UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman TAMMY J. STONE
United States Air Force

ACM S30069

17 October 2003

Sentence adjudged 10 October 2001 by SPCM convened at Goodfellow Air Force Base, Texas. Military Judge: Steven A. Hatfield.

Approved sentence: Bad-conduct discharge, 14 days of hard labor without confinement, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Jefferson B. Brown.

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

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, contrary to her pleas, of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The special court-martial, consisting of members, sentenced her to a bad-conduct discharge, hard labor without confinement for 14 days, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant has submitted one assignment of error, that the military judge abused his discretion when he did not admit into evidence an out-of-court statement that the declarant had "spiked" the appellant's drink at a party. Finding no error prejudicial to appellant's substantial rights, we affirm.

On 9 March 2001, the appellant submitted a urine specimen pursuant to a random urinalysis. Laboratory testing revealed that the appellant's urine contained 1989 nanograms per milliliter of the cocaine metabolite. During the trial, a friend of the appellant testified that she went to a nightclub with the appellant on 7 March 2001 and they consumed alcohol. After the nightclub, they went to a party where they drank more alcohol. At this party the appellant became ill and vomited. According to this witness, there was an unknown man at the party who, upon hearing that the appellant had become ill, laughed. The defense also wanted to ask this witness about a statement made by this unknown man that he "put something" in the appellant's drink and that it was "something to spice up her night." Although the military judge permitted the witness to testify as to their attendance at the party and her personal observations, he excluded this statement on the grounds that it was inadmissible hearsay. It is this ruling which forms the basis of the appellant's assignment of error.

The standard of review for a military judge's decision to admit or exclude hearsay evidence is whether the military judge abused his or her discretion. *United States v. Hyder*, 47 M.J. 46, 48 (C.A.A.F. 1997); *United States v. Kelley*, 45 M.J. 275, 279 (C.A.A.F. 1996); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995); *United States v. Zakaria*, 38 M.J. 280, 283 (C.M.A. 1993). The abuse of discretion standard involves action that is arbitrary, clearly unreasonable, or clearly erroneous. *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

At the outset, we note that the government challenged the statement in question through a motion in limine prior to the taking of evidence. In response, defense counsel averred that the statement was admissible as a present sense impression. She further stated that if the military judge ruled this statement did not fall under a hearsay exception, she could phrase her questions "to get around this." The military judge then stated:

> [A]t this time, I'm going to grant the government's Motion in Limine with regard to this statement by an unknown individual to the effect that he or someone else may have spiked the drinks. But, as I mentioned with the other Motion in Limine, depending upon how the evidence comes out, I may reconsider my ruling on that or there may be some other theory of admissibility. But at this point, it just seems like, clearly, that it's hearsay and no hearsay exception applies so I'll grant the government's Motion in Limine.

The defense counsel responded, "Yes, sir." Later, during the defense's presentation of evidence, the government objected to the proffered testimony that this witness was now going to testify as to her opinion that somebody "spiked" the appellant's drink. After hearing this proffered testimony from the witness at another Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the military judge stated, "[W]e're all in agreement that the statement of the unknown male is inadmissible hearsay." Defense counsel did not object

to this statement. The military judge then ruled that he was not going to allow the witness to give her opinion about why her friend's urinalysis was positive for cocaine. Later, the appellant testified, and in response to a question from one of the members posed by the military judge, she stated "[T]hings were said at the party that led us to believe that something might be in our drinks." The government immediately objected to the appellant's testimony and asked for an Article 39(a), UCMJ, session. During this session and a subsequent conference held pursuant to Rule for Courts-Martial (R.C.M) 802, the parties discussed the government's objection. Afterwards, the military judge stated on the record, "Counsel for both sides agreed that it was an improper question and I will instruct the jury that they are to disregard the question and the answer. Does that accurately summarize our 802 conference and is that acceptable to both sides?" The defense counsel replied "Yes, Your Honor." Given these facts, we conclude that any error was affirmatively waived for purposes of appeal. *See* R.C.M. 905(e); Mil R. Evid. 103; *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver is "an intentional relinquishment or abandonment of a known right or privilege").

Even if the error had not been waived, the military judge properly determined that the statement in question was inadmissible hearsay. Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Mil. R. Evid. 801(c). Unless an exception applies, hearsay is not admissible in trials by court-martial. Mil. R. Evid. 802. One such exception is the present sense impression, which is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." Mil. R. Evid. 803(1). *See Reedus v. Stegall*, 197 F. Supp. 2d 767 (E.D. Mich. 2001) (hearsay statement by witness to a shooting that "as big as that car is, [defendant] missed both times," when the statement was made shortly after the event); *United States v. Wheat*, 278 F.3d 722, 731 n. 11 (8th Cir. 2001) (anonymous tip to police describing defendant's erratic driving, which served as the basis for an investigatory stop), *cert. denied*, 537 U.S. 850 (2002); *United States v. Hawkins*, 59 F.3d 723 (8th Cir. 1995) (911 call by assault victim), *vacated on other grounds*, 516 U.S. 1168 (1996).

The appellant claims that the statement by the unknown man qualifies as a present sense impression in that he was explaining an event, the appellant's illness at the party. Were the statement a contemporaneous description by an eyewitness of the accused's sudden illness, the appellant's contention might have some merit. However, the statement refers to the declarant's own alleged prior conduct, that of "spiking" a drink. In other words, the proffered testimony did not relate to his "present sense impression" but rather to his past conduct. *See* Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U.L. Rev. 907, 927-28 (2001). In fact, it is not clear from the record that the alleged declarant actually witnessed the appellant become ill; he appears to have heard of it afterward. In any event, the statement is being offered to prove the truth of the matter asserted without subjecting the declarant to adversarial testing and, as such, falls within the prohibition of Mil. R. Evid. 802.

We also note that most federal courts require some indicia of reliability as a condition of admitting a present sense impression. That is, "there must be evidence independent of the statement itself to prove that the event described actually occurred." 4 Stephen A. Saltzburg, et al, *Federal Rules of Evidence Manual* § 803.02(a)(b)(8th ed. 2002); Stephen A. Saltzburg, et al, *Military Rules of Evidence Manual* 942 (4th ed. 1997); *Hawkins*, 59 F.3d at 730. In the case sub judice, there is no other evidence than the statement itself offered to prove the matter asserted. No witness was able to describe anything at the party which would suggest the presence of illegal drugs, and the statement is vague as to the nature of the substance with which the drinks were allegedly spiked. The declarant himself is characterized only as a "big man" with a "red bandanna" whose subsequent conduct is not further elaborated upon by the defense witness, despite his alleged admission that he was the cause of the appellant's sudden violent illness. The statement was insufficiently reliable to qualify as a present sense impression. Therefore, the military judge did not abuse his discretion in refusing to admit it. *See Bemis v. Edwards*, 45 F.3d 1369 (9th Cir. 1995); *Brown v. Tard*, 552 F. Supp. 1341, 1351 (D.N.J. 1982).

For reasons stated above, we conclude that the military judge did not abuse his discretion in excluding the statement. 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator