response. *See* Roberts, unpub. op. at *6.

For these reasons, CTC's statements were not plain error, and were a proper findings argument.

1. Assuming plain error, Appellant suffered no prejudice because of CTC's findings argument.

CTC's statements were not improper arguments. But even assuming error, Appellant failed to meet his burden of proving that CTC's arguments were clear and obvious error under the plain error standard. And Appellant failed to show that CTC's argument caused prejudice. To determine prejudice, for improper arguments, there are three factors this Court considers: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of evidence supporting the conviction. Fletcher, 62 M.J. at 184.

i. The severity of the misconduct

Here, the severity of the misconduct was low. First, Appellant and his trial defense counsel never objected to any of CTC's statements. This lack of a defense objection is "'some measure of the minimal impact' of a prosecutor's improper comment." Gilley, 56 M.J. at 123 (quoting United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)).

Second, the panel's mixed findings showed that CTC errors, if any, did not impact the verdict in the case. The panel acquitted Appellant of two specifications, showing that the panel reviewed every offense alleged against Appellant individually, and made their own determinations independent of CTC's argument. The fact that the panel returned a mixed verdict demonstrated that the panel was not swayed in any fashion. CTC's arguments were not pervasive, and the mixed findings highlighted this. Contrary to Appellant's assertions that the misconduct here was severe as in Vorhees and Fletcher, the severity of the misconduct, if any, was minimal. (App. Br. at 20.) This factor favors the government.

ii. Curative measures

Trial defense counsel never objected to CTC's argument and therefore the military judge and counsel did not take any curative measures. But the military judge did instruct the members "that arguments of counsel are not evidence." (R. 376.) Further, CTC in his argument told the members that they have "the absolute responsibility to determine the credibility of witness[es]," and reiterated the military judge's instructions on credibility. (R. at 395.) CTC emphasized that the military judge's instructions about the reasonable doubt standard, which "is proof that leaves your firmly convinced of the accused's guilt." (R. at 397.) Even trial defense counsel reiterated this high burden during their argument. (R. at 403.) Throughout findings arguments and the military judge's instructions, the panel were well versed on the law and burdens of proof to apply

in Appellant's case. While there were no curative measures given the lack of objections, the members, who were presumed to follow the military judge's instructions, were reminded of the correct law to apply diminishing any impact of any improper argument, however minimal. *See* Taylor, 53 M.J. at 198. This factor favors the government.

iii. Weight of the evidence supporting the conviction

This factor, like in Voorhees, also favors the government. Along with CC's credible testimony, the panel convicted Appellant of the crimes in which there was corroborating evidence. In United States v. Sewell, our Superior Court found that the panel's mixed findings further reassured the Court that the panel weighed the evidence at trial without regard to trial counsel's arguments. 76 M.J. 14, 19 (C.A.A.F. 2017). In Sewell, the appellant was acquitted of all specifications for which there was no corroborating evidence. Id. Likewise, the panel here weighed the evidence at trial to come to an independent determination of the facts, showing that they were firmly convinced of Appellant's guilt. *See* id. CC's testimony, along with the corroborating evidence describing her injuries, as well as the photos of her injuries, demonstrated that the evidence supported Appellant's convictions.

Appellant asserts that the core of CTC's improper argument was "unique to those specifications of which Appellant was found guilty," along with the fact that the corroborating evidence was not strong for Specifications 2 and 3. (App. Br. at 21.) Appellant focuses on the lack of witnesses who saw bruising for the injury related to Specification 3 and mentions that there was no testimony consistent with the injury depicted in Prosecution Exhibit 1. (App. Br. at 21-22.)

As for Specification 2, CC took photos of her injuries consistent with her testimony – despite the minor variances of when she took the photos. (Pros. Ex. 1.) Although the photos of

the injuries were taken in the morning and not later in the day – per CC's testimony, CTC explained this inconsistency – a statement that is uncontested in Appellant's Assignments of Error I. CTC explained to the panel that CC got the timing wrong. (R. at 391.) The pictures still showed the bruising on her knee and chin. (Pros. Ex. 1.) CC took the pictures on 21 May 2021, which aligned with CC's testimony. (R. at 195, 216.) The photos of the injuries corroborate Specification 2. Further, CS explained that he saw CC's bruise on her chin around middle to the end of May 202, during the timeframe of the assault. (R. at 264.) As for Specification 2, CC's testimony, photos of the injuries, and witness testimony describing the bruise on CC's chin were substantial evidence to support the conviction.

As for Specification 3, SM noticed that in early 2021 CC "came [into work] with a few bruises." (R. at 310-11.) In June 2021, CC told SM that Appellant gave her the bruises. (Id.) Not only did SM see bruising on CC's arm, corroborating CC's testimony that Appellant bit her, but also CC told SM about the assault – a prior consistent statement. (R. at 311.) Together with CC's credible testimony, for which she did not have a motivation to lie, both specifications for which Appellant was found guilty of either had testimony attesting to CC's injuries or photos of CC's injuries. For these reasons the weight of the evidence supports the conviction. This factor favors the government.

CTC's findings argument was not improper. Assuming plain and obvious error, it did not result in prejudice. The panel weighed the evidence and made an independent determination to find Appellant guilty. This Court should deny this assignment of error.

II.

IT WAS NOT PLAIN ERROR FOR THE MILITARY JUDGE TO ADMIT LAY WITNESS TESTIMONY ON THE NATURE OF BRUISING AND, IN THE ALTERNATIVE, APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL DID NOT OBJECT TO LAY TESTIMONY ON THE NATURE OF BRUISING.

Additional Facts

On redirect examination, trial counsel asked SM, "Did the bruises that you saw [CC] display appear consistent with the work that you guys were doing?" (R. at 314.) SM responded, "No, not really." (Id.) CTC asked SM this question in response to trial defense counsel's line of inquiry about SM and CC "moving boxes around, packing boxing, putting them on pallets" at Kohl's during their night shift. (R. at 312.)

Maj WF did not object to SM's testimony because he believed it was lay person opinion based on SM's perception consistent with Mil. R. Evid. 701.[2] (*Maj WF Declaration*, 16 July 2024.) SM was not testifying as an expert defined under Mil. R. Evid. 702. (Id.) Maj WF remembered SM as CC's coworker. (Id.) SM testified that her work was moderately physical as it involved movement of boxes and clothing, as well as unloading a truck with retail goods. (Id.) SM testified that she saw bruising on CC's arm. (Id.) Maj FW explained that SM's answer – that the bruising she observed was inconsistent with the work they performed at the store – was rationally based on her perception of both the work that SM experienced and the bruising that SM saw. (Id.) Thus, SM's testimony complied with Mil. R. Evid. 701(a). Lastly, SM's testimony was not based on scientific, technical, or other specialized knowledge. (Id.)

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[2] It appears Maj WF's declaration inadvertently switched CC's and SM's initials when discussing the two claims of ineffective assistance of counsel in the declaration.

Capt NW would not have raised an objection either. (*Capt NW Declaration*, 21 July 2024.) It was the defense's strategy with SM to illicit that SM and CC did manual labor in their job. (Id.) As a result, Capt NW believed that the defense opened the door to questions about bruising and manual labor. (Id.) Further, Capt NW believed that SM was "fairly able to comment on whether she or other employees received similar bruises from the work" they do compared to the bruising SM saw on CC. (Id.) Lastly, Capt NW believed that objecting to a question that the defense had opened the door would have drawn more attention to the issue, and the defense wanted to focus of the case to be on CC's inconsistencies and her motives to fabricate. (Id.)

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019). But "[f]ailure to object to admission of evidence at trial forfeits appellate review absent plain error." United States v. Eslinger, 70 M.J. 193 (C.A.A.F. 2011). "[W]hen an appellant has forfeited a right by failing to raise it at trial, [this Court] review[s] for plain error." Lopez, 76 M.J. at 154. Thus, Appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. Id.

This Court reviews claims of ineffective assistance of counsel de novo. United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007).

Law and Analysis

SM's answer to one question about bruising on redirect examination did not amount to expert testimony and therefore did not amount to error, plain or otherwise. Trial defense counsel was not ineffective when they did not object to trial counsel's sole question on redirect examination about bruising.

A. Appellant failed to meet his burden of proving plain error.

SM's testimony about whether the bruising on CC's arm was consistent with the work that they performed at Kohl's – warehouse work – was lay testimony. Lay opinion testimony is admissible if: (1) "the opinion is rationally based on the witness's perception;" and (2) "the opinion is 'either helpful to an understanding of the testimony on the stand or to the determination of a fact in issue.'" Lopez, 76 M.J. 151 at 156 (internal citations omitted). On the other hand, expert testimony is admissible when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." United States v. Brooks, 64 M.J. 325, 326 (C.A.A.F. 2007) (quoting Mil. R. Evid. 702).

SM's testimony was not expert testimony. She answered one question about whether her job responsibilities would give bruises consistent with the bruises she saw on CC's arm. The lay opinion here was rationally based on SM's perception. SM testified that when she and CC worked at Kohl's, it was more like a "warehouse operation." (R. at 312.) SM and CC moved boxes around and unloaded trucks. (Id.) SM having worked at Kohl's for some time had the knowledge and personal experience to testify to the fact that her job would not have caused bruising consistent with the bruising she saw on CC's arm. SM's answer helped the factfinder determine a fact in issue – whether Appellant caused the bruising on CC's arms rather than performing warehouse work at Kohl's. SM did not expand on the nature of bruising.

Appellant contends that testimony on bruising requires expert testimony. (App. Br. at 23.) Appellant relies on United States v. Rameshk, ACM 39319, 2018 CCA LEXIS 520 (A.F. Ct. Crim. App. 29 October 2018) (unpub. op) in which an expert witness properly testified about bruising. But Rameshk is distinguishable from Appellant's case. In Rameshk, the expert witness provided expert testimony on the lifecycle of bruises and how they change in appearance over time. Id. at *14. Testimony about the lifecycle of bruises and how their appearance changes over time is scientific and technical testimony that requires specialized knowledge. *See* id. at *15. In Appellant's case, SM did not testify about the specific appearance of the bruise, just that she saw bruising on CC's arm, which was not a result of warehouse work. There was nothing in SM's testimony that was scientific and technical in nature. No specialized knowledge was required for SM's testimony.

Contrary to Appellant's argument, SM did have the proper foundation to testify that her duties at Kohl's were not consistent with the bruising she saw on CC's arm. Appellant argues that "there was no foundation for SM to testify that she would know if the work they were doing could cause the bruising she saw on CC or any other person." (App. Br. at 24.) SM did not testify on the causation of the injuries – just that, based on SM's experiences, her job at Kohl's would not cause bruising consistent with what she saw on CC. Appellant cites United States v. York, 600 F.3d 347, 361 (5th Cir. 2010), which held that medical causation testimony about the cause of the bruise and their development required expert testimony. Again, SM did not testify about specifics of CC's bruising, such as the causation or the time it would take for a bruise to develop. Instead, SM testified that CC's bruise was not consistent with what SM experienced working at Kohl's – a type of lay "opinion that one could reach as a process of everyday reasoning." *See* id. at 361.

Courts have allowed a lay witnesses to talk about the bruises they have observed. In United States v. Valez, a lay witness was competent to testify that the bruises observed "looked like fingers." NMCM 94 00959, 1996 CCA LEXIS 422 at *24 (N.M. Ct. Crim. App 31 July 1996) (unpub.op.). A lay witness with personal experience is allowed to testify that a substance appeared to be blood, but allowing a lay witness to testify that bruising is indicative of head trauma is not allowed. United States v. Perkins, 470 F.3d 150, 155 (4th Cir. 2006) (referencing Fed. R. Evid 701 advisory committee notes). An expert witness is not always necessary when the testimony is of a specialized or technical nature. United States v. Fulton, 837 F.3d 281, 301 (3d Cir. 2016). When a lay witness has knowledge by virtue of her experience, the witness may testify even if the subject may appear specialized or technical because the testimony was based upon the layperson's personal knowledge rather than specialized knowledge within the scope of Fed. R. Evid. 702. Id. Here, SM testified based on her personal knowledge of her and CC's duties at Kohl's.

For these reasons, allowing SM to answer one question about whether CC's bruising was consistent with their job duties at Kohl's did not result in plain error. It was not plain error to allow SM to testify about her own perception. Assuming error, this error was not clear and obvious as evidence by the lack of objection at trial. Appellant has failed to prove that SM's testimony impacted his substantial rights.

B. Appellant did not receive ineffective assistance of counsel when trial defense counsel did not object to lay witness testimony on the nature of bruising.

Appellant's trial defense counsel were not ineffective. The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; Gilley, 56 M.J. at 124. In assessing the effectiveness of counsel, courts apply the standard from Strickland v.

Washington, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658 (1984).

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). The Strickland standard is "stringent." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012).

Military courts apply the following three-part test in assessing whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions"; (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance…[ordinarily expected] of fallible lawyers"; and (3) if defense counsel were ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result? United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration and omission in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

An appellant who claims ineffective assistance of counsel "must surmount a very high hurdle." United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000) (citations and quotation marks omitted). Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." Id. (citing Strickland, 466 U.S. at 689).

This Court does "not look at the success of a criminal defense attorney's trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." United States v. Thompson, ACM 32630, 1998 CCA LEXIS 163, at *7

(A.F. Ct. Crim. App. 5 February 1998) (unpub. op.). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

1. Trial defense counsel had a reasonable explanation for their actions, and their conduct fell within the wide range of reasonable professional assistance.

The Court evaluates ineffective assistance of counsel using the three-part test set out in Gooch. First, Appellant's allegations are true – trial defense counsel did not object to SM's testimony on the nature of CC's bruising. (R. at 314.) But defense counsel provided "a reasonable explanation for counsel's actions." Trial defense counsel explained that he did not object to SM's testimony because he believed SM's testimony was lay person opinion:

> I also did not feel that [S.M.'s] testimony constituted impermissible expert testimony. Nothing about [SM] marked her as an expert witness consistent with MRE 702. [SM] was a young (appearing to be in her early twenties), nightshift, retail worker. She did not claim to have any expert, professional, or academic qualifications. Nor did she claim to have any special knowledge. Her testimony was not based on gathered data or facts, nor did it rely on scientific or academic principles or methods. No member of the jury could have interpreted her statement as constituting expert opinion. I did not object, in part, because I was confident that her testimony would not be misconstrued as expert testimony.

(*Maj WF Declaration*, 16 July 2024.) Maj WF recalled SM's statement being equivocal. (Id.) Ultimately, Maj WF "did not want to draw attention to the fact that a bite mark may be inconsistent with a bruise caused by moving a box." (Id.) Choosing to withhold an objection was "within range of reasonable professional assistance." *See* Strickland, 466 U.S. at 689. As explained above, SM's testimony was not expert testimony under Mil. R. Evid. 702. SM's testimony did not require any scientific knowledge or other expertise. Second, her testimony on

redirect examination about the bruising was not extensive, it was a simple answer "No, not really." (R. at 314.)

Second, trial defense counsel's level of advocacy did not "fall measurably below the performance…[ordinarily expected] of fallible lawyers" because his choice not to object was a strategic one. Gooch, 69 M.J. at 362. Maj WF understood the ramifications that could have arisen had he objected to SM's equivocal statement. It would have drawn more attention to trial counsel's single question on the nature of bruising during redirect examination. Thus, this strategic choice not to object is "virtually unchallengeable." *See* Dewrell, 55 M.J. at 133.

Third, and finally, if this Court determined that trial defense counsel were ineffective, there was not a "reasonable probability that, absent the errors," there would have been a different result. Gooch, 69 M.J. at 362. Appellant was not prejudiced when SM answered "No, not really" when asked if the bruising was consistent with the work at Kohl's. SM's testimony about bruising was miniscule. Even without SM's testimony about whether the bruises were consistent with her job, the members could still have rejected Appellant's implication that CC sustained the injuries working in the warehouse.

Appellant argues that there would be a different outcome because SM's testimony was the only corroborating evidence regarding Specification 3 – the bite mark. "Without this improper lay witness testimony, the members would have acquitted Appellant on Speciation 3." (App. Br. at 28.) But Appellant fails to acknowledge other corroborating evidence that supports Specification 3. SM saw bruising on CC's arm, and CC told SM that Appellant gave her that bruise – a prior consistent statement. (R. at 311.) Thus, members could have convicted Appellant had they not heard of this line of testimony from SM. For these reasons, Appellant

was not prejudiced because there was no reasonable probability that there could have been a different result absent the errors. *See* Gooch, 69 M.J. at 362.

To establish deficient performance by defense counsel, Appellant fails to overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *See* Strickland, 466 U.S. at 689. Thus, trial defense counsel were not ineffective, and Appellant was not prejudiced by trial defense counsel's strategic decision. This Court should deny this assignment of error.

III.[3]

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE ALLOWED A1C AA TO TESTIFY TO "OTHER BAD ACTS."

Additional Facts

A1C AA lived with Appellant and CC in Arizona from end of September 2020 to January 2021. (R. at 291.) After living with CC and Appellant for a week, A1C AA noticed that Appellant and CC "argued nonstop." From what A1C AA could hear, they argued daily mostly about financial struggles. (Id.) Appellant started the arguments. (Id.) One day after A1C AA asked CC if she needed anything from the store, Appellant told A1C AA that if A1C AA needed to talk to CC to go through Appellant. (Id.) As a result, A1C AA never had any contact with CC via any phone calls or text messages while he lived with CC and Appellant. (Id.)

Trial defense counsel objected to trial counsel introducing testimony from A1C AA about arguments between Appellant and CC regarding financial issues under Mil. R. Evid. 404(b). (R. at 271-89.) After conducting the three-prong analysis under United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989), the military judge ruled that the government could introduce testimony

[3] Issues III was raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

from A1C AA. (R. at 281.) Regarding the first prong under Reynolds, the military judge ruled that he only had a proffer from trial counsel about what the witness would testify to – such as A1C AA's observations between Appellant and CC. (R. at 280.) The military judge said that the members could reasonably find whatever facts the witness testified to. (Id.) As to the second prong, "the existence of conflict within a marriage or arguments is at least relevant to the question of whether the [Appellant] committed any of the charged offenses…" (Id.) The military judge also concluded that "at the very least the existence of some sort of animosity or conflict in the marriage would make it more likely that someone might commit an act of violence against another person if they harbor ill will or a ill feelings against that person because of disagreements about things." (Id.) When the military judge analyzed the third Reynolds prong, the required balancing test under Mil. R. Evid. 403, he found that the probative value was not substantially outweighed by any of the dangers enumerated in that rule. (R. at 281.) The military judge noted that there had already been "evidence elicited regarding arguments or disagreements between [Appellant] and [CC] so [he did not] think that the members will be confused as to the issues before them or be misled." (Id.) Lastly, the military judge found that there was no danger of unfair prejudice given that "the existence of conflict between the spouses provide possible explanation or motive for [Appellant] to commit the charged offenses." (Id.) Thus, the military judge allowed A1C CC to testify as to "other bad acts."

Standard of Review

This Court reviews a military judge's decision to admit evidence under Mil. R. Evid. 404(b) for an abuse of discretion. United States v. Hyppolite, 79 M.J. 161, 164 (C.A.A.F. 2019). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used;

or (3) if his application of the correct legal principles to the facts is clearly unreasonable. United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008)). "When judicial action is taken in a discretionary matter, such action can not be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." Id. (quoting United States v. Sanchez, 65 M.J. 145, 148 (C.A.A.F. 2007) (internal citations and quotations omitted).

Law and Analysis

Evidence of crimes, wrongs, or other acts may not be used to establish character or propensity, but may be admissible for other purposes, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident. Hyppolite, 79 M.J. at 165. Here, the military judge found that the existence of arguments between Appellant and CC provided an explanation or motive for Appellant to commit the charged offenses. (R. at 281.)

Courts test the admissibility of uncharged misconduct under Mil. R. Evid 404(b) under a three-prong test: (1) does the evidence reasonably support a finding by the factfinder that an appellant committed prior crimes, wrongs, or acts; (2) does the evidence make a fact of consequence more or less probable; and (3) does the probative value survive a Mil. R. Evid 403 balancing test – is the evidence substantially outweighed by the danger of under prejudice. Reynolds, 29 M.J. at 109.

Appellant contests that the military judge applied "the correct legal principles to the facts in a manner that was clearly unreasonable." (App. Br. Appendix at 2.) Appellant argues that "the military judge's determination of the facts under the second prong of the Reynold's test

failed to make a fact of consequence relevant to the charged conduct more or less probable. (App. Br. Appendix at 2-3.)

But the military judge's application of Reynolds was not clearly unreasonable as applied to A1C AA's testimony. Appellant argues that the "fact that there were arguments about finances or that Appellant told A1C AA not to speak directly to CC does not make it more or less likely that Appellant would commit assault consummated by a battery against his spouse." (Id. at 3.) This argument fails. In fact, the initial argument preceding Specification 2 was first about finances. Appellant often used CC's Amazon account to purchase supplies for his car detailing business. (R. at 193.) On the day Appellant committed the offense in Specification 2, the tension between CC and Appellant began when Appellant asked CC to purchase car detailing supplies, and CC said no. (Id.) CC also told Appellant that he needed to use his own money to pay for his supplies. (Id.) CC tried to retrieve her phone so Appellant would not make a purchase. (Id.) Appellant then ran to the garage with CC's phone. (Id.) When Appellant returned from the garage, that was when the tension between Appellant and CC escalated resulting in the assault – Specification 2. Appellant and CC did argue about finances before one of the assaults. Thus, evidence about financial arguments and any animosity Appellant had towards CC was relevant to show whether Appellant had a motive to assault his wife.

Moreover, the military judge's reasoning in allowing A1C AA's testimony was not unreasonable. The existence of conflict according to the military judge was "at least relevant to the question of whether the accused committed any of the charged offenses." (R. at 280.) And the financial disagreements were "at the very least the existence of some sort of animosity or conflict in the marriage would make it more likely that someone might commit an act of violence against another person." (R. at 280.) Contrary to Appellant's assertions that A1C AA's

testimony "served only to paint Appellant as a bad person," A1C AA's testimony made a fact in consequence more probable – Appellant and CC argued and had a turbulent marriage, which ultimately led to the physical assaults. In United States v. Watkins, our Superior Court held that Mil. R. Evid. 404(b) evidence was properly admitted against the appellant during his rape prosecution because the testimony – discussing the use of the appellant's physical violence against different women – helped establish a motive for committing the charged crimes. 71 M.J. 224, 227 (C.M.A. 1986). Our Superior Court added that the evidence showed an "outlet" for the appellant to vent his emotions and that outlet existed during both the charged and extrinsic offenses. Id. Just like Watkins, the 404(b) evidence here also occurred during the charged timeframe and established that Appellant would get mad at CC and arguments led to the physical assaults – an outlet for Appellant to vent out his emotions. *See* id.

Many jurisdictions have recognized that in domestic violence cases, evidence of prior hostility or animosity between spouses were relevant to show motive. *See* United States v. Jenkins, 48 M.J. 594, 599 (A. Ct. Crim. App. 1998) (citing Garibay v. United States, 634 A.2d 946 (D.C. 1993)). Even the Supreme Court upheld admissibility of evidence of ill treatment by a husband of his spouse when the husband was charged with murder. Thiede v. Utah, 159 U.S. 510, 517-18 (1895). In Flowers v. State, the court found that prior difficulties in a marriage were admissible for a permissible, non-character purpose, such as motive for murdering a spouse. 837 S.E.2d 824, 827-28 (Ga. 2020).

Here, there was no dispute that Appellant and CC had difficulties in their marriage – financial arguments, as well as Appellant connecting with other women on social media. A1C AA's testimony highlighted frequent arguments between Appellant and CC, which made a fact more probable in that Appellant and CC argued throughout their marriage. And their

arguments preceded Appellant's crimes against CC. For these reasons, the military judge did not abuse his discretion when he held that A1C AA's testimony about the hostility between Appellant and CC were admissible under Mil. R. Evid. 404(b).

Lastly, A1C AA's testimony was not outweighed by and danger of unfair prejudice, waste of time, or misleading the factfinder. As the military judge correctly stated, there was already evidence before the members revealing arguments and disagreements between Appellant and CC. The panel members were already tracking the animosity between Appellant and CC. A1C AA was the only witness who testified as to the "other bad acts" and therefore not a waste of time. Further, A1C AA's testimony did not mislead the factfinder because there was other evidence that showed arguments and disagreements between Appellant and CC. Thus, members would not have been misled or confused as to the issues. The probative value of A1C AA's testimony was not outweighed by the danger of unfair prejudice because his testimony explained the animosity between Appellant and CC, and provided a motive, an explanation, for Appellant to commit the charged offenses. And since similar evidence had already been admitted, there was nothing unfair about additional evidence on that point. Thus, A1C AA's testimony survived the Mil. R. Evid. 403 balancing test.

For these reasons, the military judge reasonably tied the law to the facts established in the record. The military judge did not abuse his discretion in allowing A1C AA to testify as to "other bad acts." Appellant did not suffer prejudice because the members were already aware that Appellant and CC had a turbulent marriage. Even if it were error for A1C AA to testify about other arguments Appellant and CC had, there was other evidence before the members that showed Appellant and CC often argued. This Court should deny this assignment of error.

IV.[4]

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT AN ALIBI INSTRUCTION.

Additional Facts

Trial defense counsel requested an alibi instruction and argued that "the evidence in this case raises a reasonable inference of alibi…" (R. at 362.) The military judge denied the defense's request. (R. at 363.) For the following reasons, the military judge found that the evidence did not reveal that Appellant "was at a place other than the location of the alleged offense." (Id.) CC's testimony revealed that the offense (Specification 2) occurred before she left for work around 1400. (R. at 362.) Appellant left for work around 1430. (Id.) On the day of the crime, Appellant would have started work at 1500. (Id.) Thus, the military judge denied the instruction because there was no evidence indicating that Appellant was at another location other than his residence before 1400 on the day in question. (Id.)

Standard of Review

This Court reviews a military judge's denial of a requested instruction under an abuse of discretion standard. Unted States v. Rasnick, 58 M.J. 9, 10 (C.A.A.F. 2003) (citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993.))

Law and Analysis

To determine whether the military judge's denial of the requested alibi instruction was error, this Court applies the following three-prong test: (1) whether the requested instruction was correct; (2) whether the requested instruction was covered in the standard instructions; and (3) "it is on such a vital point in the case that the failure to give it deprived defendant of a

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[4] Issues IV was raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

defense or seriously impaired its effective presentation." Damatta-Olivera, 37 M.J. at 478. The term alibi means that an accused was elsewhere at the time of the offense. United States v. Brooks, 25 M.J. 175, 178 (C.M.A. 1987). Even though alibi is not an affirmative defense, which excuses, justifies, or mitigates an accused's action, if it is raised the instruction should be given. Id. In Brooks, the military judge erred in failing to give the panel an alibi instruction for one of the specifications. The appellant's own testimony and other witness testimony revealed that the appellant was in a different area of the building where the government claimed the alleged crime occurred. Id. at 179.

Here, the requested instruction was not correct. An alibi instruction is warranted only when the evidence raises an inference that an accused was not present where the government alleged where the crime occurred. Id. at 179. There was no evidence presented at trial that revealed that Appellant was not home – where the government claimed Specification 2 occurred. Appellant, on 21 May 2021, worked a swing shift that started at 1500 (R. at 216; Def. Ex. E.). Although there were inconsistencies regarding CC's testimony about the time of the assault – when she took photos of her injuries – CC's testimony still revealed that the assault occurred before she went to work that afternoon before 1400. (R. at 195-96.) Although the timestamps suggested that the assault happened earlier, Appellant still would have been home at the time of the assault because this timeframe was before Appellant would have left his residence to attend his work shift in the afternoon. Appellant went to work around 1430 before his shift started at 1500. These facts undercut Appellant's argument that an alibi instruction was warranted in this case. Appellant was home during the timeframe of the assault and had the opportunity to assault CC. Unlike Brooks, where appellant was in another location during the alleged time of the offense, the evidence here revealed that Appellant was home – where the offense was alleged to

have occurred. *See* Brooks, 25 M.J. at 179.

Appellant argues that "traditionally the instruction of alibi is given when Appellant is not at the time or place alleged – here CC was not at the time or place alleged for this injury to have occurred…." (App. Br. Appendix at 7.) Thus, Appellant argues that the instruction would have been correct with modifications. (App. Br. Appendix at 7.) But this is not how the alibi defense instruction works. The focus of an alibi instruction is on the location of an accused not the victim. Appellant was home during the time of the offense – before CC went to work. Alternatively, Appellant argues that he was asleep. (App. Br. Appendix at 8.) Still, that did not trigger the alibi defense. Appellant was still home and had the opportunity to commit the crime.

The alibi defense was not covered by the standard instructions. Yet Appellant argues that the military judge should have given a tailored instruction because at the time of the assault, CC was not present. (Id.) This did not require a tailored instruction for reasons discussed above. And trial defense counsel could have argued this point that CC was not home during the alleged crime during findings argument without an instruction from the military judge.

The alibi instruction was not a vital point in the case. While the lack of instruction deprived Appellant of the alibi defense, he was not entitled to this defense because the evidence did not raise it. The facts showed that Appellant was home in Surprise, Arizona at the date and time alleged. There was no testimony or evidence to show that Appellant was not home during the morning or early afternoon on 21 May 2021. CC's testimony revealed that she left for work at 1400. As a result, CC and Appellant on 21 May 2021 were both located at their residence during the morning and early afternoon. And they were both home when CC took pictures of her injuries. (Prox. Ex. 1.) The evidence negated any reason for the military judge to give the panel an alibi instruction or other tailored instructions. The military judge did not abuse his discretion

because the evidence did not raise the defense of alibi. This Court should deny this assignment of error.

V.[5]

APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL DID NOT SEEK ASSISTANCE FROM AN EXPERT TO EXPLAIN WHETHER THE DOCUMENTED INJURIES WERE CONSISTENT WITH THE ALLEGATIONS.

Additional Facts

Trial defense counsel did not seek expert assistance to explain whether the documented injuries were consistent with CC's allegations. *(Maj WF Declaration*, 16 July 2024.) Trial defense counsel did not obtain medical expert assistance because based on the evidence, an expert would not have benefitted Appellant's case. (Id.) CC did not seek medical attention after the assaults. As a result, an expert would have no evidence to review other than the pictures of CC's chin and leg. (Id.) Had trial defense counsel called an expert witness to testify as to the nature of CC's bruising, the expert would not have been unable to withstand cross-examination without harming Appellant's case. (Id.) Trial defense counsel was confident that the expert witness would be unable to rule out domestic violence as a source of injury. (Id.) Based on discussions with supervision and their own experience, trial defense counsel concluded that analyzing bruising is difficult to do from photographs available in Appellant's case. (*Capt NW Declaration*, 21 July 2024.) Because the defense had a strong argument that CC had a motive to fabricate the allegations, trial defense counsel decided to focus on CC's credibility rather than call an expert witness to explain CC's bruising. (Id.)

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[5] Issues V was raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. Tippit, 65 M.J. at 76.

Law and Analysis

Trial defense counsel were not ineffective when they did not seek expert assistance to determine whether the injuries conflicted with the charged allegations of domestic violence. Military courts apply the following three-part test in assessing whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions"; (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance…[ordinarily expected] of fallible lawyers"; and (3) if defense counsel were ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result? Gooch, 69 M.J. at 362 (alteration and omission in original) (quoting Polk, 32 M.J. at 153). The relevant law here is the same as outlined in Issue II, subheading B.

This Court evaluates ineffective assistance of counsel using the three-part test outlined in Gooch. First, Appellant's allegations are true – trial defense counsel did not seek expert assistance to analyze CC's bruising. But trial defense counsel explained that he chose not to seek assistance or have an expert testify because it could harm Appellant's case:

> There were no medical documents or reports for an export to analyze or explain for the benefit of our team. Meanwhile, in our experience, there is limited information that a medical expert can provide with respect to minor bruising. For example, we felt that an expert would not be able to opine as to the source of the bruising. We were concerned that this inability would weaken our case if we asked our expert to testify. We were confident that the Prosecution would ask whether the expert could rule out domestic violence as the source of injury and that they would not be able to do so. Ultimately, we were concerned that the Prosecution would argue that our own expert

> could not rule out the possibility of a crime having occurred. Accordingly, because we felt that a medical expert would have no impact, or even potentially harm our case, we decided against acquiring such an expert and instead we focused on [CC's] lack of credibility including her motive to fabricate and inconsistencies with her recollection of events.

(*Maj FW Declaration*, 16 July 2024.) Choosing to forego seeking expert assistance in Appellant's case was "within the wide range of reasonable professional assistance" especially when expert testimony would have no impact or even harmful effect on Appellant's case. *See* Strickland, 466 U.S. at 689.

Second, trial defense counsel's level of advocacy did not "fall measurably below the performance….[ordinarily expected] of fallible lawyers" because the choice not to seek expert assistance and have an expert testify was a strategic one. Had the expert testify and offered an opinion on the source of injury, the expert witness would be unable to rule out domestic violence as a source of injury. Thus, it was a strategic decision not to seek expert assistance that would not have benefitted Appellant's case. Instead, trial defense counsel focused on attacking CC's credibility and motive to fabricate. (*Maj FW Declaration*, 16 July 2024; *Capt NW Declaration*, 21 July 2024.) This strategic choice by trial defense counsel to forgo expert assistance and instead focus on CC's credibility was "virtually unchallengeable." Dewrell, 55 M.J. at 133.

Appellant argues that not seeking expert assistance hindered his ability to put on a full defense and was unreasonable for the following three reasons (1) it prevented him from determining whether the bruises in Prosecution 1 were consistent with the injury described by CC (2) it prevented him from determining whether the bruises shown in Prosecution Exhibit 1 were consistent with the charged timeframe and the date and time the photographs were taken; and (3) it prevented him from determining whether a bite would have caused a bruise that would have lasted about two weeks.. (App. Br. Appendix at 9.) Appellant's arguments fail. As both

trial defense counsel noted, there was very little information an expert could dissect for CC's bruise, and therefore an expert witness would not have been of any assistance to Appellant's defense. CC took photographs of her injuries, related to Specification 2, with her cell phone, and the bruises are not fully visible given the lack of lighting in which the photographs were taken. (Pros. Ex. 1.) Although one can see bruising in the photographs, it is difficult to see the details of CC's bruises. (Pros. Ex. 1.) Thus, it would have been difficult for an expert to discern the extent of the injuries from the photographs alone. Additionally, there were no medical reports nor any medical history documenting CC's injuries. Thus, there would be very little for an expert to clarify, and very little information for an expert witness to analyze to form an opinion as to CC's injuries related to Specification 2 shown in Prosecution Exhibit 1.

Appellant contends that an expert may have been able to opine on whether a bite would have caused a bruise that would have lasted about two weeks. (App. Br. Appendix at 9.) Here, there were no evidence, such as pictures of the injuries or a medical history, that an expert could have depended on to form an opinion that would have benefited Appellant's case. Trial defense counsel even noted that in his experience, "there is limited information that a medical expert can provide with respect to minor bruising." (*Maj WF Declaration,* 16 July 2024.) Given the lack of evidence about CC's bite mark and subsequent bruise – no medical report – an expert would not be able to opine with certainty as to the source of CC's injuries. With this said, trial defense counsel was concerned with an expert's inability to opine as to the source of bruising, as well as the inability to rule out domestic violence as a source of injuries. (Id.)

For the sake of argument, had an expert contended that a bite mark could not lead to a bruise that would last two weeks, that would open the door for the prosecution to challenge this opinion. The expert would have also agreed that the bite mark and its later injuries could

resemble domestic violence; which would support the government's theory of the case. This would have harmed Appellant's defense.

Appellant relies on United States v. Davis, 60 M.J. 469 (C.A.A.F. 2005). (App. Br. Appendix at 10.) In Davis, the trial defense counsel were not familiar with the applicable law and facts and therefore gave the appellant ill advice on his sentencing case strategy. Id. at 475. This case is distinguishable; trial defense counsel knew the law in Appellant's case and had a strategic reason not to have an expert clarify CC's injuries. In fact, trial defense counsel knew the facts of the case and recognized that they had very little evidence for an expert to review, just photos of "superficial bruising on [CC's] chin and leg." (*Maj FW Declaration*, 16 July 2024.) Trial defense counsel are presumed to be competent, and they even sought advice from their supervision to conclude that seeking expert testimony would not assist Appellant's case. (*Capt NW Declaration*, 16 July 2024.) This decision not to seek expert advice was not taken lightly, and trial defense counsel decided that a better strategy was to attack CC's credibility rather than focus on the nature of her injuries and bruising. Previously, CAAF upheld a trial defense counsel's strategy not to call an expert witness because calling the expert may have undermined the credibility of the defense's case. United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002). Expert testimony would have undermined Appellant's defense because it would have made the prosecution's theory of the case more probable in that the injuries could have resulted from domestic violence. *See* id. Appellant has not met his burden of proving that the strategic decision of trial defense counsel were unreasonable and "fell measurably below the performance…[ordinarily expected] of fallible lawyers." *See* Gooch, 69 M.J. at 362.

Third, and finally, if this Court determined that trial defense counsel were ineffective, there was not a "reasonable probability that, absent the errors," there would have been a different

result. Gooch, 69 M.J. at 362. Appellant claims that the "split findings on the specifications demonstrates how dispositive this evidence involving bruising or injury was to the trial." (App. Br. Appendix at 12.) But Appellant was not prejudice for the lack of expert assistance on the nature of CC's injuries or bruises. In fact, had an expert testified, the expert would have been compelled to agree with the prosecution that CC's injuries could have been consistent with domestic violence – a fact that would have harmed Appellant's case. Given the lack of evidence available to an expert for review, the expert would have not ruled out domestic violence as a source of injury. Thus, Appellant was not prejudiced by trial defense counsel's strategic decision not to open the door to this line of inquiry that would have supported the prosecution's theory of the case. This Court should deny this assignment of error.

VI.[6]

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS GUILTY VERDICT.

Additional Facts

Trial defense counsel filed a motion for appropriate relief for a unanimous verdict. (App. Ex. III.) The military judge denied the motion. (App. Ex. V.)

Standard of Review

The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (citing United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

[6] Issues VI was raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members in accordance with Article 52, UCMJ. (R. at 415-16.) Appellant now argues that he was deprived of his constitutional right to a unanimous guilty verdict. (App. Br. Appendix at 13.)

In Ramos v. Louisiana, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. 590 U.S. 83 (2020). The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 90-91. The Supreme Court did not state that this interpretation extended to military courts-martial.

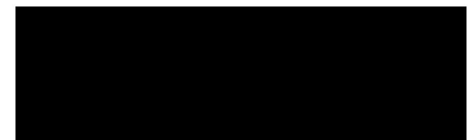
CAAF addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). Our Superior Court reaffirmed that servicemembers do not have a Sixth Amendment right to a jury trial. Id. at 295. CAAF rejected the same claims Appellant raises now:

> [W]e disagree that [Ramos] further held that [a unanimous verdict] is also an essential element of an impartial factfinder. In the absence of a Sixth Amendment right to a jury trial in the military justice system, Appellant had no Sixth Amendment right to a unanimous verdict in his court-martial.

Id. at 298. CAAF held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. Id. at 300. Further, our Superior Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at 302. This Court should follow CAAF's binding precedent and deny Appellant's assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.



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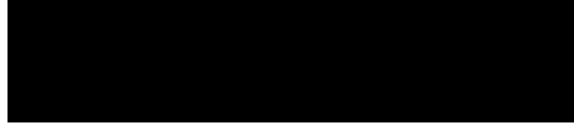

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 22 August 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO FILE AMENDED ANSWER**
v.	)	Before Panel No. 3
Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant.*	)	No. ACM 22072 22 August 2024

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rules 23.3(n) and 23(d) of this Honorable Court's Rules of Practice and Procedure, the United States hereby moves to file an amended Answer to Assignments of Error. The original Answer to Assignments of Error was timely filed on 4 August 2024. Amendment is necessary because since it was filed, the United States became aware that Appellant received Article 65(d) review prior to the 23 December 2022 change to Article 66 that would give this Court jurisdiction over Appellant's court-martial. The entry of judgment documenting the Article 65(d) review was not contained in the United States' version of the record but is contained in the original record docketed with the Court. In the amended pleading, page two is adjusted to include the United States' position that this Court has no jurisdiction to review Appellant's case and acknowledgement that this Court has previously decided the issue adverse to the United States in a published opinion. This amendment is being made merely to ensure preservation of the issue in case of further litigation. No other substantive changes were made in the amended pleading which is included with this filing. Undersigned counsel adjusted the table of contents and table of authorities accordingly.

WHEREFORE, the government respectfully requests this Honorable Court grant its motion to file an amended Answer to Assignments of Error.

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I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 22 August 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION FOR LEAVE TO FILE A**
Appellee,	)	**SUPPLEMENTAL ASSIGNMENT**
	)	**OFERROR**
v.	)	
	)	Before Panel No. 3
Ainnan First Class (E-3)	)	
JOHN P. MATTI,	)	No. ACM 22072
United States Air Force,	)	
Appellant.	)	2 Febma1y 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 18.4 and 23(d) of this Honorable Comi's Rules of Practice and Procedure, Auman FiI·st Class (AlC) John P. Matti (Appellant), requests leave of this Comi to file a supplemental assignment of enor that he personally asse11s based on the President's Executive Orders issued since Januaiy 20, 2025. Appellant requests this Court not issue any decision and grant a period of one week (7 days) to file the supplemental assignment of enor from the date the Comi takes action on this motion.

Appellant respectfully requests that this Honorable Comi grant this motion for leave to file a supplemental assignment of enor so he can fully exercise his right to appeal.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I ce1iify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 Febma1y 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR
v.	)	
Airman First Class (E-3) **JOHN P. MATTI** United States Air Force *Appellant.*	)	Before Panel No. 3 No. ACM 22072 10 February 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for leave to file a supplemental assignment of error. Appellant has not shown good cause to file a supplemental assignment of error. The motion for leave to file does not state the basis for the supplemental assignment of error, such as the issue presented, nor does the motion reference the relevant Executive Order at issue. For these reasons, the United States respectfully requests this Honorable Court deny Appellant's motion for leave to file a supplemental assignment of error.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 10 February 2025.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22072**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John P. MATTI	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

Appellant submitted his original assignments of error brief on 28 May 2024. The Government submitted its answer brief on 4 August 2024, and Appellant submitted his reply brief on 11 August 2024. With the court's permission, Appellant submitted an amended assignments of error brief on 22 August 2024.

On 2 February 2025, Appellant submitted a Motion for Leave to File a Supplemental Assignment of Error. Specifically, Appellant requested leave "to file a supplemental assignment of error that he personally asserts based on the President's Executive Orders issued since January 20, 2025." Appellant did not submit the proposed supplemental assignment of error with the motion, but requested a period of seven days from the date his motion for leave to file is granted in which to file the supplemental assignment of error. Appellant does not further describe or explain the proposed supplemental assignment of error.

On 10 February 2025, the Government opposed the motion for leave to file, contending Appellant has not shown good cause to grant it.

The court has considered Appellant's motion, the Government's opposition, prior filings and orders in this case, case law, and this court's Rules of Practice and Procedure. We conclude Appellant has not demonstrated good cause to grant the motion.

Accordingly, it is by the court on this 13th day of February, 2025,

ORDERED:

Appellant's Motion for Leave to File a Supplemental Assignment of Error dated 2 February 2025 is **DENIED.**

FOR THE COURT

OLGA STANFORD, Capt, USAF
Deputy Clerk of the Court