

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

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

UNITED STATES OF AMERICA

v.

**ALLEN J. SOLOMON
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201100582
GENERAL COURT-MARTIAL**

Sentence Adjudged: 11 July 2011.

Military Judge: LtCol Stephen F. Keane, USMC.

Convening Authority: Commanding General, 1st Marine
Logistics Group, MarForPac, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol W.N. Pigott,
Jr., USMC.

For Appellant: Maj Kirk Sripinyo, USMC.

For Appellee: Capt David N. Roberts, USMC.

31 July 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.**

MODZELEWSKI, Senior Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial composed of members with enlisted representation of abusive sexual contact, indecent conduct, drunk and disorderly conduct, and obstruction of justice in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. Additionally, the appellant was convicted, pursuant to his pleas, of violating a lawful

order and wrongful use of a controlled substance in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892 and 912a. The convening authority approved the adjudged sentence of confinement for six years, reduction to pay grade E-1, total forfeitures and a dishonorable discharge.

The appellant assigns the following three errors: (1) the military judge erroneously admitted evidence of a previous sexual assault on two female Marines under MILITARY RULES OF EVIDENCE 413 and 404, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); (2) the trial counsel's improper arguments on findings constituted prosecutorial misconduct that materially prejudiced the appellant's substantial rights; and, (3) the specifications alleging drunk and disorderly conduct and obstruction of justice fail to state offenses because the specifications do not allege the terminal element of Article 134.

Facts of the Charged Offenses

The appellant's convictions arise from events that occurred in his barracks room with his roommate, Lance Corporal (LCpl) K, in the early morning of 17 December 2010. LCpl K woke at about 0245, and got fully dressed to go to the designated smoking area. The appellant was watching television, and went with LCpl K to the "smoke pit." LCpl K returned to the room and went back to bed without undressing.

LCpl K testified that he next woke up at approximately 0320-0330 with his belted jeans open and pulled down to his ankles, along with his boxer shorts; the appellant was lying on top of him between his knees and rubbing his exposed genitals against LCpl K's. LCpl K testified that he pushed the appellant off and asked what he was doing. The appellant did not respond, but returned to his own bed. LCpl K turned on the light, pulled up his pants, and walked over to the appellant's bed to confront him. The appellant was lying on the bed naked and clutching a cell phone to his chest. LCpl K took the phone from the appellant and found three photos of his exposed genitals.

LCpl K left the room to show the Duty Noncommissioned Officer (DNCO) the photos. LCpl K stepped back in to retrieve his own cell phone, at which time the appellant attempted to grab his phone from LCpl K's hand. A short struggle ensued, but ultimately the appellant regained possession of his cell phone and deleted the photos in front of LCpl K. LCpl K then left and made his report.

The Admissibility of Prior Sexual Offenses

Prior to trial, the appellant moved to suppress evidence of three previous incidents proffered by the Government under MIL. R. EVID. 413 and alternatively under MIL. R. EVID. 404(b). The first incident occurred on 15 August 2009. The appellant had been discovered outside a female barracks room, masturbating while watching the female Marines sleeping within; he pled guilty at a summary court-martial for this "peeping Tom" behavior. The second incident occurred earlier on the evening of 15 August 2009; a female Marine awoke to find an unknown man, whom she later identified as the appellant, standing in her barracks doorway watching her while she slept. The third incident was an alleged sexual assault of two female Marines, Lance Corporal (LCpl) B and LCpl R, on the night of 15 November 2009 in their barracks room. The appellant was acquitted of the 15 November 2009 allegations at a previous court-martial.

At the pretrial motions session, neither party requested or called witnesses to establish the facts of the earlier offenses. On the peeping Tom incidents of 15 August 2009, the Government proffered statements made to investigators at the time by the female Marines involved, and the documentation of the summary court-martial. On the sexual assault incident of 15 November 2009, the Government presented the written statements that LCpl B and LCpl R made to NCIS on 17 November 2009. Appellate Exhibit XII at 63-70. The defense submitted two documents: an email from the appellant's defense counsel from his previous court-martial and an incident report from the Camp Pendleton Provost Marshal's Office. AE X.

LCpl B's statement alleged the following facts: On 14 November 2009, she and her roommate, LCpl R, watched a movie in their barracks room and went to bed at approximately 2330. She awoke at approximately 0230-0300 to someone touching her inside her panties. As she rolled over, LCpl B saw an unidentified male walk over to where LCpl R lay sleeping, and saw him grabbing LCpl R's feet or ankles. At that point, LCpl B shouted and startled the intruder, who ran out through the bathroom into an adjoining room. As the intruder passed through the lighted bathroom, LCpl B recognized the appellant: he lived on the same hallway, and she had daily contact with him during the preceding month. LCpl B stated that LCpl R, who was roused by LCpl B's shout, pursued the appellant into the adjoining room. When LCpl R returned, she told LCpl B that a window was loose in the adjoining room. The two were unsure about what to do, and did not report the incident to anyone that night. AE XII at 64-66.

LCpl R's statement also indicated that she and LCpl B went to sleep at approximately 2330 on 14 November 2009 after watching a movie. At around 0230-0300, she was awakened by her roommate's shout, and she saw the appellant standing at the foot of her bed pulling at her covers and touching her legs and feet. *Id.* at 68. LCpl B stated that she recognized the appellant because he worked in her unit and lived next door in the barracks. *Id.* at 69. The appellant ran through the bathroom to an adjoining room, which was unoccupied for the weekend; she followed him, but he was already gone. After inspecting the room, LCpl R believed that the appellant had entered through the window, as it was not shut. On Monday morning, LCpl R and LCpl B discovered that the appellant was apprehended for a DUI on Sunday morning "a few hours after our incident." An NCO overheard them discussing the incident in the barracks room, and they then initiated the report of the assault through their chain of command. *Id.*

The police report submitted by the defense in support of their suppression motion appeared to contradict the female Marines' recollection of the time of the incident: the report documented that at 0158 on 15 November 2009 the appellant attempted to drive onto base and was taken into military police custody for driving under the influence. AE X at 5. He was released into the custody of a staff NCO at 0326. *Id.* The only other evidence submitted on the motion by the defense was an email from the defense counsel at the previous court-martial that detailed factors he believed contributed to the acquittal. *Id.* at 1.

The trial judge granted the defense motion in part by finding that testimony regarding both of the 15 August 2009 "peeping Tom" incidents was not admissible under either MIL. R. EVID. 404(b) or 413. Record at 77. The military judge ruled, however, that LCpl B's and LCpl R's testimony regarding the alleged sexual assault of 15 November was admissible under both MIL. R. EVID. 413 and 404(b).¹ The judge briefly stated his ruling on the record prior to trial: he cited the appropriate test under *United States v. Berry*, 61 M.J. 91 (C.A.A.F. 2005), referenced the balancing test of MIL. R. EVID. 403, and determined that the probative value of this evidence was not substantially

¹ We are confining our analysis to whether the evidence was properly admitted under MIL. R. EVID. 413. If it was not properly admitted under that rule, it cannot be "saved" by a MIL. R. EVID. 404(b) analysis, as the members were instructed that they could consider this MIL. R. EVID. 413 evidence for all relevant purposes.

outweighed by the danger of unfair prejudice. He subsequently appended to the record his written supplemental findings of fact and conclusions of law. Record at 76-77; AE XLVII.

We review a military judge's ruling admitting evidence for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). The challenged action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997) (internal quotation marks and citations omitted).

MIL. R. EVID. 413 is, by its plain language, a rule of inclusion: "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." MIL. R. EVID. 413(a). Before admitting evidence under MIL. R. EVID. 413, however, the military judge must first make three threshold determinations: 1) that the accused is charged with an offense of sexual assault within the meaning of MIL. R. EVID. 413(d); 2) that the proffered evidence is evidence that the appellant committed another offense of sexual assault within the meaning of MIL. R. EVID. 413(d); and 3) that the proffered evidence is logically relevant under both MIL. R. EVID. 401 and 402. *Berry*, 61 M.J. at 95 (citing *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000)).

If the evidence passes the threshold requirements, the military judge must then conduct a balancing test under MIL. R. EVID. 403 that considers the following factors: the strength of proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties. *Wright*, 53 M.J. at 482. Although evidence offered under MIL. R. EVID. 413 inherently carries with it a presumption of admissibility, when the "balancing test requires exclusion of the evidence, the presumption of admissibility is overcome." *Berry*, 61 M.J. at 95.

The appellant argues the military judge abused his discretion by admitting LCpl B's and LCpl R's testimony under MIL. R. EVID. 413 because: (1) the evidence of the previous

assaults was weak and could not reasonably support the finding that he had committed the prior crimes; (2) the alleged assaults were not similar to the charged assault; and (3) the weak probative value of the evidence was substantially outweighed by prejudice and other considerations delineated in *Wright*. Appellant's Brief of 9 Jan 2012 at 7. We disagree.

As the trial judge properly determined, the three threshold requirements under MIL. R. EVID. 413 were met for the admissibility of the November 2009 incident. First, the appellant was charged with offenses that constituted a sexual assault within the meaning of the rule. Secondly, the statements of LCpl B and LCpl R were evidence of the appellant's commission of another sexual assault, and the trial judge determined that members could find by a preponderance of evidence that the offense occurred. AE XLVII at 4. Thirdly, the alleged prior acts satisfied the logical relevance requirements under MIL. R. EVID. 401 and 402, in that they showed the accused's propensity to commit this type of offense, as well as his plan, intent, motive, and state of mind. *Id.* We turn now to whether the trial judge properly considered the *Wright* factors when conducting his MIL. R. EVID. 403 balancing test.

The trial judge enumerated and weighed each of the *Wright* factors. Without belaboring the entirety of his analysis here, the military judge found the probative value high, the risk of distraction low, the temporal proximity adequate, and the strength of proof of the prior act (i.e., the statements of the two female Marines) to be "compelling." He noted that the members at the appellant's prior general court-martial did not find him guilty beyond a reasonable doubt, but concluded that the members at this court-martial could find by a preponderance of the evidence that the offenses occurred and that the appellant committed them. *Id.*

The appellant disputes the trial judge's evaluation of strength of proof of the prior offense. As noted above, the female Marines' statements proffered by the Government placed the incident as occurring between 0230 and 0300, and the defense submitted a police report that indicated the accused was apprehended at 0158 for driving under the influence, and remained in custody until 0326.² The military judge did not explicitly reference or reconcile this contradiction in his findings of fact. He entered findings that the appellant broke

² At trial, LCpl B and LCpl R testified consistently with their written statements, although they did expand the timeframe in which the alleged assault occurred (0200-0300 vice 0230-0300).

into the barracks room of the two sleeping female Marines "at night or in the early morning hours," and that, after the appellant fled the room, he "ultimately receiv(ed) a citation for driving under the influence of alcohol." AE XLVII at 1-2.

Although this contradiction with regard to the time of the 15 November assault is not explicitly reconciled or explained, the military judge's factual finding has support in the evidence of record. The evidence indicates that the two female Marines were awoken from their sleep to find the appellant in their room, that he assaulted, or attempted to assault them, and that on the same night the appellant was apprehended for an unrelated offense. It is implicit in his findings of fact that the military judge concluded that the appellant entered the female Marines' room earlier than they recall and was apprehended subsequently. We decline to disturb the factual findings of the judge on the grounds that they are unsupported by the record or clearly erroneous.

Finally, we note that the members were amply informed that the appellant had been acquitted of the November 2009 offenses by an earlier court martial. Although the military judge declined to take judicial notice of the acquittal, and did not factor the acquittal into his written findings of fact and conclusions of law, he permitted the defense attorney to inquire into the acquittal on cross-examination of the female Marines and to argue the earlier acquittal in closing. See *United States v. Griggs*, 51 M.J. 418, 419-20 (C.A.A.F. 1999).

In summary, we conclude that the military judge properly considered the threshold requirements and the *Wright* factors in his MIL. R. EVID. 413 and MIL. R. EVID. 403 analyses, and that he did not abuse his discretion in admitting the evidence of the November 2009 incident.

The Missing Terminal Element

The appellant correctly notes that both specifications under Charge II failed to contain an explicit allegation of service discredit or prejudicial conduct, as required for violations of Article 134, UCMJ.

Whether a specification states an offense is a matter we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense if it alleges every element of the offense, either expressly or by necessary implication. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225, 229

(C.A.A.F. 2011); *Crafter*, 64 M.J. at 211; RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). When a specification does not expressly allege an element of the intended offense, appellate courts must determine whether the terminal element was necessarily implied. *Fosler*, 70 M.J. at 230. The interpretation of a specification in such a manner as to find an element was alleged by necessary implication is disfavored. *Ballan*, 71 M.J. at 33-34.

Although it may appear logical that prejudice to unit good order and discipline is necessarily implied when a Marine is alleged to have been drunk and disorderly onboard a Marine Corps base or when he is alleged to have impeded an investigation into his own misconduct, the consequences of acts alleged in a specification do not necessarily imply additional elements. A violation of any of the three clauses of Article 134, UCMJ, "does not necessarily lead to a violation of the other clauses" and the principle of fair notice requires that an accused know to which clause he is pleading guilty and against which clause or clauses he must defend. *Ballan*, 71 M.J. at 34 (citing *Fosler*, 70 M.J. at 230; *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)). Although we view the terminal elements as logical consequences of the facts alleged in the appellant's obstruction of justice and disorderly specifications, we adhere to *Fosler*, *Ballan* and *United States v. Humphries*, 71 M.J. 209, No. 10-5004, 2012 CAAF LEXIS 691 (C.A.A.F. Jun. 15, 2012), and find that those specifications did not necessarily imply the terminal elements.

"[A] charge that is defective because it fails to allege an element of an offense, if not raised at trial, is tested for plain error." *Ballan*, 71 M.J. at 43 (footnote omitted). This is true whether the appellant contested their conviction or plead guilty. *Id.* at 35 n.8. Under the plain error analysis, the appellant has the burden of showing: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). In this case, we find that there was error, it was plain or obvious, and that the error materially prejudiced the substantial rights of the appellant.

Under the third prong of the plain error analysis, the question is "whether the defective specification resulted in material prejudice to [Appellant's] substantial right to notice." *Humphries*, 71 M.J. 209, 2012 CAAF LEXIS 691, at 17. Although the appellant has the burden of showing prejudice under

a plain error analysis, this burden may be met if “[n]either the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued.” *Id.* at 20, 25 n.10 (citing *Girouard*, 70 M.J. at 11). Having reviewed the entire record, we are convinced that the appellant’s substantial rights were materially prejudiced by the lack of reference to the terminal elements until after the close of evidence. Although the military judge instructed the members on the terminal element of both specifications, this did not constitute adequate notice as it “did not alert [the appellant] to the Government’s theory of guilt” until after the close of the evidence. *Id.* at 21. Accordingly, the findings of guilty of Charge II and the specifications thereunder must be set aside and Charge II and both specifications dismissed.

The Argument of Trial Counsel

Finally, the appellant avers that his convictions should be set aside because the trial counsel’s argument on findings was improper as he interjected himself into the proceedings by expressing his personal belief as to the truth of the witnesses, that it was inflammatory, and that he set up the case as a “popularity contest” between himself and the defense counsel.

Improper argument is a question of law reviewed *de novo*. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011). In the absence of objection to the argument, this court reviews allegations of improper argument for plain error. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011).

Turning first to the issue of improper vouching, the appellant contends that trial counsel improperly vouched for his witnesses by using the terms “we should believe them” and “(y)ou should believe him.” Appellant’s Brief at 18. Although these references were improper in that the trial counsel was giving his personal assurance of the witness’s veracity, we decline to find plain error. Unlike in *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005), the argument was not permeated with the trial counsel’s repeated vouching for the credibility of the Government’s witnesses and evidence. In *Fletcher*, the trial counsel offered her personal commentary on the truth or falsity of the testimony and evidence on more than two dozen instances, repeatedly inserting herself into the proceedings by using the pronouns “I” and “we.” The Court of Appeals for the Armed Forces (CAAF) found that “[s]he put the authority of the Government and her office behind the prosecution’s witnesses” and that “[t]hese errors were blatant and obvious.” *Id.* at 181.

Here, the trial counsel referred to believability of his witnesses on four occasions in the course of a lengthy closing statement. He did not use the clearly prohibited language of "I think it is clear" or "I have no doubt," and used the pronoun "we" on only one occasion. Given the relatively limited nature and number of these comments, we do not find plain error.

We turn next to the trial counsel's characterization of the defense's case. In *Fletcher*, the CAAF found improper two aspects of the trial counsel's treatment of defense counsel. As noted above, the CAAF found that the trial counsel improperly interjected her personal beliefs into the case. That interjection included her use of the following terms in describing Fletcher's defense: "nonsense," "fiction," "unbelievable," and "ridiculous." *Id.* at 180. Additionally, the CAAF found that she made improper and disparaging comments about defense counsel's style and suggested that Fletcher's defense was invented by his counsel. She drew direct comparisons between her style and that of defense counsel, painting herself as less "scary," more polite and more honest, and "erroneously encouraged the members to decide the case based on the personal qualities of counsel rather than the facts." *Id.* at 182. The appellant here argues that trial counsel in his case made the same errors, and that they were plain and obvious. We disagree.

First, let us acknowledge that trial counsel used injudicious language in his closing statement: he called the defense theory "absolutely ridiculous" and "absolutely preposterous" and asserted that there were "not that many conspiracies in the JFK assassination." Record at 367-68. But those imprudent statements were made in the context of, and in response to, the defense theory that the appellant was framed by a conspiracy of Government witnesses. The defense counsel consistently maintained, from opening through closing, and in his examination of witnesses, that the victim of the charged offenses had fabricated a "strange, fanciful story." Record at 183. Similarly, he implied throughout the case that the female Marines who testified regarding the earlier incident had also fabricated their accounts. The trial counsel fairly characterized this theory, in which several witnesses were independently lying about separate events over an extended period of time, as a conspiracy theory. Assuming arguendo that trial counsel's characterization of the defense as "absolutely ridiculous" and "absolutely preposterous" was improper argument, we again decline to find plain and obvious error in the context of the defense theory of the case.

We find no support in the record for the appellant's assertion that the trial counsel made this a *Fletcher*-style "popularity contest" between the two advocates. Similarly, we find no merit in the appellant's assertion that trial counsel lied to the members in his rebuttal argument. As noted above, the contradiction between the female Marines' recollection of the time of the assault and the appellant's arrest during the same timeframe was not resolved during the course of the court-martial. The trial counsel's suggestion that the arrest occurred subsequently was not a "lie," but one possible explanation of the discrepancy. We note that the military judge arrived at the same conclusion. AE XLVII AT 2.

Sentence Reassessment

As a result of our action on the Article 134, UCMJ, charge and specifications, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006) (citing *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986)). Although our action on findings changes the sentencing landscape, the change is not sufficiently dramatic so as to gravitate away from our ability to reassess. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). The appellant remains convicted of an abusive sexual contact, an indecent act, an orders violation, and the use of ecstasy. The maximum penalty is reduced from 22 years and one month to sixteen years and ten months.

We affirm a sentence of confinement for four years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. Considering the offenses of which the appellant was found guilty, we are convinced that, absent the error, the members would have imposed a sentence of at least this severity.

Conclusion

The appellant's convictions as to Charge II and both specifications thereunder are set aside and Charge II and its specifications are dismissed. The remaining convictions are affirmed. Only so much of the sentence as includes a dishonorable discharge, confinement for 4 years, total forfeiture of pay and allowances, and reduction to the grade of E-1 is affirmed. Following our corrective action, the remaining findings and the sentence, as reassessed, are correct

in law and fact, and no error prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Chief Judge PERLAK concurs.

BEAL, Judge, dissenting:

Because I find merit in the appellant's first two assigned errors, I respectfully dissent.

MIL. R. EVID. 413

To be admissible under MILITARY RULE OF EVIDENCE 413, MANUAL OF COURTS-MARTIAL, UNITED STATES (2008 ed.), evidence must pass three threshold requirements: (1) the appellant was charged with an offense of sexual assault (as defined under MIL. R. EVID. 413(d)); (2) the evidence proffered was evidence of the appellant's commission of another sexual assault; and (3) the evidence is relevant under MIL. R. EVID. 401 and 402. *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000). In my view, the trial judge's denial of the appellant's motion to exclude evidence of his alleged sexual assault on Lance Corporal (LCpl) B and LCpl R was an abuse of discretion because he misapplied the law and the evidence of the record does not support his conclusion that the threshold requirements were satisfied.

In his written supplemental findings of fact and conclusions of law, the trial judge stated, "For requirement (2), the court must conclude the members *could* find by preponderance of evidence that the proffered offense occurred. See, [*Wright*, 53 M.J. at 483]." Appellate Exhibit XLVII at 2. The judge's statement of the law is erroneous in two ways. First, the quoted test applies not to the second threshold requirement for admissibility under MIL. R. EVID. 413, but to the third, i.e., the evidence is relevant under MIL. R. EVID. 401 and 402. *Id.* at 483 (citing *United States v. Huddleston*, 485 U.S. 681, 689-90 (1988)). Second, for evidence to be relevant under MIL. R. EVID. 401 and 402, the trial judge must, under MIL. R. EVID. 104(b), examine all the evidence in the case and decide whether a fact-finder could *reasonably* conclude by a preponderance of the evidence that the appellant committed the prior sexual assault. *Id.* The judge does not consider that the conclusion must be reasonable.

The factual evidence presented at the motions hearing of the alleged sexual assault on LCpl B and LCpl R was scant, consisting of two sets of contradictory documents. The

Government provided two written statements, purportedly made by LCpl B and LCpl R, which provided details of the alleged sexual assault upon them in the early morning hours of 15 November 2009. AE XII at 63-70. Each of those statements unequivocally alleged the appellant assaulted LCpl B and LCpl R in their barracks room, specifically between 0230-0300. *Id.* Conversely, the defense offered an incident report from the Camp Pendleton Provost Marshal's Office which documented that at 0158 on 15 November 2009 the appellant attempted to drive onto base and was taken into military police custody for driving under the influence after providing a breath sample indicating a BAC of .20%. AE X at 5.

Considering all the evidence adduced on the motion, members could not reasonably conclude by the preponderance of the evidence that the appellant committed the acts alleged by LCpl B and LCpl R because the police report effectively established the appellant's alibi. The majority reasons that the members could reasonably conclude that LCpl B and LCpl R were mistaken about the time of the alleged assault, but there was no evidence offered of a possible mistake. If any reasonable conclusion were to be made from their statements, the fact that both claimed that the assault occurred within the same one half hour period of time refutes the suggestion that they were mistaken.

Furthermore, I'm of the opinion that even if the threshold requirements were satisfied, the trial judge's MIL. R. EVID. 403 balancing test was inadequate because it was predicated on factual findings unsupported by the record. If the threshold requirements of MIL. R. EVID. 413 are met, the trial judge must conduct a thorough balancing test under MIL. R. EVID. 403 in which he should consider the following factors: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties." *Wright*, 53 M.J. at 482. Although evidence offered under Rule 413 inherently carries with it a presumption of admissibility, when the "balancing test requires exclusion of the evidence, the presumption of admissibility is overcome." *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005).

The trial judge characterized the strength of proof as compelling; a conclusion supported by his factual finding that the appellant's citation for driving under the influence occurred subsequent to the alleged assault on LCpl B and LCpl R.

That finding, however, is not supported by the evidence in the record. At the motions session, the only evidence of the alleged assault was contained in the written statements provided by the complaining witnesses, who both agreed the assaults occurred around 0230-0300. The fact that the appellant was attempting to come onto base prior to 0200 and remained in PMO's custody until he was released into the custody of a staff noncommissioned officer at 0336 serves as compelling evidence that the appellant was in custody during the time of the alleged assault. Additionally, the LCpl B's and LCpl R's written statements were impeached by the original trial defense counsel email which indicated that they had motive to fabricate in retaliation for the appellant's DUI which caused the cancellation of the unit's extended liberty period.

Finally, I am concerned with the scant attention the trial judge seemed to pay to the fact that the appellant was acquitted of charges stemming from the alleged prior act. Although "[t]he fact of an acquittal does not necessarily bar the evidence of prior acts [t]here is a need for great sensitivity when making the determination to admit evidence of prior acts that have been the subject of an acquittal." *United States v. Griggs*, 51 M.J. 418, 419-20 (C.A.A.F. 1999) (internal citations omitted). In *Griggs*, the court held the admission of the prior acts evidence was not an abuse of discretion and noted "the military judge exercised due sensitivity" to the fact of Grigg's previous acquittal. *Id.* at 420. The parties entered into a written stipulation to the fact of Grigg's acquittal which was admitted as evidence to the members. Additionally, the trial judge expressly mentioned the acquittal during his instructions regarding the stipulation and again during his limiting instructions. *Id.*

In sharp contrast to *Griggs*, the fact of the appellant's acquittal was barely noticed; the trial judge sustained the trial counsel's objection to the defense's motion to take judicial notice of the acquittal; and the military judge made no mention of the acquittal during his instructions. The only evidence of the acquittal that was presented to the members was a brief question to LCpl B on cross-examination by the defense counsel. Under these circumstances, I find the trial judge failed to exercise due sensitivity as required by *Griggs* to the fact of the appellant's previous acquittal and that his denial of the defense motion to exclude LCpl B's and LCpl R's testimony was an abuse of discretion.

Even if the military judge abused his discretion by admitting the evidence, the error is harmless if the Government

can demonstrate that "the error did not have a substantial influence on the findings." *Berry*, 61 M.J. at 98 (internal citation omitted). Based on this record, the Government fails to satisfy that burden. The Government's case that the appellant sexually assaulted LCpl K centered on the impermissible MIL. R. EVID. 413 evidence; LCpl B and LCpl R were the first witnesses to testify and the Government's closing argument highlighted the fact that the appellant was guilty of three "secrets": his assault on LCpl B, his assault on LCpl R, and his assault on LCpl K.

Without the propensity evidence, the case against the appellant, which lacked any physical evidence of the alleged sexual misconduct, amounted to little more than LCpl K's testimony, which was improperly bolstered with his hearsay statements to three other witnesses.³ Although the defense did not present any evidence in their case-in-chief, they did elicit on cross-examination some evidence of LCpl K's motive to fabricate his allegations in order to get rid of his drunkard roommate. Under these circumstances, particularly where the essence of the Government's case centered on the facts of the earlier acquittal, we cannot say the impermissible evidence of the alleged sexual assault on LCpl B and LCpl R did not have a substantial influence on the findings.

Improper Argument

The trial counsel's argument on findings was interlaced with instances in which he expressed personal opinions on the evidence and vouched for the veracity of the witnesses. Additionally, he repeatedly discredited the defense counsel's cross-examinations as being disingenuous, ridiculed the defense's theory of the case, and argued facts not in evidence. All of these types of comments are examples of a prosecuting attorney overstepping "the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (internal quotation marks and citations omitted).

³ Before LCpl K testified, three other witnesses testified regarding his hearsay statements on the night of the assault. Though not raised as an assigned error, the defense objected at trial on hearsay grounds. The military judge ruled the statements were admissible as excited utterances. We find the record does not support that ruling as these statements lacked the spontaneity which provides the indicia of reliability of these types of statements.

In assessing prejudice, appellate courts look at the cumulative impact of any prosecutorial misconduct on the appellant's substantial rights and integrity of his trial. *Id.* at 184. We use three factors to assess 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.*

As noted above, the impermissible comments interlaced the trial counsel's entire closing argument and were minimally constrained by the trial judge's rulings. Few, if any, measures were adopted to cure the misconduct, and the weight of the evidence, absent the impermissible MIL. R. EVID. 413 was not overwhelming.

Conclusion

The manner in which this case was prosecuted, combined with the faulty gate keeping of evidence by the trial judge, creates great reservations in my mind on the reliability of the appellant's convictions for the offenses of which he pled not guilty. I would set aside the findings as to Charges I and II and authorize a rehearing on the findings, and on the sentence.

For the Court

R.H. TROIDL
Clerk of Court