UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DEVON P. JOHNSON
United States Air Force

ACM S32047

04 September 2013

Sentence adjudged 8 February 2012 by SPCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Jeffrey A. Ferguson.

Approved Sentence: Bad-conduct discharge, confinement for 30 days, forfeiture of $745.00 pay per month for one month, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Brian C. Mason; Captain Thomas J. Alford; and Mr. Gerald R. Bruce, Esquire.

Before

HARNEY, SOYBEL, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

The appellant was convicted, contrary to his pleas, by a special court-martial composed of officer members of distribution of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence was a bad-conduct discharge, confinement for 30 days, forfeiture of $745 pay per month for one month, and reduction to the grade of E-1.

On appeal, the appellant avers that (1) the evidence is factually and legally insufficient to support the finding of guilty, and (2) the record is incomplete because the

findings instructions in the record of trial are not the findings instructions that were presented to the members.

Background

The appellant was a 21-year-old Airman with two years in service at the time of his court-martial. He was charged with one specification of use of marijuana on divers occasions and one specification of distribution of marijuana, both in violation of Article 112a, UCMJ. A panel of officer members acquitted the appellant of the use specification and convicted him of the distribution. The substantive evidence against the accused was the testimony of two previously convicted Airmen.

Airman Basic (AB) David Chappell testified under a grant of immunity that he used marijuana 20 to 30 times, and all but one time AB William Haines used with him. He also testified that the appellant smoked marijuana with him and AB Haines on at least 15 occasions. AB Chappell stated that the appellant provided him with marijuana 10 to 15 times. However, on cross-examination AB Chappell admitted that in his prior testimony at AB Haines' court-martial, he testified that he only received marijuana from two individuals, neither of whom were the appellant. AB Chappell also admitted that he provided two false official statements to investigators and had been convicted of making a false official statement.

AB Haines also testified under a grant of immunity. AB Haines explained that on one occasion the appellant helped him obtain marijuana; the appellant contacted a friend who he knew sold marijuana, then drove AB Haines and AB Chappell to buy blunt wraps. He then drove to his friend's house where the marijuana purchase occurred. A second time, AB Haines provided money to the appellant for the purchase of marijuana, the appellant took the money, and returned later to provide AB Haines with marijuana. AB Haines testified that he and AB Chappell used marijuana together. However, he never saw the appellant use marijuana. AB Haines admitted that he lied to investigators when they first asked about his and his friends' use of marijuana. AB Haines was convicted at his own court-martial for making a false official statement.

Factual and Legal Sufficiency

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

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 . . . convinced of the [appellant's] guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of

innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *Turner*, 25 M.J. at 324. "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citing *United States v. Rogers*, 54 M.J. 244, 246 (C.A.A.F. 2000)).

The appellant argues there was no credible evidence presented at trial to show the appellant actually distributed marijuana. The only witnesses to testify did so under grants of immunity. They were previously convicted of making false official statements, and their testimony was in conflict with each other's. However, two Airmen testified that they received marijuana from the appellant. Additionally, AB Haines was able to testify specifically regarding the details of his transaction by which he obtained marijuana from the appellant. Having weighed the evidence in the record of trial, with allowances for not having personally observed the witnesses, we are personally convinced of the appellant's guilt beyond a reasonable doubt of a single distribution of marijuana. Similarly, we find a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.

Completeness of the Record

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the military judge and counsel for each side addressed the written findings instructions that the military judge drafted. Upon motion of trial counsel and over trial defense counsel's objection, the military judge ruled that he would change the word "weaken" to "affect" in the instruction regarding the use of the court-martial convictions of AB Haines and AB Chappell. The following typographical errors were also noted: AB Haines' name was misspelled as "Hanes," the date range for the distribution was "341 October" and on page five, the third paragraph was missing a period. After noting these corrections, the military judge reserved Appellate Exhibit V for the instructions that he would provide to the members.

After counsel for each side presented argument and the military judge provided all the instructions orally on the record, the military judge told the members that he needed to make some corrections and as soon as that was completed he would have the instructions printed and delivered to the members. The members requested a recess before beginning deliberations. After the recess, the military judge told the members that he completed the corrections to the written findings instructions and published them as

Appellate Exhibit V to the members. The bailiff then handed the members Appellate Exhibit V. The Appellate Exhibit V which is included in the record of trial does not contain any of the corrections that were discussed in the Article 39(a), UCMJ, session. Appellate Exhibit V also contains a few other typographical errors when compared to the instructions provided on the record.[1] Therefore, it is the determination of this Court that the Appellate Exhibit V in the record of trial is the draft of the findings instructions and not the final version that was provided to the members.[2]

On 14 March 2012, the court reporter certified that the transcript was "an accurate reflection of the proceeding of the court." The record of trial was authenticated by the military judge on 15 March 2012. On 20 March 2012, a complete copy of the entire record of trial was presented to trial defense counsel and the appellant.

A complete record of trial is required in a special court-martial when the sentence includes a bad-conduct discharge. Article 54(c)(1)(B), UCMJ, 10 USC § 854(c)(1)(B); Rule for Courts-Martial (R.C.M.) 1103(b)(2)(B); *See United States v. Santoro*, 46 M.J. 344 (C.A.A.F. 1997). R.C.M. 1103(b)(2)(D) requires appellate exhibits to be part of the record of trial.

A substantial omission from the record of trial renders it incomplete. "Whether an omission from a record of trial is 'substantial' is a question of law that we review de novo." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). A record of trial may be complete and verbatim if the omissions are insubstantial. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (record complete even though four prosecution exhibits omitted from the record because omission was not substantial as the rest of the record of trial incorporated the information contained therein); *United States v. Barnes*, 12 M.J. 614 (N.M.C.M.R. 1981), *aff'd on other grounds*, 15 M.J. 121 (C.M.A. 1983) (omission from the record of questionnaires completed by members prior to voir dire did not make record incomplete as omission was insubstantial). *Cf. United States v. McCullah*, 11 M.J. 234, 236-37 (C.M.A. 1981) (prosecution exhibit that was prima facie evidence omitted from record was substantial omission and left the record incomplete); *United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F. 1999) (failure to attach personnel records of witness to record, which trial judge reviewed, but did not release to the defense, was substantial).

We analyze whether an omission is substantial on a case-by-case basis. *Abrams*, 50 M.J. at 363. The omission of rulings or evidence which affect an appellant's rights at

[1] Appellate Exhibit V omits the word "specifications" from the initial instructions, while the military judge stated on the record: "The law presumes the accused to be innocent of the charges and specifications against him." Also, the block to indicate whether trial counsel or the bailiff will hand the worksheet to the members; the block to indicate the panel President's name; and the block to indicate the number of the appellate exhibit for the findings worksheet is blank on Appellate Exhibit V.

[2] In an earlier motion to this Court, appellate defense counsel sought to compel the production of the findings instructions provided to the members. Our earlier ruling referred the appellant to Appellate Exhibit V. We now conclude that Appellate Exhibit V does not contain the finding instructions actually provided to the members.

trial render appellate review impossible and are substantial omissions. *Id.* at 364; *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979) (omission of sidebar conference involving a ruling by the trial judge that affected the appellant's rights was substantial).

Here, the proper findings instructions were read to the members and captured verbatim on the record. The members were then provided a copy of those instructions, in which minor typographical errors had been corrected. The members were properly instructed on the record and no one raised an objection after the instructions were read, nor when the instructions were published to the members. The only discrepancies between the draft and final version of the findings instructions are de minimis and amount to little more than typographical edits. The only potential substantive change between the instructions as read and the written instructions contained in the record is that Appellate Exhibit V contains the word "weaken" vice "affect" pursuant to trial defense counsel's objection. The record is clear that the written findings instructions as provided to the members are the same as Appellate Exhibit V with the corrections as noted on the record and included in the verbatim transcript. Including only the draft version of Appellate Exhibit V is error, but after reviewing the entire record, we find the omission is not substantial.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court