

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JEREMY G. BOYER
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100523
GENERAL COURT-MARTIAL**

Sentence Adjudged: 4 May 2011.

Military Judge: LtCol Gregory Simmons, USMC.

Convening Authority: Commanding General, Marine Corps
Recruit Depot/Western Recruiting Region, San Diego, CA.

Staff Judge Advocate's Recommendation: LtCol S.M. Sullivan,
USMC.

For Appellant: Capt Michael Berry, USMC.

For Appellee: LCDR Keith B. Lofland, JAGC, USN; Capt Mark
V. Balfantz, USMC.

27 December 2012

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.**

PRICE, Judge:

A panel of officer members, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of indecent liberties with a child and one specification of sodomy with a child under 12, in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925. The members sentenced him to forfeiture of all pay and allowances, reduction to pay grade E-1,

confinement for eight years, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant assigns four errors: (1) legal and factual insufficiency of his sodomy conviction; (2) admission of the alleged victim's [P.B.'s] recorded statement violated the Confrontation Clause; (3) admission of P.B.'s other hearsay statements violated the Confrontation Clause; and (4) the military judge abused his discretion by admitting P.B.'s out of court statements after ruling she was not competent to testify. Additionally, the appellant has petitioned for a new trial pursuant to Article 73, UCMJ, averring that he deserves a new trial because of P.B.'s post-trial "recantation." We specified three issues related to whether trial counsel committed prosecutorial misconduct during findings arguments.¹

After considering the record of proceedings, the parties' pleadings, and the oral arguments of counsel, we conclude that trial counsel's improper arguments on findings constitute prosecutorial misconduct that materially prejudiced the appellant's substantial rights. We will set aside the findings and sentence in our decretal paragraph. We find no merit in the appellant's first assigned error, and our action on the specified issues moots the remaining assignments of error. The Petition for New Trial is denied.

I. Background

On the afternoon of 25 May 2010, the appellant was with his two children and three other children in his home near Camp Pendleton. He was the only adult in the residence for approximately one hour, during which his wife, S.B., was at a medical appointment. During that timeframe, a neighbor picked up her children from the appellant's home and the appellant used his cell phone extensively.

When S.B. returned from her medical appointment, their then four-year-old daughter, P.B., immediately approached her and said "Daddy put his wink in my mouth." Record at 1035. "Wink" was a family term for penis. The appellant, then nearby on the floor playing video games with the other children, overheard P.B.'s claim, got up and approached S.B. with a confused and stunned look on his face.

¹ The specified issues included: (I) whether the trial counsel committed prosecutorial misconduct during his findings arguments, (II) if he did commit misconduct, whether it materially prejudiced the appellant's substantial rights, and (III) assuming material prejudice, what is the proper remedy?

S.B. took P.B. into the garage in order to speak to her alone. In the garage, P.B. said that the appellant put chocolate on his penis and put his penis in her mouth; she then made a gagging sound. The appellant denied any wrongdoing, but insisted that they take P.B. to the hospital for examination.

The appellant and his wife took P.B. to the hospital, where she was examined. Medical personnel discovered chocolate sauce in her hair and on her clothing, and chocolate sauce stains on her face, under her chin and on the back of her neck. P.B.'s demeanor was outgoing and cheerful, and a physician found no signs of injury or trauma. At trial, a Government expert testified that there was no forensic evidence to show that there was contact between the appellant and P.B..

During an interview by Naval Criminal Investigative Service (NCIS) special agents later that night, the appellant denied any wrongdoing. He claimed that P.B. and his three-year-old son, C.B., had poured chocolate syrup on themselves while he was distracted, and that he cleaned them up before his wife got home. During that interview, the NCIS agents misinformed the appellant that his semen had been found on P.B., but the appellant maintained his innocence, offering to pay for exculpatory forensic testing. The appellant testified at trial and again claimed to be innocent. However, cross-examination at trial highlighted significant inconsistencies in his version of events including: which child was holding the chocolate syrup; his precise steps in cleaning up the children; when he changed his clothing after the chocolate incident; whether and when P.B. may have observed her parents engaging in oral sexual contact; and the date of his last sexual encounter with his wife prior to the alleged sodomy of P.B..

P.B. did not testify at trial. In a pretrial Article 39(a), UCMJ, hearing, the military judge found P.B. incompetent to testify, concluding that she could not appreciate the importance of telling the truth in the courtroom. He also found that P.B. could appreciate the difference between the truth and a lie as a general matter, and found her statements to her mother reliable enough for admission under the excited utterance and residual exceptions to the hearsay rule. MILITARY RULES OF EVIDENCE 802, 803(2), and 807, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

At trial, among other evidence, the Government introduced P.B.'s initial statements through her mother, a drawing that P.B. made shortly after the alleged incident in which she drew

her father with a penis for the first time, and a recording S.B. made of P.B. describing the events several months later. S.B. testified that she made the recording after P.B. claimed that the appellant had not committed the misconduct. The purported recantation occurred after S.B. told P.B. that her father could not come home because of what he had done to her. At that moment, P.B. became emotional and said that nothing had really happened, prompting S.B. to search for a recorder. When she found one several minutes later and began to record, however, P.B. retold her original account of the events and added additional detail.

The Government theory at trial focused on the detail and consistency of P.B.'s description of the sexual activity, the corroborating physical evidence, and on inconsistencies in the defense case and the appellant's description of events.

The Defense theory at trial was reasonable doubt focused on P.B.'s complaint, credibility, possible exposure to sexually explicit information and conduct, the lack of evidence of the appellant's motive and opportunity, and the absence of physical evidence. S.B. and her mother (P.B.'s grandmother) testified that P.B. was prone to drama and exaggeration in order to get attention. They described a number of examples of such behavior including one incident when P.B. suffered a neck injury and then pretended to be paralyzed. After P.B. feigned paralysis, S.B. took her to the hospital where she persisted in her tale of paralysis through comprehensive medical testing and examination, only to spring from the examination table after a treating physician stated that there was nothing physically wrong with her. The appellant also described this episode in his testimony, maintaining that P.B. had never been similarly confronted in this case, although he conceded on cross-examination that she had been questioned by various parties dozens of times since the incident.

Additional facts concerning the trial counsel's findings arguments are discussed below.

II. Prosecutorial Misconduct

In response to the issues specified by the court, the appellant asserts that trial counsel's argument on findings was improper and constituted prosecutorial misconduct. He identifies six categories of trial counsel's improper comment including: (1) interjection of his personal beliefs or opinions; (2) disparaging comments about defense counsel; (3) disparaging comments about the appellant's credibility; (4) introduction of

facts not in evidence; (5) claims that the defense was attempting to "silence" the victim, and (6) requests that the members "protect" the victim by convicting the appellant.

The appellant avers that, taken as a whole, trial counsel's comments materially prejudiced his substantial rights under Article 59(a), UCMJ. He contends that defense counsel properly objected at trial; that trial counsel's improper comments were pervasive and severe; that the military judge's curative efforts were insufficient; that the evidence of guilt was "paltry"; and that there is a reasonable likelihood that the misconduct contributed to the appellant's conviction and thus materially prejudiced his substantial rights.

The Government responds that trial counsel's argument on findings was proper response to the defense theory of the case, and that any injudicious language used in argument was in response to defense counsel's mischaracterizations of the evidence and did not amount to prejudicial error.² Specifically, the Government contends that defense counsel's improper assertions during opening statements that P.B. was lying opened the door to trial counsel's argument that the appellant lied and that trial counsel's "arguably injudicious characterization" of the appellant was not disparaging in a manner that prejudiced the appellant. The Government also denied that trial counsel inappropriately interjected his personal beliefs and opinions into the trial, improperly vouched for P.B.'s credibility, or disparaged the defense counsel. The Government acknowledges that trial counsel improperly introduced facts not in evidence, but avers that the military judge's instructions cured any prejudice. We disagree.

A. The Law

"The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). "An accused is supposed to be tried and sentenced as an individual on the basis of the offense(s) charged and the legally and logically relevant evidence presented." *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007).

² The Government did not address trial counsel's repeated requests that the members "protect" P.B. in their brief.

While a trial counsel "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Fletcher*, 62 M.J. at 179 (quoting *Berger*, 295 U.S. at 88). "[I]t is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'" *Schroder*, 65 M.J. at 58 (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983) and citing RULE FOR COURTS-MARTIAL 919(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Discussion). Trial counsel is also prohibited from injecting into argument irrelevant matters, such as personal opinions and facts not in evidence. *Schroder*, 65 M.J. at 58; R.C.M. 919(b) Discussion. To that end, courts have struggled to draw the "exceedingly fine line which distinguishes permissible advocacy from impermissible excess." *Fletcher*, 62 M.J. at 183 (citation and internal quotation marks omitted). Improper argument is a question of law that we review *de novo*. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011).

When determining whether prosecutorial comment was improper, the statement "must be examined in light of its context within the entire court-martial." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (citation omitted). "Under the 'invited response' or 'invited reply' doctrine, the prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense." *Id.* (citing *United States v. Gilley*, 56 M.J. 113, 120-21 (C.A.A.F. 2001)). "In the course of reviewing whether an appellant was deprived of a fair trial by such comments, the question an appellate court must resolve is whether, viewed within the context of the entire trial . . . defense counsel's comments clearly invited the reply." *United States v. Lewis*, 69 M.J. 379, 383-85 (citation and internal quotation marks omitted).

In *Fletcher*, the Court adopted a three factor balancing test to determine 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. *Fletcher*, 62 M.J. at 184. The court reasoned that "prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id.*

B. Trial Counsel's Argument - The Errors

First, we address the inflammatory impact of trial counsel's repeated request for the members to "protect" the victim. Second, we discuss the trial counsel's introduction of facts not in evidence. Third, we address trial counsel's disparagement of defense counsel. Fourth, we discuss trial counsel's improper argument including his personal beliefs, opinions and disparagement of the appellant.

1. Call to "Protect" the Victim

"[I]t is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'" *Schroder*, 65 M.J. at 58 (quoting *Clifton*, 15 M.J. at 30 and citing R.C.M. 919(b), Discussion). Asking a jury to perform a role beyond evaluating the evidence is generally impermissible. See, e.g., *United States v. Young*, 470 U.S. 1, 18 (1985) (finding error in telling the jury "do its job"); *Brown v. State*, 680 S.E.2d 909, 912-15 (S.C. 2009) (finding error in asking the jury to "speak up" for child victim).

Trial counsel concluded his opening statement to the members with "after you hear all the facts and evidence in this case, you'll come to the right decision. You'll protect P.B. You will hold [the appellant] accountable for what he did to his daughter." Record at 964 (emphasis added). Briefly into his lengthy summation, trial counsel argued "you represent the people of the United States and the Marine Corps. And it will be a sad day for our Marine Corps and our country *if a child cannot be protected from their father* when they provided this overwhelming amount of consistent information, a consistent recollection of exactly what's happened." *Id.* at 1990 (emphasis added). Near the end of summation, trial counsel asserted as "fact that no one - no one to date has stood up for P.B. . . ." *Id.* at 2036. He concluded with "The government asks that *you be the first to step up and protect P.[B.]*. Listen to what she said, and listen to what she's done. Look at everything that has occurred over that last year after the incident happened *and protect her.*" *Id.* (emphasis added). Following defense counsel's closing argument on findings, trial counsel restated this theme just prior to concluding his rebuttal argument: "And now when you go back into that room, it is your turn to push that smoke back, to look at the evidence together, and to *protect P.[B.]*." *Id.* at 2078 (emphasis added).

We find no legal or logical relevance in trial counsel's repeated invocation to the members to "protect" P.B. in his argument on findings.³ In context, we can identify no permissible basis to request the members to perform this role. Quite the opposite, the intended effect appears to be to appeal to the court members' protective instincts or prejudices to motivate those members to return guilty findings. Moreover, such argument could only tend to mislead the members or prejudice the appellant.

Among the many possible impacts, the members could reasonably have interpreted the call to protect P.B. as a highly prejudicial (and irrelevant) claim that she would not be safe unless her colluding parents were separated. Notably, the trial counsel called attention to the fact that the appellant's wife supported the appellant and did not believe P.B.; in his words, she was "in denial." *Id.* at 1988. The trial counsel then linked this state of affairs to P.B.'s welfare, arguing that "no one has stood up for P.B.," and that the members should be the "first" to do so. *Id.* at 2036. Thus, before asking the members to protect P.B., the trial counsel asserted P.B.'s isolation from those morally, legally and instinctively responsible for her safety and welfare - her parents.

These comments constitute a repeated request, indeed an appeal, to the members to perform an impermissible role beyond evaluation of the evidence - protection of the victim. It is indisputable that this case was emotionally charged given that it involved sexual misconduct with a four-year-old child. Repeated references to "protect[ing]" P.B. suggests that these words were carefully chosen to play on the natural human instinct to protect a young child - particularly when her father was the threat and in light of evidence that her mother was either unable or unwilling to protect her. In the same breath, trial counsel cued the members to remember "everything that has occurred over that last year," which would include P.B.'s brief placement in foster care, purportedly triggered by notification of state authorities that her mother allowed the appellant to visit P.B. without prior approval.⁴ That P.B.'s recent home life was difficult, and that her mother did not believe her rendition, are facts that invite the sympathy of any caring

³ Such argument may be relevant to determining an appropriate sentence. See R.C.M. 1001(g).

⁴ In response to a member's question, S.B. testified that Child Protective Services removed her children believing "I was a non-protective parent." Record at 1149 (emphasis added).

person, but they bear no relevance on the appellant's guilt, and could only have served to unduly inflame the passions or prejudices of the court members. *Schroder*, 65 M.J. at 58.

Unlike most of the errors addressed below, the appellant did not object to these comments, so we review for plain error. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused. *Fletcher*, 62 M.J. at 179. We find that trial counsel's repeated appeal to "protect" P.B. constituted error. Similarly, given the strategic placement of trial counsel's appeals at the conclusion of his opening statement, at the beginning and dramatic end of his arguments on findings, and near the conclusion of his rebuttal argument, the error was plain and obvious. Such an argument could only serve to unduly inflame the court members' passions or prejudices and was irrelevant to determining guilt.

In the context of this trial, and for the reasons discussed below, we also conclude that trial counsel's impermissible "protect" comments materially prejudiced the substantial rights of the appellant. See *Carter*, 61 M.J. at 33 ("A prosecutorial comment must be examined in light of its context within the entire court-martial.").

Assuming *arguendo* that trial counsel's repeated appeals to the members to "protect" P.B. do not constitute plain error, we exercise our authority, in the interests of justice, and take notice of this otherwise "forfeited" error. See Art. 66(c), UCMJ; see also *United States v. Nerad*, 69 M.J. 138, 144 (C.A.A.F. 2010) (citing *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991) (holding that a CCA may disregard doctrines like waiver "in the interest of justice" to reach legal errors that would otherwise be uncognizable)).

2. Facts Not in Evidence

The trial counsel's reliance on facts not in evidence during argument is especially troublesome as his comments appeared to target the heart of the defense case, forming testimonial arguments that "are not given under oath, are not subject to objection based upon the rules of evidence, and are not subject to the testing process of cross-examination." *Clifton*, 15 M.J. at 29. The record is replete with examples of trial counsel's efforts to augment the record with facts not in evidence. Two notable examples were improper comments rebutting

a central defense theory, the insufficiency of the evidence, specifically P.B.'s absence from trial.

In his closing argument, the defense counsel emphasized the significance of the military judge's determination that P.B. was incapable of appreciating the seriousness of the court and incapable of understanding the importance of telling the truth. During his closing argument, trial counsel claimed that he had "studied hundreds and hundreds of trials" and was "not aware of any child ever testifying under the age of seven." Record at 2001. He later argued "And again, gentlemen, four year-olds simply rarely, if ever, testify." *Id.* at 2008. This argument is unsupported by the record and contradicted by case citations included in the Government's pleadings in this case.⁵

The Supreme Court recognized that "assertions of personal knowledge [by prosecutors during argument] are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88. We are particularly concerned that the trial counsel exploited his standing because, shortly after he made this misleading factual assertion about child witnesses in other cases, he characterized the defense's attempt to raise the issue of "incompetency" as "another distortion intended to distract you." Record at 2001. Trial defense counsel made a timely objection to this argument as facts not in evidence and requested a curative instruction. *Id.* at 2020-21. The military judge overruled the objection, but indicated he would again instruct the members that statements of trial counsel are not evidence.

Additionally, in his closing argument, trial defense counsel emphasized his inability and that of the members to question P.B. and then articulated numerous questions comprising more than 3 single-spaced typed pages in the transcript that he would have liked to ask P.B. had she testified. *Id.* at 2046-49. Trial counsel objected, in the presence of the members, to a portion of the hypothetical questions during which defense counsel indicated a "[question] was never posed to P[.B.]," stating those questions were asked the night of the incident. *Id.* at 2048. He subsequently argued in rebuttal that trial defense counsel "also brought up his—about 20 minutes of I wish

⁵ The Government's pretrial motion requesting a ruling on P.B.'s competency to testify included cites to two cases in which several children of similar age testified at trial. See *United States v. Morgan*, 31 M.J. 43 (C.M.A. 1990) (4-year-old victim of sexual offenses testified at trial); *United States v. Allen*, 13 M.J. 597 (A.F.C.M.R. 1982) (three 4-5 year-old victims of indecent liberties testified at trial). Appellate Exhibit II at 3.

they had asked that, I wish they had asked this questions [sic]. The fact is *all of those questions were asked of P.B. We wouldn't be here if they weren't.*" *Id.* at 2069 (emphasis added).

Defense counsel also objected to this argument asserting either that he had not been provided required information in discovery or that trial counsel's assertion implies that the Government has brought this action based upon facts not before the members. *Id.* at 2084-86. The military judge commented that "while I agree with you that trial counsel may have gone a little far in his response to [defense counsel's desired questions] this is something that you brought on yourself." *Id.* at 2086. The military judge then agreed to instruct that argument is not evidence and that the members must limit their decision on the offenses to the evidence.

By arguing the aforementioned facts not in evidence, trial counsel was "inviting the members to accept new information as factual, based upon his authority." *Clifton*, 15 M.J. at 30. Such argument was improper and constitutes error.⁶

3. Disparagement of the Defense Counsel

Disparaging the opposing counsel presents a similar risk of distracting the jury from the evidence and encouraging them to decide the case based on which lawyer they like better. *Fletcher*, 62 M.J. at 181. In *Fletcher*, the court found error where trial counsel made disparaging comments about defense counsel's style and also made comments suggesting that Fletcher's defense was invented by his counsel. The trial counsel here made two different arguments that impermissibly disparaged the defense counsel.

⁶ Other examples of trial counsel's reliance on facts not in evidence include statements that "*All too often in these cases where a parent is accused of molesting their child, that child is never given a voice, never given a genuine opportunity to explain exactly what happened to them. Whether it's because that child is too young to [understand or articulate what happened], the child's never given an opportunity to let the truth come forward. More commonly, if one of the parents is accused of molesting their child, that other parent will be in denial.*" *Id.* at 1988 (emphasis added). After acknowledging that there was no expert testimony on the impact of child molestation on a child, trial counsel asserted that "P.B. exhibiting strange behavior [months] after being molested, taken out of her home is not unusual." *Id.* at 2000. Defense counsel did not object to these comments and we find no plain error, but do consider these comments relevant to prejudice.

First, he carried too far a common line of argument about defense counsel and distraction. Critique of an opponent's case is permissible to a point, but *Fletcher* found error where the trial counsel referred to her opponent's arguments as "fiction" four times, called one argument "a phony distraction," and referred to the entire defense case as "that thing they tried to perpetrate on you." 62 M.J. at 182. Likewise, other courts have drawn the line at terms like "fabricated," "woven out of the thread of desperation," or made "out of whole cloth." *United States v. Washington*, 263 F. Supp. 2d 413, 434-35 (D.Conn. 2003) (citations omitted).

Here trial counsel criticized the defense assertion of P.B.'s incompetency as a basis for reasonable doubt as "another distortion intended to distract you." Record at 2001. In response to a defense posit that the nine-year-old daughter of a neighbor who purportedly often simulated oral sex with varying objects as a likely source of P.B.'s sexually advanced knowledge, the trial counsel argued "this child was attacked by the defense and Sergeant Boyer, because they didn't think that she would be able to have a voice. They didn't think that she would be able to defend herself." *Id.* at 2004. Trial counsel similarly criticized the "desperate level, the desperate lengths that defense counsel are trying to go through to distract you from the evidence," and repeatedly characterized the defense as "grasping at straws." *Id.* at 2005-06. Later, he decried the "nonsense the defense has thrown on you." *Id.* at 2014. One of the themes of his rebuttal was that the defense had "popped smoke, calling it reasonable doubt, and now they are scurrying in different corners trying to hide." *Id.* at 2067; see also 2075, 2078.

These comments are disparaging and address the trustworthiness of counsel, not just the state of the evidence. When a prosecutor personalizes the case in this manner, it creates an unfair advantage as the Government begins most trials with the members' trust in the good faith of prosecutors. See *Berger*, 295 U.S. at 88. That advantage presents yet another non-evidentiary factor that could unduly influence the outcome, and the word choice here crossed the line into impermissible error.

Second, the trial counsel asserted that the defense had tried to "silence" P.B.. Trial counsel argued that "the defense has done everything they can to silence P.B." Record at 1991. He then articulated "five areas in which the defense and [P.]B.'s father are *trying to silence her.*" *Id.* at 1992.

"Again, the defense is using P.[B.] being a four-year-old child against her and they're making every attempt to silence everything that she's done and said to get their client off the hook." *Id.* at 1999.

Defense counsel objected, asserting that use of the term "silence" suggested defense counsel had done something "impermissible," "something wrong," and "can lead the members to wonder if there is something additional out there." *Id.* at 2021. We find trial counsel's response at trial telling. He claimed that the term, "silence" was to salvage P.B.'s credibility, and then immediately noted that "[t]here is also evidence . . . that [S.B.] has destroyed evidence, which I haven't even commented on" *Id.* The military judge disagreed with defense counsel's interpretation, and instructed the members to base their determination on their recollection of the evidence and that counsel's argument isn't evidence.

We disagree with the trial judge and conclude that trial counsel's use of the words "silence" in reference to the defense was disparaging, inflammatory argument and error. *See United States v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001) ("Disparaging remarks [suggesting] defense counsel has lied to or withheld information [can] caus[e] the jury to believe that the defense's characterization of the evidence should not be trusted and [] that a finding of not guilty would be in conflict with the true facts of the case."). Here trial counsel asserted three times that the defense had attempted to "silence P.B.." His response to the defense objection and immediate reference to alleged destruction of evidence by S.B. suggests use of this inflammatory term was not a "slip of the tongue," but instead a calculated, clearly inflammatory choice of words. *Carter*, 61 M.J. at 34.

In context, use of the word "silence" reasonably implies that defense counsel or the accused has done something impermissible. That risk was acute in this case, where the "silent" victim was the accused's daughter and where her mother's doubts regarding P.B.'s story were acknowledged by both parties. It is intuitive that parents exert a powerful influence over their children, reasonably to include participation in proceedings or responses to questions to determine competency, and that therefore P.B.'s absence may have been influenced by the appellant or his counsel. This concern may be vitiated, but is not eliminated, by the military judge's instruction that he had determined that P.B. was not competent to testify. Record at 1986.

4. Personal Beliefs, Opinions and Disparagement of the Appellant

It is improper for a trial counsel to interject himself into the proceedings by expressing a "personal belief or opinion as to the truth or falsity of any testimony or evidence." *Fletcher*, 62 M.J. at 179 (citations and internal quotation marks omitted). When trial counsel offers personal opinions, they become "a form of unsworn, unchecked testimony and tend to exploit the influence of [the] office and undermine the objective detachment which should separate a lawyer from the cause for which [he] argues." *Id.* at 179-80 (citation and internal quotations omitted). There are many ways a trial counsel might violate the rule against expressing a personal belief or opinion including "giving personal assurances that the Government's witnesses are telling the truth" and "offering substantive commentary on the truth or falsity of the testimony and evidence." *Id.* at 180 (citing *Young*, 470 U.S. at 18-19). This is commonly referred to as "vouching," and often occurs when prosecutors "use . . . personal pronouns in connection with assertions that a witness was correct or to be believed." *Id.* Also, "calling the accused a liar is a 'dangerous practice that should be avoided.'" *Id.* at 182 (quoting *Clifton*, 15 M.J. at 30 n.5).

Trial counsel offered his "take" that the appellant's testimony was "rehearsed" and "disingenuous." Record at 2032. This was a personal assessment, and as the word "rehearsed" suggests, there was an unmistakable implication that defense counsel was complicit and would go to "desperate lengths" to distract the members from the truth. *Id.* at 2005. He also asserted in varying forms that the appellant lied to the NCIS and/or the members more than 10 times in argument. And the Government fairly argues that saying the appellant lied was an "invited response" to defense tactics. However, we do find that it was error for trial counsel to disparage the appellant so thoroughly and repeatedly by arguing at least ten times that he was lying. The comments here ventured far into the "gray zone" of improper opinion and disparagement of the accused and were the subject of the appellant's objection prior to argument. *Id.* at 1974.

The trial counsel also repeatedly interjected his personal beliefs and opinions into these proceedings. For example, "[w]e know that her father, the person who did this, has provided a variety of different accounts of exactly what happened." *Id.* at 2072. "The government hopes that we haven't come to a point

. . . where you are going to let someone who is clearly guilty walk away because of forensic evidence that you wouldn't expect to find in the first place." *Id.* at 2077.

Other personal assessments included: "Mr. W [a government witness] came down, defended his daughter, defended himself, and was honest," *id.* at 2004; that it was "ridiculous" for the appellant to "waffle" on the witness stand when he did not remember something, *id.* at 2016; and that "[w]e have to listen to [PB]," *id.* at 2069.

Trial counsel also told a detailed "personal story" in the first-person singular, describing a child that he knew, in an attempt to bolster P.B.'s credibility by illustrating through a personal anecdote that children do not have inherent sexual knowledge, and even if exposed to sexual information are unable to place that knowledge into proper context. *Id.* at 2071.

Even putting aside the irrelevance of this commentary, it is error because the trial counsel's personal perspective—reinforced by the repeated use of the personal pronoun—is necessarily not based on the evidence. It risks creating the inference that P.B. is telling the truth not because of anything offered during the trial, but instead because trial counsel has the ability to evaluate children and has found P.B. credible. The Supreme Court could have been commenting on these same facts when it warned against the danger that "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Young*, 460 U.S. at 18-19 (citing *Berger*, 295 U.S. at 88-89).

C. Prejudice

"[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *Id.* at 11. We are mindful that the distinction between proper and improper argument is bounded by "exceedingly fine line[s]." *Fletcher*, 62 M.J. at 183. We turn to the three-part test articulated in *Fletcher* to determine whether "the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Id.* at 184.

1. Severity of the Misconduct

"Indicators 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." *Id.* (citing *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981)).

We have highlighted the passages that we find most troubling, but in total there are dozens of improper comments, appearing on more than 25 of the 53 pages of trial counsel's transcribed arguments on findings. Viewed individually, no one comment is particularly significant or prejudicial. In the aggregate, however, the effect is severe. The trial counsel asked the members to protect P.B. four times, three of which were among the last lines of his arguments, while also asserting that the defense had "silence[d]" the alleged victim. He referred to facts not in evidence at least six times; two of those "facts" directly rebutted key aspects of the central defense theory on insufficiency of the evidence.

Like *Fletcher*, there are "more than two dozen instances in which the trial counsel offered [his] personal commentary on the truth or falsity of the testimony and evidence." 62 M.J. at 181. We acknowledge that in a case where witness credibility is a central issue, some such commentary is perhaps likely, and would rarely constitute reversible error. However, when in such a high volume, and in combination with other errors, the repeated juxtaposition of the Government's truthful witnesses with an allegedly lying accused becomes more like prejudicial name-calling than a proper marshalling of evidence. See *Hodge v. Hurley*, 426 F.3d 368, 379-80 (6th Cir. 2005).

The brevity of the deliberations also favors the appellant. After pretrial litigation on nine separate days and an eight-day trial, the members deliberated for only two hours, less time than it took trial counsel to argue. In *Fletcher*, the court weighed this factor in the appellant's favor where the members deliberated for four hours after a three-day trial. 62 M.J. at 185.

The remaining factors do not clearly favor either party. The trial counsel's misconduct was not confined to his rebuttal, and in fact most of it came during his initial (and much lengthier) summation. This is a small portion of the overall trial, but an important one. And, as we will discuss below,

there were essentially no rulings from the military judge for the trial counsel to abide by.

2. Curative Measures

Generally, potential harm from improper comments can be cured through a proper curative instruction. See *United States v. Ashby*, 68 M.J. 108, 123 (C.A.A.F. 2009). Like the military judge in *Fletcher*, however, this military judge essentially gave a "generic limiting instruction reminding the members that 'what the attorneys say is not evidence.'" 62 M.J. at 185. When requested to provide more specific limiting instructions, the military judge declined to do so.

Of note, prior to closing statements, the defense counsel alerted the trial judge that he believed the trial counsel was going to engage in improper argument. The trial defense counsel cited as the basis for his concern the PowerPoint presentation that trial counsel had prepared for his closing and trial counsel's improper argument in an earlier trial. The defense counsel provided the military judge with a copy of *Fletcher*, and requested that the judge instruct trial counsel not to call his client a liar, make disparaging comments about defense counsel, or inject his personal beliefs. Record at 1974. The judge declined to provide tailored instructions or guidance to counsel, instead stating that at that time he "[was] in no position to determine that fine line for counsel [and] ha[d] to trust that counsel know what the rules are and will follow them." *Id.* at 1975.

Following completion of trial counsel's argument in rebuttal and prior to the members commencing deliberations, defense counsel objected to trial counsel's reliance on facts not in evidence. Yet, with the exception of repeated and essentially generic instructions that arguments of counsel are not evidence, the military judge declined to provide any specific limiting or curative instructions.

We conclude that the military judge's minimal curative efforts were insufficient to overcome the severity of the trial counsel's misconduct. With the exception of several "argument is not evidence" instructions, the military judge provided no targeted or curative instructions. As the Court of Appeals for the Armed Forces has long-recognized "[c]orrective instructions at an early point might have dispelled the taint of the initial remarks." *Fletcher*, 62 M.J. at 185 (quoting *United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977)). We conclude

under these facts that “it is impossible to say that the evil influence upon the [members] of these acts of misconduct was removed by such mild judicial action as was taken.” *Id.* (quoting *Berger*, 295 U.S. at 85).

3. Weight of the Evidence

Courts often do not find unfair prejudice if the evidence is “overwhelming,” *Young*, 470 U.S. at 19, but a closer case presents a greater risk that the misconduct influenced the result. See, e.g., *United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994). That risk is present here, where the evidentiary picture was mixed. Although the evidence supporting the conviction is relatively strong and we have concluded that the findings were legally and factually sufficient, there is inherent doubt based upon the victim’s tender age, absence from trial due to the military judge’s competency determination, and her history of exaggeration. In addition, the short window of time in which these offenses could have occurred and the lack of forensic evidence do not weigh in favor of the Government.

To be clear, the Government’s circumstantial case was strong and, combined with the appellant’s unpersuasive testimony, could have weighed heavily in the members’ deliberations. However, the evidence is by no measure “overwhelming.” This was a close, emotionally charged child sexual abuse case – so much so that a single instance of inflammatory rhetoric or a well-placed fact from outside the record could have tipped the balance in the Government’s favor.

III. Conclusion

We are mindful that “a criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone.” *Young*, 470 U.S. at 11. However, the cumulative impact of trial counsel’s strategic and repeated invocation that the members “protect” the young child victim from her sexually abusive father, and trial counsel’s argument of facts not in evidence that deliberately targeted crucial points of contention seriously affected the fairness of this trial.

Standing alone, many of trial counsel’s remaining improper comments would likely have been deemed not prejudicial, particularly in light of the military judge’s repeated admonition that arguments of counsel were not evidence. However, under these facts, trial counsel’s use of the words

"silence" the victim, disparagement of the defense counsel, defense case and the appellant, and insertion of his personal beliefs and opinions clearly enhanced the potential impact and prejudice of the improper "protect" argument. In fact, trial counsel's improper comments were not "slight or confined to a single instance, but . . . pronounced and persistent, with a probably cumulative effect upon the jury which cannot be regarded as inconsequential." *Fletcher*, 62 M.J. at 185 (quoting *Berger*, 295 U.S. at 89).

Simply put, trial counsel's multiple improper comments crossed the "exceedingly fine line which distinguishes permissible advocacy from improper excess." *Id.* at 183 (citation and internal quotation marks omitted). In such a close and emotionally charged case, there is simply too high a risk that the members were swayed by trial counsel's inflammatory and multiple invitations to consider factors outside of the evidence. Further, we conclude that trial counsel's improper comments, taken as a whole, were so inflammatory and damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone. *Id.* at 184. After balancing the three *Fletcher* factors, we conclude that setting aside the findings and sentence is the proper remedy.

Accordingly, the findings and sentence are set aside. Art. 59(a) and 66(c), UCMJ. A rehearing is authorized.

Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court