UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MICHAEL D. HILLIARD
United States Air Force

ACM 35516

13 December 2005

Sentence adjudged 7 December 2002 by GCM convened at MacDill Air Force Base, Florida. Military Judge: John J. Powers.

Approved sentence: Bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Gilbert J. Andia, Jr., and Major Terry L. McElyea.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACOBSON, Judge:

The appellant was convicted, contrary to his pleas, of attempting to distribute Xanax, dereliction of duty, distribution of Xanax, and distribution of marijuana, in violation of Articles 80, 92, and 112a, UCMJ, 10 U.S.C. §§ 880, 892, 912a. The general court-martial, consisting of officer members, sentenced the appellant to a bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence except for $1,105.50 pay per month of forfeitures, which he deferred and waived for benefit of the appellant's two dependant children.

On appeal, the appellant asserts that (1) the military judge erred by failing to give a defense-requested instruction regarding continuing entrapment; (2) the evidence was legally and factually insufficient to sustain the specification of attempted distribution of Xanax; and (3) the evidence was legally and factually insufficient to support the specification of distribution of Xanax. For the reasons set out below, we find no merit in the appellant's assignments of error and affirm.

Background

The appellant is a 33-year-old noncommissioned officer assigned to the 6th Medical Operations Squadron at MacDill Air Force Base, Florida. At the time of his trial he had served approximately 12 years on active duty.

The primary witness against the appellant at trial was KW, a former airman who had recently been discharged from the Air Force. KW testified that she and the appellant were involved in a personal relationship that included sexual activities. This relationship started in October 2001. KW explained that the appellant provided her with Xanax on several occasions between October 2001 and January 2002. She further stated that on 18 January 2002 the appellant gave her, and she consumed, a Xanax pill while the two were out drinking with coworkers. As a result, she said she lost her inhibitions, performed fellatio on another military member in a parking lot, and allowed that person to follow her back to her dorm. In her dorm room she had sex with this individual. She later went to the Air Force Office of Special Investigations (AFOSI) and alleged that she had been raped. During the course of the ensuing investigation, KW informed AFOSI that she had lost the ability to consent to sexual activity on the night in question due to the mixture of alcohol and Xanax she had ingested. Investigators subsequently shifted the focus of their investigation toward the appellant and recruited KW as a confidential informant. She participated in several controlled buys during which the appellant sold her Xanax on several occasions, and marijuana twice.

Several other witnesses testified during the court-martial. Technical Sergeant (TSgt) Everage testified that he had once declined a Xanax pill offered to him by the appellant. This became the basis of the attempted distribution specification. Airman First Class (A1C) Cabrera and Airman (Amn) Diaz testified that the appellant provided each of them with Xanax on separate occasions.

I. Defense-Requested Instruction

Law

The standard of review for examining the military judge's refusal to give a defense-requested instruction is abuse of discretion. *United States v. Maxwell,* 45 M.J. 406, 424 (C.A.A.F. 1996) (citing *United States v. Damatta-Olivera,* 37 M.J. 474, 478

(C.M.A. 1993)). The military judge has substantial discretionary power in determining which instructions to give. *Damatta-Olivera*, 37 M.J. at 478. In assessing whether a court properly exercised its discretion, a reviewing court must examine the instructions as a whole "to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence." *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). The issue of whether the military judge gave the members proper instruction is a question of law, which this court reviews de novo. *Id.* at 20 (citing *United States v. Snow*, 82 F.3d 935, 938-39 (10th Cir. 1996)).

Discussion

At trial it was undisputed that a possible entrapment defense was raised on both specifications of the distribution charge. The evidence showed that KW was working undercover for the AFOSI during the controlled buys of Xanax and marijuana, and that while she was working for AFOSI she asked the appellant to supply her with marijuana. The evidence also tended to show that the appellant was predisposed to distribute drugs. This evidence included testimony regarding previous drug distributions to KW (prior to her involvement with AFOSI) and other military members, and testimony by KW that the appellant bragged about his ability to procure marijuana. At the conclusion of the evidence, relying on *United States v. Jursnick*, 24 M.J. 504, 507 (A.F.C.M.R. 1987), trial defense counsel requested the following instruction on entrapment: "If you believe that an improper government inducement caused . . . the accused to distribute Xanex [sic], marijuana, or both Xanex [sic] and marijuana then the influence of the prior inducement is presumed to extend to a subsequent similar act unless the prosecution establishes the contrary beyond a reasonable doubt." The military judge refused to give the requested instruction. Instead, the military judge gave the entrapment instruction found in Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 5-6 (15 Sept 2002), and supplemented the standard instruction with language proposed by the government regarding extraordinary inducements.

The appellant avers that the military judge erred by failing to give the entrapment instruction requested by his defense counsel. In doing so, the appellant again relies on *Jursnick*, arguing that this instruction was necessary because "if the members thought the first distribution of marijuana, for example, was pursuant to entrapment, the defense wanted the members to understand that the second distribution could be the result of the original entrapment *even if no further entrapment occurred."*

Law and Analysis

While the logic of *Jursnick* may be sound insofar as it applies to the concept of continuing entrapment, this appellant's reliance upon the holding is misplaced. In *Jursnick,* the accused was *acquitted* of the first alleged drug distribution and convicted of the second allegation of distribution. Thus, the issue of continuing entrapment was raised

in the context of whether the two findings were inconsistent. In the case sub judice, however, the appellant was *convicted* of all charges and specifications relating to distribution of drugs, with no exceptions or substitutions by the court-martial panel. This situation is more akin to *United States v. Jacobs*, 14 M.J. 999 (A.C.M.R. 1982), in which the accused was found guilty of the initial offense following government-initiated inducements as well as later offenses flowing from the same pattern of inducements. The Army Court held that the military judge should have given an instruction on "continuing entrapment." However, the Court found no harm because the findings reflected the members' rejection of the entrapment defense as to the earlier offenses. *Id.* at 1001. Since the members found no entrapment as to the earlier drug offenses, the court found "no rational possibility that they would have presumed a continuing entrapment" as to subsequent drug offenses. *Id*. In the present case, the members likewise rejected the defense's entrapment theory *in toto* after hearing evidence that tended to show the appellant's predisposition to distribute drugs. This evidence included KW's testimony that the appellant had provided her with Xanax on five occasions and had bragged about how he could get marijuana from his neighbor prior to the time she started working with the AFOSI on 30 January 2002. Additionally, Amn Diaz and A1C Cabrera testified that the appellant provided them with Xanax prior to 30 January 2002, and TSgt Everage testified that the appellant offered him Xanax in mid-January 2002. By finding the appellant guilty of the specifications without exceptions and substitutions, the members obviously rejected the entrapment theory altogether. Without an initial entrapment, there is no "continuing course of entrapment" that would carry over to subsequent distributions.

Unlike the Court's holding in *Jacobs,* however, we decline to find that the military judge here committed error. As we stated in *Jursnick,* "[w]e do not endorse the wisdom of an instruction based on a presumption of continuing entrapment in most such situations. We do, however, emphasize that the law, in its present state, demands as a minimum that, once entrapment is raised as an issue, it must be addressed in appropriately tailored instructions as to each offense that it may reach." *Jursnick*, 24 M.J. at 508. The military judge, in his findings instructions, adequately explained the affirmative defense of entrapment, and informed the members that the defense applied to both distribution specifications under Charge III.

Therefore, we find that the instructions as a whole sufficiently covered the issues in the case and focused on the facts presented by the evidence. The instructions given by the military judge sufficiently explained the affirmative defense of entrapment and how it related to the specifications of drug distribution. The military judge did not abuse his discretion by refusing to give the defense-requested instruction.

II. Legal and Factual Sufficiency

In these assignments of error, the appellant argues that the evidence presented at trial was legally and factually insufficient to sustain the findings of guilty to the specification of attempted distribution of Xanax to TSgt Everage, and distribution of Xanax to KW, Amn Diaz, and A1C Cabrera. In doing so, the appellant does not dispute the evidence showing that he offered a blue pill to TSgt Everage and distributed pills that "looked like" Xanax to the other witnesses. He simply argues that the government did not prove that the pills the appellant distributed actually were Xanax.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla,* 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. *Turner,* 25 M.J. at 325 (citing *Jackson v. Virginia*, 443 U.S. at 319).

We conclude that there is sufficient competent evidence in the record of trial to support the court's findings. The testimony of KW, Amn Diaz, A1C Cabrera, TSgt Everage, the AFOSI agents, and the expert testimony of Major Bayley in this case was credible and compelling. Although trial defense counsel pointed out minor inconsistencies and flaws in various aspects of the prosecution's case, the overwhelming weight of the evidence from multiple witnesses leaves us convinced that the pills the appellant distributed were Xanax, and thus convinced of the appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 325; Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Conclusion

Accordingly, we conclude the 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. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). On the basis of the entire record, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court