

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARVIN B. FLETCHER
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201000421
GENERAL COURT-MARTIAL**

Sentence Adjudged: 8 March 2010.

Military Judge: LtCol G.W. Riggs, USMC.

Convening Authority: Commanding General, 2d Marine Air
Wing, Cherry Point, NC.

Staff Judge Advocate's Recommendation: Maj S.D. Schrock,
USMC.

For Appellant: LT Ryan Santicola, JAGC, USN; LT Toren
Mushovic, JAGC, USN.

For Appellee: Capt Mark Balfantz, USMC.

25 August 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PERLAK, Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of one specification each making a false official statement, aggravated sexual contact, unlawful entry as a lesser included offense of burglary, and impersonating a noncommissioned officer, in violation of Articles 107, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 807, 920, and 934. The appellant was sentenced to confinement for six months, reduction in pay grade to E-1, and a bad-conduct discharge. The convening

Corrected Opinion
Issued Pursuant to CAAF Order of 26 January 2012

authority approved the sentence but, as an act of clemency, suspended one month of confinement for 12 months.

The appellant raises five assignments of error.¹ After carefully considering the record of trial and the pleadings of the parties, and oral argument heard on 13 April 2011, we grant relief on the third, fourth, and fifth assignments.

Facts

The appellant was an administrative clerk in his ninth year of service, assigned to Marine Wing Headquarters Squadron, Marine Corps Air Station, Cherry Point. For the two years immediately preceding this assignment, he was assigned similar duties with the Marine Corps Administrative Detachment, Redstone Arsenal, Huntsville, Alabama. The record indicates that the

¹ I. THE RIGHT TO A FAIR TRIAL GUARANTEED AN ACCUSED PRECLUDES THE GOVERNMENT'S INTRODUCTION OF MISLEADING EVIDENCE AND UNDISCLOSED PRETRIAL STATEMENTS MADE BY THE ACCUSED. IN APPELLANT'S COURT-MARTIAL, THE TRIAL COUNSEL KNOWINGLY INTRODUCED AN UNDISCLOSED PRETRIAL STATEMENT AND MISLEADING TESTIMONY REGARDING ANOTHER STATEMENT, BOTH OF WHICH PREJUDICED APPELLANT. THE MILITARY JUDGE ABUSED HIS DISCRETION AND DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL IN FAILING TO GRANT APPELLANT'S MOTION FOR MISTRIAL.

II. A MILITARY TRIAL COUNSEL HAS A RESPONSIBILITY TO TRY CASES FAIRLY AND MUST NOT MISLEAD THE MEMBERS NOR VIOLATE EVIDENCE DISCLOSURE REQUIREMENTS. THE TRIAL COUNSEL IN APPELLANT'S CASE INTENTIONALLY MISLED THE MEMBERS REGARDING A PRETRIAL STATEMENT BY APPELLANT AND ALSO INTRODUCED A SEPARATE PRETRIAL STATEMENT BY APPELLANT THAT HAD NEVER BEEN DISCLOSED TO DEFENSE COUNSEL. THE TRIAL COUNSEL'S CONDUCT CONSTITUTED PROSECUTORIAL MISCONDUCT AND DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

III. AN ACCUSED MAY ONLY BE CONVICTED OF A LESSER INCLUDED OFFENSE WHEN THE ELEMENTS OF THAT OFFENSE ARE A SUBSET OF THE CHARGED OFFENSE. APPELLANT WAS CONVICTED OF UNLAWFUL ENTRY, ARTICLE 134, UCMJ, AS A LESSER INCLUDED OFFENSE OF BURGLARY, ARTICLE 129, UCMJ, DESPITE THE FACT THAT UNLAWFUL ENTRY CARRIES AN ADDITIONAL ELEMENT. APPELLANT'S CONVICTED OF UNLAWFUL ENTRY AS A LESSER INCLUDED OFFENSE OF BURGLARY VIOLATES APPELLANT'S DUE PROCESS RIGHT TO FAIR NOTICE AND ARTICLE 79, UCMJ.

IV. THE GOVERNMENT HAS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE CHARGED OFFENSE. THE GOVERNMENT FAILED TO PRESENT ANY EVIDENCE THAT APPELLANT'S IMPERSONATION OF A NONCOMMISSIONED OFFICER WAS PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OR SERVICE DISCREDITING. THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT FOR THE OFFENSE OF IMPERSONATING A NONCOMMISSIONED OFFICER.

V. APPELLANT IS ENTITLED TO HAVE THE OFFICIAL RECORDS FROM HIS GENERAL COURT-MARTIAL ACCURATELY REFLECT THE RESULTS OF HIS TRIAL. THE COURT-MARTIAL ORDER SIGNED BY THE CONVENING AUTHORITY MISSTATES THE FINDINGS AND PLEAS FROM APPELLANT'S COURT-MARTIAL. THE RECORD OF TRIAL IN APPELLANT'S CASE SHOULD BE REMANDED FOR NEW POST-TRIAL PROCESSING.

appellant is a native Alabaman with familial ties to that state. Redstone Arsenal is home to the primary military occupational specialty (MOS) training school for ammunition technicians. "JC", the victim in this case, was at the time a 20-year-old Private (Pvt) concluding her duties as a trainee at Redstone, still assigned to quarters in the student barracks.

In the early morning hours of 15 February 2009, Pvt JC was assaulted by the appellant in her barracks room. The appellant, then a Corporal of Marines, entered her room wearing civilian clothing but representing himself to be a Marine Corps gunnery sergeant inspecting for infractions of command policy relating to alcohol and comingling of the sexes in the barracks.

Pvt JC, in response to questions from the appellant, as a putative military superior in the performance of his duties, was compelled to explain her status as a private. As she related the unpleasant matter of a prior summary court-martial following an absence offense, she began to emote. Pvt JC accepted an embrace from the appellant, but declined his further advances.

The appellant then resumed a would-be official role and questioned Pvt JC about the presence of alcohol in her room. Pvt JC admitted to having Smirnoff Ice in the refrigerator, to which the appellant then helped himself. After drinking some quantity of the alcohol, the appellant approached Pvt JC while she sat on her rack and told her that if "the little private" did not do "something" for the gunnery sergeant he would get her kicked out of the Marine Corps. Pvt JC understood the "something" to be sexual favors. The appellant joined Pvt JC on her rack, held her hands above her head and, over her crying protestations, removed her shirt and bra and fondled and sucked on her breast. He then stood up, unzipped his pants and demanded that Pvt JC fellate his penis, which he had pulled out and touched to her mouth. The appellant placed his hand into Pvt JC's pants and touched her vaginal area and thigh over her underwear. Throughout, Pvt JC was crying and imploring him to stop.

The assault only ended when the barracks duty knocked on the door to inform Pvt JC that a formation was pending. After a brief exchange in which Pvt JC alleges the appellant threatened to kill her if she told anyone about what occurred, the appellant exited the barracks room through the window. Pvt JC attended the formation noticeably upset, disheveled and crying. When she was later asked by a friend Lance Corporal (LCpl) A what had upset her, she responded, "Gunny raped me."

On 18 February 2009, the appellant was interrogated by Naval Criminal Investigative Service (NCIS) Special Agent (SA) CH regarding the subject assault.² The appellant was informed of his right to remain silent and his right to counsel yet executed a written rights waiver and began talking to SA CH.³ After several incriminating verbal statements, including admissions to being in Pvt JC's room, drinking her alcohol, and sucking on her breast, SA CH asked the appellant to make a written statement. The appellant then asked SA CH why he did not have an attorney present. SA CH explained that he had waived that right and showed him the rights waiver he had previously signed. In response to this revelation, the appellant was observed to remark, "I f***ed up." Record at 352.

Testifying to what occurred during this interview, SA CH recounted the several incriminating statements attributed to the appellant. This included a statement to the effect that, "he should have thrown the clothes out the window of his vehicle like he thought about doing," made in response to SA CH's seizure of clothing from the appellant's barracks room. *Id.* at 349-50. Contextually, this statement indicated that the accused was expressing regret that while driving from Redstone Arsenal back to Cherry Point he did not dispose of the clothing he was wearing during the assault. In violation of MILITARY RULE OF EVIDENCE 304(d)(1), UNITED STATES (2008 ed.),⁴ the prosecution failed to provide this statement to the defense until it was presented to the members through SA CH's testimony.

A second declaration, also attributed to the appellant, was elicited at the conclusion of direct examination of SA CH as follows:

² Originally, due to the apparent randomness of the assault, there were no leads in this case. During the course of the investigation, however, a fellow Marine recalled a similar incident in 2007 in which the appellant was sent to nonjudicial punishment for pretending to be a sergeant in order to gain access to a female junior Marine's barracks room to ask her out and for sexual favors. This information led NCIS to conduct a photo array in which Pvt JC identified the accused three times.

³ SA CH testified that a second NCIS special agent was also present during the interview, however, neither party called this witness at the court-martial. Record at 35.

⁴ MIL. R. EVID. 304(d)(1) states: "Disclosure. Prior to arraignment, the prosecution shall disclose to the defense the contents of all statement, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces."

Trial Counsel: Special Agent [CH], when you concluded your interview with Corporal Fletcher on the 18th of February did he say anything to you?

SA [CH]: Yes, he did.

Trial Counsel: What did he say to you?

SA [CH]: He said, "I f***ked up."

Record at 352.

Trial defense counsel deferred cross-examination and instead requested an Article 39(a), UCMJ, session, out of the presence of the members, where he raised evidentiary objections to the introduction of the two statements relating to clothing disposition and the final three words.

Trial defense counsel argued that the statement regarding the clothing was inadmissible because it had never been turned over to the defense as required by MIL. R. EVID. 304(d)(1). The military judge agreed and took appropriate remedial action, excluding the evidence and giving a curative instruction to the members to completely disregard the clothing comment. Record at 369.

As to the final three words, trial defense counsel argued that the statement was either an invocation of the right to counsel or was misleading the members and improper for the context in which it was presented. The defense counsel moved for a mistrial or, in the alternative, that the military judge strike SA CH's testimony in its entirety. The parties argued their positions on the potential meaning and effect of the words. In an effort to ensure the members were not misled, the military judge returned SA CH to the stand in an Article 39(a) session and conducted *voir dire* including the following:

Military Judge: Is it possible that [the appellant] said "I f***ed up" to mean that "I f***ed up" by talking to NCIS?"

SA [CH]: That is what I took it as.

Id. at 362. So the state of the record was that, in the opinion of the one percipient witness offered by the United States, the words were an expression of regret for the confession immediately preceding those words.

Following these questions by the military judge, trial counsel, Captain S, asked additional questions which generally served to style the exchange leading up to the three words as a question of clarification of the interview process, and further

distanced the three words from perhaps being something else—such as an ambiguous invocation of counsel—following the appellant’s verbal confession. *Id.* at 362-63. Regarding the defense counsel’s objection to the introduction of the statement “I f***ed up”, however, the military judge did not explicitly rule on whether the appellant had thereby invoked his right to counsel. Rather, the military judge found the statement to be an unprotected spontaneous utterance, subject to various interpretations, which counsel were free to explore. *Id.* at 365-66. The trial defense counsel conceded, and the military judge concluded, that the defense had long been on notice that the statement existed. The military judge ruled that there was no need to remediate the trial counsel’s putative mis-characterization of the statement, because the defense counsel could correct any confusion the members may have through cross examination. *Id.* He stated specifically:

I am not going to tell the members to disregard that statement because I don’t believe it was incorrect. I don’t believe there will have to be any mention that the accused had possibly invoked his right to remain silent or his right to counsel to ask the Special Agent what she thought the accused meant by [I f***ed up].

Id. at 367.

For whatever reason, notwithstanding having become aware of SA CH’s opinion as to the contextual meaning of the words, the defense counsel did not raise the matter during his subsequent examination of the witness, confining his questioning in large measure to the circumstances of the interrogation. Regardless of the tactical decisions made by the defense, by this point in the trial the trial counsel was clearly on notice that his one percipient witness (to the three words) called at trial, opined and agreed with the military judge’s proffer that the phrase meant that the appellant regretted talking to NCIS.

The three words surfaced again much later in the trial. During his closing argument, the trial counsel again worked the ambiguous words, “I f***ed up,” into his summation as follows:

[T]he [appellant] told [SA CH] that he’d gone to Redstone Arsenal. That he entered a student’s room. That he had been there for a couple of hours. That he touched some things. That he touched a person and that the contact was sexual. He only made those statements, those statements which are entirely

consistent with the testimony of [Pvt JC], after Special Agent [CH] confronted him with the evidence. Then he told Special Agent [CH] that he had "f***ed up."

Id. at 556. The statement, while factually comporting, strictly speaking, with the state of the evidence, and reiterated in the context of argument, drew a defense objection and counterargument. The words were not repeated or otherwise characterized by the trial counsel. Rather, we are left to assess the potential impact of any mischaracterization of the words, as used, in essence, as an exclamation point or punch line to an otherwise effective closing argument.

Discussion

1. Prosecutorial Misconduct and Actions by the Military Judge

The first assignment alleges that the military judge abused his discretion when he failed to declare a mistrial in light of what appeared to be prosecutorial misconduct. The second assignment alleges that the prosecutor committed misconduct by withholding from the defense team the appellant's incriminating statement which he had an affirmative duty to disclose; and then twice misrepresented to the members the contextual meaning of the appellant's statement "I f***ed up."⁵ These assignments or error are intertwined and we will address them together. See *United States v. Edmond*, 63 M.J. 343, 350 (C.A.A.F. 2006)(noting that prosecutorial misconduct analysis may be "intertwined" with other assignments of error).

"Prosecutorial misconduct is action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *Edmond*, 63 M.J. at 347 (quoting *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997))(internal quotation marks omitted). Appellate courts review *de novo* the question of whether prosecutorial misconduct amounted to prejudicial error. *Argo*, 46 M.J. at 457.

When analyzing allegations of prosecutorial misconduct and whether it amounts to a due process violation, this court looks at the fairness of the trial and not the culpability of the prosecutor. *Edmond*, 63 M.J. at 345 (citing *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). Courts should gauge the "'overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness.'" *Id.* (quoting *United States v.*

⁵ See record at 352, 556.

Thompkins, 58 M.J. 43,47 (C.A.A.F. 2003)). Therefore, we are not concerned with the intent of the prosecutor, merely the outcome of his actions. See *id.*

If prosecutorial misconduct is found, this court will examine the record as a whole to determine whether the appellant was prejudiced by the misconduct. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) ("As [a] proper objection was made at the trial level, we will review those comments for prejudicial error."). In making that determination, we will weigh three factors when evaluating the impact of prosecutorial misconduct on a trial: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. *Id.* at 184; see *United States v. Rodriguez-Rivera*, 63 M.J. 372, 378 (C.A.A.F. 2006). From our consideration of these three factors we will determine whether the appellant was prejudiced by the prosecutorial misconduct. *Rodriguez-Rivera*, 63 M.J. at 378.

The allegation of prosecutorial misconduct as posited in this case can be distilled as follows: a prosecutor representing the United States failed to disclose incriminating evidence that he was required to disclose under the Military Rules of Evidence.⁶ He then made affirmative misrepresentations to the court, improperly implying an admission of guilt and implicating a comment upon the accused's invocation of counsel. The failure of discovery need not detain us as the military judge took appropriate, curative action, excluding contaminated evidence.

As to the actual meaning of the three words, very little is clear. Like all testimony taken at trial, ambiguous words are left to argument by the parties and ultimate resolution by the trier of fact. We do know that there were three possible persons who would have been witness to their utterance, only one of whom provided testimony at trial—SA CH. Her take, opinion, or contextual understanding of the words was developed outside the presence of the members and never elicited through testimony, by either side, before the members. We know that the Government's witness understood them to mean the appellant regretted speaking to NCIS. In assessing for prosecutorial misconduct, we look at trial counsel's use of the three words. In the first instance, they were uttered by SA CH in response to his final question asked on direct examination. As such, they seem to have been elicited, following a discussion of the appellant's verbal confession, perhaps as a rhetorical exclamation point, perhaps suggestive of culpability. Armed

⁶ See MIL. R. EVID. 304(d)(1).

with its own understanding of what the words meant, and fully cognizant of the military judge's *voir dire* revealing a meaning suggestive of regret for speaking to NCIS, the defense did not cross the witness on this point to bring forth any different interpretation to the three words. In closing argument, trial counsel used the words for dramatic effect, albeit otherwise uncharacterized.

2. Severity of the Misconduct⁷

There is no question that the prosecutor violated MIL. R. EVID. 304(d)(1). He presented to the members a confessional statement by the accused that had not first been disclosed to the defense. This statement, "I should have thrown the clothes out the window," evidenced consciousness of guilt and intent to deceive investigators.

The prosecutor then presented the appellant's statement "I f***ed up" during his case in chief and again during his closing argument. While there are many possible meanings, one version is as a confessional statement that implied the appellant believed he had "f***ed up" by assaulting Pvt JC, the ultimate issue before the court-martial. The only evidence presented on the contextual meaning of that statement came from SA CH, who testified during an Article 39(a), UCMJ, session—but not in front of the members—that she interpreted that statement not as a reflection on appellant's interaction with Pvt JC, but rather commentary on his decision to speak with NCIS. To the extent that SA CH arguably may have also taken this ambiguous statement as an invocation of the appellant's right to counsel, we hold that definitively it was not. See *United States v. Delarosa*, 67 M.J. 318, 320 (C.A.A.F. 2009) ("If a suspect provides an ambiguous statement regarding invocation of rights after *Miranda* warnings have been given, law enforcement officials are not obligated to cease interrogation") (citations omitted). The defense counsel likewise then declined to cross examine SA CH on this issue.

As the Court of Appeals for the Armed Forces has noted, when arguing to the members, "the trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Erickson*, 65 M.J. 221, 222 (C.A.A.F. 2007) (quoting *United States v. Baer*, 53

⁷ The court explained in *Fletcher* that "[i]ndicators of severity include (1) the raw numbers -- the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge." 62 M.J. at 184. (citation omitted).

M.J. 235, 237 (C.A.A.F. 2000)). But dishonesty, or anything near it, is a foul blow. In this case, the prosecutor, either by design or through inexperience, came needlessly close to dishonesty through his use of the three words as a crescendo to his argument, arguing the words in a manner that took them out of the context of confessional regret, and into the context of an admission to the underlying misconduct. We find that the great initial ambiguity in the words themselves became clear through the impressions of the lone witness called by the Government. We view SA CH as uniquely informed, as a percipient witness who had served as the lead agent in the interrogation of the appellant. While there may have been more damning assessments of what the words may have meant, trial counsel did not bring those forth. We are left to assess the typewritten words on the record before us. Doing so, we view the prosecutor, armed with the testimony from the Article 39(a) session, now clearly aware of his own witness' understanding, making an argument which stood to needlessly cross the line that segregates aggressive advocacy with a good faith belief the words meant regret, to dishonesty and unfair blows, in an overstatement intended or likely to leave the members with the clear implication that the appellant's words were confessional. Assuming without deciding that this knowing, rhetorical license crossed the line into dishonesty, we will assume prosecutorial misconduct. In our consideration of the three factors detailed above, with our assumption, this factor necessarily favors the appellant. See *Rodriguez-Rivera*, 63 M.J. at 378; *Fletcher*, 62 M.J. at 184.

3. Curative Measures

We assess the curative measures taken by the military judge within our analysis of whether the appellant was prejudiced by the prosecutorial misconduct itself; and we will assess whether the military judge abused his discretion when deciding against granting a mistrial.

The defense properly objected to the prosecutor's clear violation of MIL. R. EVID. 304(d)(1) when he presented to the members the appellant's statement "I should have thrown the clothes out the window," without previously disclosing it to the defense. The defense also objected to the prosecutor's questionable characterization of the appellant's declaration "I f***ed up." After the objections were made, and during two Article 39(a) sessions—one during the examination of SA CH and one during closing arguments—the defense twice requested a mistrial.

We must determine whether the military judge erred in failing to grant a mistrial on the grounds of prosecutorial misconduct. Relief for a military judge's failure to grant a mistrial is available only upon clear evidence of abuse of discretion. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)(citing *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)). A mistrial is a drastic remedy to be used only sparingly to prevent manifest injustice. *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). A mistrial is appropriate only when "circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Barron*, 52 M.J. 1, 4 (C.A.A.F. 1999)(citations and internal quotation marks omitted).

The military judge devised an appropriate solution to the introduction of the statement "I should have thrown the clothes out the window," when he provided the members an appropriate curative instruction. Record at 169; see *Taylor*, 53 M.J. 195, 198 ("A curative instruction is the 'preferred' remedy for correcting error when the court members have heard inadmissible evidence")(citation omitted).

In addressing whether the prosecutor had mischaracterized the statements of the appellant, the military judge noted that SA CH's testimony was only one possible interpretation of the meaning of the statement. The military judge further advised the defense counsel that he could explore any inconsistencies through cross-examination. The trial counsel had, after all, foolishly opened himself up to an assault on his own credibility—and by association, that of his case—by providing to the members a questionable interpretation of the appellant's statement. During an Article 39(a), UCMJ, session SA CH testified to her interpretation of what that statement meant, and was thus locked into testifying accordingly.

We find that, considering the ambiguity of the statement and the fact that it was not an invocation of either the right to counsel or the right to remain silent, the military judge's decision not to issue any curative instruction to the members was far more reasonable than granting the extreme remedy of a mistrial. See *Thompkins*, 58 M.J. at 47 ("a mistrial is a drastic remedy to be used only sparingly to prevent manifest injustice"). We find that the military judge did not abuse his discretion in failing to grant a mistrial for the residual, prosecutorial misconduct arising from a non-contextual overplaying of the three words.

4. Weight of the Evidence and Prejudice

Having already addressed the matter of the withheld evidence, remediated by the military judge, we now assess the weight of the evidence based on the foregoing assumption that the prosecutor crossed the line to dishonesty in mischaracterizing the appellant's statements. We hold that the appellant cannot demonstrate prejudice sufficient to merit a rehearing. The weight of the evidence was overwhelming and the appellant's guilt is obvious. This case brings together the confluence of sound testimonial, physical and circumstantial evidence of guilt, supported by a confession. Any alternative description of events, divined from the formulation of defense questions or defense arguments, failed of their own vacancy or implausibility. Furthermore, the court-martial received properly admitted evidence under MIL. R. EVID. 404(b), establishing that the appellant had committed a similar assault using an identical scheme just a few years prior.⁸

Thus, as we gauge the overall effect of the prosecutor's conduct on the trial, even if viewed with the assumptions made above, we conclude that despite any overreaching or liberties implied in argument, the evidence properly presented to the members clearly established the appellant's guilt beyond a reasonable doubt. See *Edmond*, 63 M.J. at 345. We are left to conclude that the prosecutor's remarks, delivered in the context of an argument to a properly-instructed venire, and rebutted by the argument of opposing counsel, was of *de minimis* prejudicial effect.

Lesser Included Offense Finding

The appellant's third assignment of error alleges that the appellant was improperly convicted of housebreaking as a lesser included offense of burglary. Charge IV alleges that the appellant committed burglary in violation of Article 129, UCMJ. The members, however, after being instructed by the military judge, convicted the appellant of unlawful entry in violation of Article 134, UCMJ, as a lesser included offense (LIO) of burglary. In light of the holdings in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), and its progeny, this conviction cannot stand. The Article 134, UCMJ offense contains the terminal elements of prejudice to good order and discipline or service discredit that are not present in the charged offense; therefore, unlawful entry cannot be an LIO of burglary. *Id.* at 468 (court's shall apply the strict elements test when determining whether one offense is an LIO of another); see

⁸ See footnote 2 above.

United States v. Miller, 67 M.J. 385, 388-89 (C.A.A.F. 2009) (rejecting the notion that clauses 1 and 2 of Article 134, UCMJ, are *per se* included in every enumerated offense, and overruling cases that held to the contrary).

Per *Jones*, we must reject the Government's argument that, in this case, convicting a person of a crime he was not charged with is not prejudicial error. We assess this constitutional error for prejudice and, considering the appellant was not charged with the offense of which he was convicted, the specification was never amended in accordance with RULE FOR COURTS-MARTIAL 603, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), nor did the accused defend himself in any way designed to invite error by means of an improperly instructed upon LIO, we find the conviction to be prejudicial. See *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011); *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011). We provide appropriate relief below.

Article 134 Offense

The appellant's fourth assignment of error avers that the Government failed to prove Charge V, brought under Article 134, UCMJ, of wrongfully impersonating a gunnery sergeant.⁹ Our analysis of the legal and factual sufficiency of this charge and specification has morphed from the original assignment of error, whose predicate assumptions and merits must now be analyzed based on the holding of the Court of Appeals for the Armed Forces in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). We likewise treat this assignment of error as concomitantly alleging a failure to state an offense under Article 134.

The specification under Charge V does not expressly allege any terminal element, under either Clause 1 or 2 of Article 134, UCMJ. These clauses are legally distinct and "not synonymous," *Fosler*, slip op. at 13. Looking to R.C.M. 307(c)(3) and *Fosler* slip op. at 14, we next look to see whether the terminal element was necessarily implied, in the absence of a specific allegation.

The specification reads:

In that Corporal Marvin B. Fletcher, U.S. Marine Corps, Marine Wing Headquarters Squadron-2, 2d Marine Aircraft Wing, Marine Corps Air Station, Cherry Point,

⁹ An Article 93, UCMJ, offense was stricken from the original charge sheet, leaving the Article 134 offense at issue here resequenced as Charge V and its specification.

North Carolina, on active duty, did, at or near Marine Corps Detachment, Redstone Arsenal, Alabama, on or about 15 February 2009, wrongfully and willfully impersonate a staff noncommissioned officer of the U.S. Marine Corps, by identifying himself to Private [JC], U.S. Marine Corps, as a Gunnery Sergeant, and asserted the authority of a Gunnery Sergeant by threatening Private [JC] with punitive action.

The specification plainly describes the "disorder" or wrongful conduct the appellant must defend against. However, the analysis and holding in *Fosler* requires that, on a case with this procedural posture, where the Charge and specification were met with a plea of not guilty and contested at court-martial, then challenged pursuant to R.C.M. 917, we, ". . . read the wording more narrowly and . . . only adopt interpretations that hew closely to the plain text." Slip op. at 14. Through this filter, we cannot conclude that on its face this specification further signals, by necessary implication, that these actions, absent some further allegation of the attendant circumstances, axiomatically impacted good order and discipline or that they served to lower the public esteem of the Marine Corps. The appellant held himself out as and asserted the authority of a gunnery sergeant. Unless we make further assumptions rejected by the Court of Appeals in *Fosler*, a circumstantial nexus, clearly signaling Clause 1 or 2 by necessary implication, is not plead. The impersonation and assertion of office stand alone, in the absence of circumstances which necessarily imply Clause 1 or 2. Such circumstances ostensibly would include the fact that Pvt JC then submitted to the impersonation and false assertion of office, and, as a putative subordinate, took some action, such as admitting the appellant into her quarters under color of authority. One can readily intuit a circumstance where either or both Clauses 1 and 2 may be implicated on the specification as written, but intuition does not bring a necessary implication providing notice of which terminal element(s) must be defended.

Further analysis of the R.C.M. 917 motion and its effect on findings is in order. During argument on the motion, trial defense counsel averred that the Government had failed to "offer any evidence on the prejudice to good order and discipline prong..." Record at 547. These words indicate an understanding and acknowledgment of notice to defend under Clause 1. Trial counsel then responded that, "the conduct in question is both inherently prejudicial to good order and discipline and inherently service discrediting to the armed forces." *Id.* The motion was denied, with the military judge's remarks accompanying the ruling limited to a finding of some evidence

relative to good order and discipline only. *Id.* at 548. Taking this ruling at face value, in the context of an R.C.M. 917 motion, only Clause 1 survived the motion. However, the members were instructed and given definitions pertaining to both Clauses 1 and 2. *Id.* at 591. They then returned a general finding of guilty to Charge V and its specification. *Id.* at 609. There being no manner of knowing what role improper consideration of Clause 2 played in reaching this finding, we are left to conclude that, should the specification have survived *Fosler* necessary implication scrutiny, we do not have a finding reviewable under Article 66(c). *Cf United States v. Saxman*, 69 M.J. 540 (N.M.Ct.Crim.App. 2010).

In light of *Fosler*, if we strip the specification of any of the historic assumptions accompanying this Article 134 offense, and give Clauses 1 and 2 their necessary legal distinctiveness, on the state of this record, we hold that the specification fails to state an offense under Article 134. We take appropriate action in our decretal paragraph.

Accuracy of Records

The appellant pleaded not guilty to all the offenses with which he was charged, yet the court-marital order (CMO) states incorrectly that he pleaded guilty to all the offenses. The CMO also states incorrectly that the appellant was convicted of an attempt in violation of Article 80, UCMJ, when in fact he was acquitted of that charge. The CMO also states incorrectly that he was convicted of violating Article 129, UCMJ, when in fact he was convicted of violating Article 130, UCMJ.

The parties agree that the appellant is entitled to post-trial processing that is free of error. *See United States v Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). The appellant alleges no prejudicial error, nor do we find any. We will order corrective action in our decretal paragraph.

Conclusion

We set aside the guilty finding of unlawful entry and dismiss Charge IV and its specification. We likewise set aside the guilty finding to Charge V and its specification. We find the remaining findings of guilty to be correct in law and fact and affirm them accordingly. In light of the modified findings, we must reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986).

"A 'dramatic change' in the penalty landscape gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006)(quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)).

We are satisfied beyond a reasonable doubt that there has been no dramatic change to the penalty landscape and we may reassess. *Id.* The essential facts giving rise to the two dismissed offenses contain details and information relative to the underlying sexual assault and would properly be before the trier of fact on the merits of those offenses or in aggravation thereof. Reassessing the sentence, we conclude that the sentence as adjudged and approved is appropriate and no greater than would have been adjudged based on the modified findings.

The sentence is affirmed. The supplemental court-martial order shall correctly record the state of the pleas and the disposition of the charges as discussed herein.

Senior Judge MAKSYM and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court