**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Senior Airman ASHEA L. FULLER**
**United States Air Force**

**ACM 35058**

**23 June 2004**

Sentence adjudged 30 November 2001 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: Thomas G. Crossan Jr.

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

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Jennifer R. Rider, and Major Shannon J. Kennedy.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

ORR, Judge:

A general court-martial tried the appellant at Maxwell Air Force Base (AFB), Alabama, from 27 to 30 November 2001. Contrary to her pleas, a panel of officer and enlisted members convicted her of the wrongful use of cocaine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court members sentenced her to a bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant raises two issues for our consideration. First, she argues that the military judge erred when he prohibited several defense witnesses from testifying that they had daily contact with the appellant during the charged time frame and they had not seen or known her to use illegal drugs. In her second assignment of error, the appellant claims the military judge's findings instructions were constitutionally flawed. For the reasons set forth below, we affirm the findings and sentence.

*I. Background*

On 16 January 2001, the appellant was randomly selected to provide a urine sample for drug testing. She reported in a timely fashion and provided her urine sample without incident. The sample was properly packaged and sent to the Air Force Drug Testing Laboratory at Brooks AFB, Texas, where it tested positive for the cocaine metabolite benzoylecgonine (BZE). The level of concentration detected was 242 nanograms per milliliter (ng/mL). The Department of Defense cut-off for this metabolite is 100 ng/mL.

On 29 January 2001, Special Agent (SA) Bauss from the Air Force Office of Special Investigations (AFOSI) interviewed the appellant about the results of her urinalysis. During the interview, the appellant denied using cocaine. However, she told SA Bauss that cocaine might have entered her system as a result of having sexual intercourse with her boyfriend the day prior to the urinalysis. She told SA Bauss that her boyfriend had recently taken the drug Lorset after having dental work, and that cocaine might have passed to her through his semen. The appellant then consented to provide a hair sample for drug testing. The AFOSI agents sent the appellant's hair sample to Associated Pathologies Laboratories (APL) in Las Vegas, Nevada, where it tested positive for BZE and cocaine.

Dr. Matthew Selavka testified on behalf of the government as an expert in forensic toxicology. According to Dr. Selavka, the level of BZE detected in the appellant's urine was consistent with the use of cocaine within a three-day period prior to the urine collection date. Additionally, he stated that it was possible the positive test results could have been the result of sexual intercourse. However, this would have required the appellant to engage in sexual intercourse with at least seven male partners who had recently used a recreational dose of cocaine. Moreover, this sexual activity would have had to have occurred shortly before she provided her urine sample. Dr. Selavka later testified that the drug Lorset does not contain cocaine.

Dr. Selavka also provided testimony to explain the laboratory results of the hair testing. He testified that APL laboratory personnel tested the hair sample in five segments, each segment representing a three-month time period. Each of the five hair segments tested positive for cocaine well above the laboratory cut-off level of 300 picograms per milligram. Generally, a person would need to use cocaine in the vicinity

of 15 times over a three-month time period to test positive at the cut-off level. Dr. Selavka stated that the person who submitted this hair sample used cocaine more than 15 times within each of the five, three-month time periods because the hair samples tested positive for cocaine, well above the cut-off levels. Nevertheless, based upon either the urinalysis or hair test results, Dr. Selavka could not say that the appellant knowingly and consciously used cocaine, nor could he say how the cocaine got into the appellant's system or that she would have felt the effects of cocaine.

The appellant testified on her own behalf and denied that she knowingly or wrongfully used cocaine. She also denied knowing anyone who used illegal drugs. The appellant testified that when confronted with the positive drug results, she cooperated fully with AFOSI agents by providing a hair sample and offering to provide another urine sample. Additionally, the appellant said she told SA Bauss her boyfriend went to the dentist because of a bad toothache and the dentist prescribed Lorset. She told SA Bauss that cocaine might have entered her system by having sexual intercourse with her boyfriend because her boyfriend was taking Lorset. During cross-examination, the appellant gave evasive answers concerning her whereabouts the weekend prior to the urinalysis. She also was less than candid with the trial counsel about her relationship with her boyfriend. Specifically, the appellant stated that she was no longer seeing her boyfriend, Darren. Originally, the appellant testified that the only way she knew how the trial counsel could contact Darren was by telephone or electronic mail. When the appellant was recalled to testify the following day, she admitted that she had lived in Darren's apartment since July of 2001 and that it was fair to say that someone could find him at their apartment. The appellant then testified that she did not know of any additional ways to contact Darren because he did not have a job or attend school. When the trial counsel questioned the appellant about the duration of her relationship with Darren, the appellant agreed that the positive hair test results showed the use of cocaine months before she met Darren. The appellant denied knowing whether any of her co-workers, friends, or roommates used cocaine or were around cocaine contaminants. However, in her written invitation to attend a pajama party scheduled for 30 November 2001, she specifically advised the civilians she sponsored on base not to bring drugs or drug paraphernalia.

The appellant also provided evidence of her good military character and her character for truthfulness and law-abidingness. This evidence included 19 affidavits and the testimony of 8 witnesses, including the appellant's commander, who testified the appellant's reputation for military character was outstanding.

*II. Ruling to Limit Witness Testimony*

The appellant sought to have four of her friends testify that they knew her very well and had never seen or known her to use cocaine. In response, the government filed a motion in limine to limit the witnesses' testimony. Specifically, the government argued

that the witnesses were not proper alibi witnesses because they could not account for the appellant's presence over the entire charged time frame. Additionally, the trial counsel argued that the defense was trying to place into evidence specific instances of conduct to support a defense of good military character. The military judge granted the government's motion stating, "The Defense can certainly use MRE 404 and 405 to put on character evidence of the Accused. However, unless the witness has direct contact and observation of the Accused during the time frame, or the entire time frame, those are not alibi witnesses."

The standard of review for a military judge's ruling to admit or exclude evidence is abuse of discretion. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). Mil. R. Evid. 404(b) indicates that as a general rule, specific conduct evidence is not admissible to demonstrate that an individual had a certain character trait and acted in conformity with it. However, Mil. R. Evid. 405(b) is an exception to that general rule. It provides that specific instances of conduct can only be used to establish an essential element of an offense or defense. Our superior court has held that a military judge does not abuse his or her discretion when excluding the testimony of a witness who failed to observe criminal activity. "Thus, the failure to observe criminal activity, or the observation of general good conduct, is not probative of an 'essential element of a [ ] . . . defense.'" *United States v. Schelkle*, 47 M.J. 110, 112 (C.A.A.F. 1997) (quoting Mil. R. Evid. 405(b)).

In the instant case, the appellant was charged with using cocaine on divers occasions over a 15-month period. The appellant tried to show through the testimony of her friends that she did not use cocaine because witnesses who knew her from their participation in worthwhile off-duty activities did not see her use cocaine. Essentially, this was evidence of a course of conduct designed to show that she was not the kind of person who uses illegal drugs. This is exactly the type of evidence Mil. R. Evid. 404(a) prohibits. Moreover, this type of evidence does not fall within the exception provided by Mil. R. Evid. 405(b) because it is not an essential element of an offense or defense. *Schelkle*, 47 M.J. at 111. *See also* Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* 4-152 (5th ed. 2003).

The proffered testimony of these witnesses was not admitted in support of an alibi defense. "The essence of alibi evidence is a showing that it would have been physically impossible for the accused to have committed the crime because he was elsewhere when it was committed." *United States v. Wright*, 48 C.M.R. 295, 299 (A.F.C.M.R. 1974). The appellant argues that the testimony of the four witnesses, taken together, present an alibi defense. Even if we assume that the appellant used cocaine at least five times a month over a 15-month period, as Dr. Selavka estimated, she still had a considerable amount of time to use cocaine without being seen by any of the proposed four witnesses. Given the large time frame charged, coupled with the fact that the witnesses could not account for all of the appellant's actions during the charged time frame, the military

judge correctly ruled that the witness were not proper alibi witnesses. Therefore, we hold that the military judge's decision to exclude such evidence because the witnesses were not alibi witnesses was not an abuse of discretion.

### *III. Findings Instructions*

Before closing arguments in findings, the military judge reviewed his proposed instructions with the parties. The military judge indicated that at an earlier conference with the parties conducted pursuant to Rule for Courts-Martial (R.C.M.) 802, he had given the counsel a written copy of his proposed instructions. During an Article 39a, UCMJ, 10 U.S.C. § 839(a) session, the defense counsel objected to a stipulation of expected testimony asserting that the expected testimony highlighted the issue of burden shifting. His key concern was that the expected testimony of a prosecution witness could suggest that the burden of proof had shifted to the appellant. The military judge sustained the objection. The military judge immediately began a discussion of his proposed written instructions. After the military judge asked whether either counsel objected to his proposed instructions, the defense counsel stated he had no objections or requests for additional instructions.

The military judge instructed the court members:

> To be punishable under Article 112a, use of a controlled substance must be wrongful. Use of a controlled substance is wrongful if it is without legal justification or authorization. Use of a controlled substance is not wrongful if such act or acts are: (a) Done pursuant to legitimate law enforcement activities, for example, an informant who is forced to use drugs as part of an undercover operation to keep from being discovered is not guilty of wrongful use; (b) Done by authorized personnel in the performance of medical duties or experiments; or (c) Done without knowledge of the contraband nature of the substance, for example, a person who uses cocaine but actually believes it to be sugar is not guilty of wrongful use of [c]ocaine. Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required. *The burden of going forward with evidence with respect to any such exception in a Court-Martial shall be upon the person claiming its benefit. If such an issue is raised by the evidence, then the burden of proof is upon the United States to establish that the use was wrongful.* Knowledge by the Accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances. However, the drawing of any inference is not required.

(Emphasis added.)

Because the appellant failed to raise this issue below, we review for plain error on a constitutional issue. Trial defense counsel had the opportunity to object to these instructions at trial. Indeed, the trial defense counsel objected to other evidence that he believed tended to shift the burden to the appellant immediately before he stated that he had no objection to these instructions. As a result, the trial defense counsel waived any error to these instructions in the absence of plain error. R.C.M. 920(f). To establish plain error, the appellant must demonstrate that there was error, that it was plain or obvious, and that it materially prejudiced a substantial right. *See generally United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998); Article 59(a), UCMJ, 10 U.S.C. § 859(a). The test for determining whether a constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). When constitutional error is at issue, the burden is on the government to establish beyond a reasonable doubt that any error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 18 (1999); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991). In *Harrington v. California*, 395 U.S. 250, 254 (1969), the Supreme Court stated the *Chapman* test for harmless error could be satisfied where there is overwhelming evidence of guilt. However, "If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error . . . it should not find the error harmless." *Neder*, 527 U.S. at 19.

We first consider whether it was error for the military judge to give the challenged instruction. The military judge's instructions were taken virtually verbatim from the *Manual* and they are a correct statement of the law. *See Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 37c(5) (2000 ed.). Nonetheless, the appellant argues that it was error to instruct the members using the portion of the instruction highlighted above, because it created a "mandatory rebuttable presumption" that the appellant's use of cocaine was wrongful. We agree with the government that the military judge's instruction did not explicitly create a mandatory rebuttable presumption, because it did not direct the members to presume the use of cocaine was wrongful. To the contrary, the instruction properly allowed the members to infer the use was wrongful, but noted the inference was not required.

The appellant also argues the challenged instruction improperly shifted the burden of persuasion to the appellant on the "wrongfulness of her use of cocaine." The Supreme Court has held that when presumptions have the effect of shifting the burden of persuasion to an accused on an element of the offense, due process is violated. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). The ultimate issue is "whether there is a *reasonable likelihood* that the jury has applied the

challenged instruction in a way that [violates the Constitution]." *Boyde v. California*, 494 U.S. 370, 380 (1990) (emphasis added). *See also O'Neal v. Morris*, 3 F.3d 143 (6th Cir. 1993). *But cf. United States v. Loving*, 41 M.J. 213, 277 (C.A.A.F. 1994) (the ultimate issue is "whether there is a *reasonable possibility* that the jury understood the instructions in an unconstitutional manner" (emphasis added)) (quoting *Peek v. Kemp*, 784 F.2d 1479, 1489 (11th Cir. 1986) (en banc)). "Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented." R.C.M. 920(a), Discussion. Confusing jury instructions are subject to a plain error analysis. *United States v. Curry*, 38 M.J. 77 (C.M.A. 1993); *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992).

In *United States v. Voda*, ACM 35337 (A.F. Ct. Crim. App. 26 Jan 2004) (unpub. op.), this Court found these same instructions confusing because they failed to draw a distinction between a burden of production and a burden of persuasion. The *Voda* Court also found material prejudice to the appellant because there was a reasonable likelihood that the court members construed the instructions as placing a burden on the appellant to establish the defense of innocent ingestion. *Voda*, unpub. op. at 6-7.

We find the military judge's instructions were obvious error, because the instructions could have caused the panel members to believe that the appellant had to affirmatively prove the defense of innocent ingestion by some undefined standard of proof. *United States v. Cuffee*, 10 M.J. 381, 382-83 (C.M.A. 1981). As Judge Cox stated in *Curry*, "Even if we, as lawyers, can sift through the instructions and deduce what the judge must have meant, the factfinders were not lawyers and cannot be presumed to correctly resurrect the law." *Curry*, 38 M.J. at 81.

We now examine the case for prejudice. The evidence in this case includes a urinalysis and hair test results that both indicate that the appellant used cocaine. The evidence of guilt in this case was overwhelming. The appellant presented evidence sufficient to raise the defense of innocent ingestion. The challenged instructions were given after the appellant had done so. The prejudicial effect of the improper burden shifting is lessened where the appellant undertakes to present evidence to meet the burden. We find no material prejudice because the appellant's contradictory and implausible explanation for having cocaine in her system was utterly unpersuasive. We are convinced "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *McDonald*, 57 M.J. at 20 (citing *Neder*, 527 U.S. at 18).

## *IV. Conclusion*

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator