

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman JOSHUA A. BOBINSKI
United States Air Force**

ACM 34357

29 January 2002

Sentence adjudged 21 September 2000 by GCM convened at Vandenberg Air Force Base, California. Military Judge: Michael J. Rollinger.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, Major Thomas L. Farmer, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Lori M. Jemison (legal intern).

Before

**SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges**

OPINION OF THE COURT

PECINOVSKY, Judge:

The appellant was convicted, pursuant to his pleas, of dereliction of duty for underage drinking, making a false official statement, and using cocaine, in violation of Articles 92, 107, and 112a, UCMJ, 10 U.S.C. §§ 892, 907, 912a. Contrary to his pleas, the appellant was found guilty of using methamphetamine, in violation of Article 112a, UCMJ. He was found not guilty of the using marijuana on divers occasions and using cocaine on divers occasions. Article 112a, UCMJ. His approved sentence included a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

The appellant argues that his conviction for the use of methamphetamine is factually and legally insufficient because the sole witness against him was an accomplice whose uncorroborated testimony was self-contradictory and uncertain. He further argues that the military judge erred by failing to instruct the members that the appellant could not be convicted on the uncorroborated testimony of an accomplice if that testimony was self-contradictory, uncertain, or improbable. We hold that the conviction for use of methamphetamine, based upon the accomplice testimony, is legally and factually sufficient. We further hold that regardless of whether the military judge erred in not instructing the members, exactly as requested, appellant was not prejudiced by this error. We affirm.

I. Factual and Legal Sufficiency

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we approve only those findings of guilt that we determine to be correct in both law and fact. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, a reasonable fact finder could have found the appellant guilty of all elements of the offense, beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). Our superior court held that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. *But see United States v. Washington*, 54 M.J. 936 (A.F. Ct. Crim. App. 2001) (discussing how Congress intended this Court to apply a preponderance of the evidence standard to the question of factual sufficiency).

The sole evidence against the appellant was the testimony of Constructionman (CMCR) James Roush, a Navy Seaman. At the time of appellant's trial, CMCR Roush was serving an 18-month sentence pursuant to his conviction for distribution of illegal drugs.

There was sufficient evidence presented through the testimony by CMCR Rouse, when viewed in the light most favorable to the government, to conclude that a reasonable fact finder could have found the appellant was guilty of all elements of the offense, beyond a reasonable doubt. Similarly, we are convinced beyond a reasonable doubt of the appellant's guilt of wrongfully using methamphetamine. Although there are inconsistencies in CMCR Roush's testimony, his description of the appellant's methamphetamine use is clear. While CMCR Rouse contradicted himself as to when the use occurred, who was with the appellant at the time of the use, and how many times it occurred, his testimony that he saw the appellant use methamphetamine was unwavering.

II. Accomplice Instruction

The appellant argues that because of the contradictions in CMCR Rouse's testimony, the court members should have been instructed that the appellant could not be convicted on the uncorroborated testimony of an accomplice if that testimony was self-contradictory, uncertain, or improbable. The government incorrectly relies upon waiver. The following discussion between the trial judge and defense counsel clearly shows that the appellant raised this issue at trial and thereby preserved it for our review:

MJ: Do you have any objections to these instructions or requests for any additional instructions?

DC: Yes, Your Honor. I have one objection and then a request for additional instructions.

MJ: All right. Why don't we deal with the objection first.

DC: Objection, Your Honor, particularly to the—well, I guess, Your Honor, I probably should rephrase it. I have two requests for additional instructions.

The defense counsel first asked for a more specific instruction to highlight the inconsistencies in CMCR Rouse's testimony. The defense counsel claimed that CMCR Rouse's testimony was inconsistent in that, on different instances, CMCR Rouse stated that he sold the appellant methamphetamine for \$10, for \$15, and for \$10-15. The military judge held that the difference between \$10 and \$15 was not a material inconsistency and that he would not highlight that testimony as an inconsistency.

The defense counsel also asked for an instruction that "an accused cannot be convicted on uncorroborated testimony of a purported accomplice if that testimony is self-contradictory, uncertain, or improbable." The military judge held that the testimony of CMCR Rouse was not self-contradictory, uncertain, or improbable and the requested instruction was not given. However, the military judge stated, "Your position is noted for the record."

While defense counsel did not then raise an objection, he clearly was under the belief that his objection/request for additional instruction was preserved "for the record." We need not address the issue of whether a defense counsel, whose additional instructions are rejected, must also object on the record. Here, the military judge treated defense counsel's actions as an objection "on the record."

We review a judge's decision not to give a defense-requested instruction for an abuse of discretion. *United States v. Maxwell*, 45 M.J. 406, 425 (1996). The appellant

relies upon *United States v. Sanders*, 34 M.J. 1086 (A.F.C.M.R. 1992) for the proposition that the additional instruction should have been given. The accomplice instruction given to court members properly left the factual question of whether Rouse was an accomplice for the members to decide. *Id.* at 1093. In *Sanders*, this Court held that “[o]nce a military judge decides to give an accomplice instruction, the wording of that instruction depends on whether the accomplice testimony is corroborated.” *Id.* at 1093. Here, as in *Sanders*, the accomplice testimony was uncorroborated. *Id.* at 1094.

The record shows that there were minor contradictions in CMCR Rouse’s testimony. However, the military judge made a finding of fact that CMCR Rouse’s testimony was not “self-contradictory, uncertain, or improbable.” Based upon this factual finding, the military judge denied defense counsel’s requested instruction. The military judge ruled that the witnesses did not waiver in their testimonies, but that the court members could use their inconsistencies to assess the credibility of the witnesses. The appellant claims that the testimony was self-contradictory and argues that the court members should have been instructed that an accused cannot be convicted based on the uncorroborated testimony of an accomplice if the testimony is self-contradictory, uncertain, or impossible.

We need not reach the issue of whether the military judge was clearly erroneous in his finding that Rouse’s testimony was not self-contradictory and whether he should have given the requested instruction because the appellant was not prejudiced in this case. We find that the appellant failed to show any prejudice to his substantial rights by the judge’s decision. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

The issue of the witness’ inconsistencies was clearly before the members. Mimicking the words of the military judge, the trial counsel argued that CMCR Rouse was “unshakeable” in his testimony that he used methamphetamine with the appellant. The trial counsel minimized the inconsistencies of who was with them during the use and when it occurred. The trial defense counsel, on the other hand, went to great lengths to describe all of the inconsistencies in CMCR Rouse’s testimony. Additionally, the military judge specifically instructed the members on CMCR Rouse’s inconsistencies.

The members learned from both the trial defense counsel’s argument and the instructions from the military judge about the inconsistencies in CMCR Rouse’s testimony. The members were specifically instructed that the testimony of an accomplice “is of questionable integrity and should be considered by you with great caution.” They were clearly directed to the inconsistencies in CMCR Rouse’s testimony. The members considered CMCR Rouse’s testimony, inconsistencies and all, and believed CMCR Rouse to be credible, finding that the appellant did use methamphetamine as alleged. Under these circumstances, the military judge did not abuse his discretion when he refused to give the defense-requested instruction. Furthermore, the appellant was not harmed. Article 59(a), UCMJ.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court