UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class IAN J. GROSHONG
United States Air Force

ACM 35675

14 December 2005

Sentence adjudged 24 January 2003 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Timothy D. Wilson.

Approved sentence: Bad-conduct discharge, confinement for 1 year, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Lieutenant Colonel Nikki A. Hall, Major Terry L. McElyea, Major James M. Winner, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Michelle M. McCluer, and Captain C. Taylor Smith.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

The appellant was tried at Nellis Air Force Base (AFB), Nevada, by a general court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was convicted of one specification of wrongful distribution of lysergic acid diethylamide (LSD), in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The

convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 1 year, and reduction to E-1.

On appeal, the appellant asserts five errors: (1) The military judge abused his discretion by allowing an Air Force Office of Special Investigations (AFOSI) agent to testify about the appellant's admission of uncharged drug activity; (2) The trial counsel improperly elicited and argued a co-actor's guilty plea as substantive evidence to establish the appellant's guilt of wrongful distribution; (3) The trial counsel's findings argument was improper, in that he shifted the burden of proof to the appellant to exonerate himself and implicitly commented on the appellant's Fifth Amendment right not to testify by repeatedly referring to the evidence as "uncontradicted"; (4) His conviction and sentence should be set aside because of the cumulative errors that occurred; and (5) The evidence is legally and factually insufficient to support his conviction. Finding no error, we affirm the findings and sentence.[1]

Background

A week or two after 11 September 2001, the appellant met socially with a friend, then-Airman (Amn) Jeanne M. Johnson, and Amn Johnson's friend, Airman First Class (A1C) Amanda E. Nielsen. Amn Johnson and A1C Nielsen planned to attend a party the next day and decided they needed some clothes. The appellant suggested his civilian friend, Sarica, might have some clothes the two airmen could borrow. Sarica was at work, but she agreed to the idea and the three airmen drove to her house. While they were looking through Sarica's clothing, a glass pipe wrapped in tissue fell out of a pair of pants. Amn Johnson testified that the appellant then "casually mentioned that she [Sarica] might be a crack head."

When the appellant left the room, A1C Nielsen asked Amn Johnson to ask him if he could get LSD or Ecstasy for them. Amn Johnson did so and, she testified, the appellant said "he could probably do that for us." It took a couple of days for the transaction to occur. According to Amn Johnson, they went to Sarica's house after the appellant called and said "he had what we wanted." When they arrived at Sarica's, the appellant took them to the kitchen and produced a roll of tin foil from the freezer. The appellant told them it was LSD and Amn Johnson described the roll as "like sweet tarts or something wrapped in tin foil." Amn Johnson testified that the appellant later told A1C Nielsen that he would be able to get more LSD. Later that afternoon, Amn Johnson took

[1] When he accounted for the members present when the court was called to order, the record reflects that the trial counsel included a Captain Kevin F. Manning, an officer who was not detailed to the court-martial by the convening authority. We ordered the government to explain the reference to Captain Manning. The government filed a declaration with us from the current Chief of Military Justice at Nellis AFB, which indicates the reference to Captain Manning probably was a typographical, "cut and paste" transcription error. Based on that declaration and our careful review of the record otherwise, there is no evidence that a Captain Manning was detailed to the court-martial or sat as a member of it. Appellate defense counsel did not oppose our consideration of the declaration. We conclude the reference to Captain Manning was an administrative error and find no prejudice to the appellant.

one of the four sweet tarts. She described feeling "clammy and uncomfortable and everything was enhanced."

Unbeknownst to Amn Johnson and the appellant, A1C Nielsen was a confidential informant for the AFOSI. An investigation was opened and AFOSI Special Agent (SA) Steven DuBose interviewed the appellant. After a rights advisement and before requesting counsel, the appellant made some admissions to SA DuBose. Although there was some dispute about exactly what was said, at trial SA DuBose testified the appellant told him "he had a childhood friend from Oklahoma named Sarica, that in the past had sold him things such as LSD, which he then provided to his friends." The appellant's trial defense counsel moved to exclude that statement as uncharged misconduct, but the military judge found it to be admissible under Mil. R. Evid. 404(b). SA DuBose testified the appellant told him that he had again contacted Sarica in September 2001 in an attempt to get more drugs for his friends. The appellant told SA DuBose that "Sarica asked him to put his friends in touch with her directly and he stated he did just that, put his friends in touch with her." On cross-examination, SA DuBose testified the appellant told him he had never physically handled any of the drugs.

Amn Johnson was prosecuted for use and distribution of ecstasy and her use of the LSD-laced "sweet tart" she received from the appellant. She pled guilty pursuant to a pretrial agreement and testified against the appellant under a grant of immunity.

Uncharged Misconduct

As he did at trial, the appellant now contends his statement to SA DuBose that "he had a childhood friend from Oklahoma named Sarica, that in the past had sold him things such as LSD, which he then provided to his friends" was inadmissible uncharged misconduct. The government contended the statement was admissible under Mil. R. Evid. 404(b) as proof of the appellant's plan or scheme. The military judge agreed and instructed the members on the limited use they might make of that evidence.

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004); *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000). We will not overturn a military judge's evidentiary decision unless that decision was "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *McDonald*, 59 M.J. at 430 (citing *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)).

We are satisfied that this evidence was not admitted to show the appellant's propensity or predisposition to commit the charged offense. *See United States v. Diaz*, 59 M.J. 79, 94 (C.A.A.F. 2003); *Tanksley*, 54 M.J. at 175. We have tested admissibility under the three-pronged test of *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), and conclude the appellant's statement to SA DuBose was admissible: Given all

the evidence in the case, the court members could reasonably find that the appellant engaged in the prior crime or act; the crux of the charged offense, distribution, was made more probable by the evidence; and the probative value was not substantially outweighed by the danger of unfair prejudice. In short, the uncharged conduct mirrored the charged conduct: The appellant obtained LSD from his friend, Sarica, and provided it to other friends. The military judge did not abuse his discretion by admitting evidence of the uncharged misconduct.

Evidence of Amn Johnson's Guilty Plea

The appellant challenges the evidence about Amn Johnson's guilty plea as elicited by the trial counsel, and the trial counsel's subsequent references to her plea in his findings argument. We consider the evidence elicited by trial counsel during Amn Johnson's testimony, without defense objection, to have been fair bolstering of a witness who clearly faced an attack on her credibility. That attack came during cross examination and the most significant detail about Amn Johnson's plea, to include inquiry about the stipulation of fact she accomplished in conjunction with her plea, was elicited by the appellant's trial defense counsel, not the government's counsel.

With respect to the trial counsel's argument, we review for plain error because the trial defense counsel did not object during the argument. *United States v. Barrazamartinez*, 58 M.J. 173, 175 (C.A.A.F. 2003); *See also United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). We are satisfied the trial counsel's references to Amn Johnson's plea and conviction were meant to emphasize the credibility of his key witness, not prove the appellant's guilt. *United States v. Toro*, 34 M.J. 506, 514-515 (A.F.C.M.R. 1991). The trial counsel devoted a significant portion of his argument to the "15 different reasons why you should believe Airman Johnson," and he went through each reason. One of those reasons was that Amn Johnson had pled guilty to LSD use. As "[n]umber eight" on his list of reasons to believe Amn Johnson, the trial counsel argued that "she pled guilty for this use of drugs. You would have to believe that she pled guilty, was convicted, served time for this, admitted to what she did wrong, but was simultaneously lying about it to frame Airman Groshong. It doesn't pass the common sense test." The trial counsel's argument was complicated by the alternate theories of criminality he was trying to address: That the appellant was either guilty of directly distributing the LSD, as Amn Johnson testified, or guilty of aiding and abetting the distribution, consistent with his statement to SA DuBose. The import of the trial counsel's comments was to emphasize that Amn Johnson's admission of LSD use was credible, in part, because she pled guilty and was punished for it. After examining the argument in the context of the entire court-martial, *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000), we do not find that the trial counsel's comments constituted plain error. *See Powell*, 49 M.J. at 465.

The Trial Counsel's Findings Argument

The appellant contends the trial counsel made other comments in his findings argument that, in effect, shifted the burden to the defense to prove the appellant's innocence and improperly infringed on the appellant's constitutional right not to testify. The trial defense counsel twice objected that the trial counsel was shifting the burden, and twice the military judge overruled the objections. The military judge noted that he had instructed the members on the appropriate burden and concluded that trial counsel was making "fair comment."

The heart of the appellant's concerns are with the trial counsel's references to persons identified by trial defense counsel during cross examination of Amn Johnson, mostly acquaintances that were involved in drug use to some extent, and that those persons never testified. The appellant also objects to the trial counsel's repeated characterization of the evidence as "uncontradicted."

Again, we examine the trial counsel's comments in the context of the entire court-martial. *Baer*, 53 M.J. at 238. His references to the lack of testimony by Amn Johnson's acquaintances did not imply that the appellant had an obligation to produce evidence to contradict the government witnesses. *Cf. United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005). Rather, the trial counsel argued that those persons were irrelevant altogether, an example of a "red herring" he contended was raised by the trial defense counsel.

The trial counsel argued that Amn Johnson's testimony was "virtually uncontradicted," "uncontradicted," and "not contradicted at all." Taken in context of the entire trial, we agree with the military judge that these were fair comments on the evidence. This portion of trial counsel's argument is illustrative:

> Fourteen, and there's only fifteen, so you know I'm almost done with talking about her [Amn Johnson]. Fourteen, there is virtually no evidence in the record to contradict what she told you. Now, the reason I say, "virtually," is because the only evidence that contradicts it is Airman Groshong's statement to Special Agent DuBose saying, "I never touched the drugs."

Although the appellant did not testify, he did make pre-trial statements about the charged offense that were in evidence and, unlike *Carter*, he was not the only person who possessed information to contradict the government's witnesses. *Id.* at 34.

Remaining Issues

In view of our conclusions above, the appellant's allegation of cumulative error has no merit. As for the legal and factual sufficiency of the evidence, we may affirm only those findings of guilty that we determine are correct in law and fact and, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, a rational factfinder could have found the appellant guilty of all the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

We conclude that the court's findings are correct in law; that is, we are convinced that a rational factfinder could have found the appellant guilty beyond a reasonable doubt of the elements of the charged offense. We are also convinced the findings are correct in fact.

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; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court