UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ROCKY L. BROCK
United States Air Force

ACM S31084

7 May 2007

Sentence adjudged 26 January 2006 by SPCM convened at Keesler Air Force Base, Mississippi. Military Judge: Glenn L. Spitzer (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of $849.00 pay per month for 5 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain Timothy Cox, and Captain Vicki A Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Carrie E. Wolf.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

PER CURIAM:

Consistent with his pleas, a special court-martial composed of a military judge convicted the appellant of larceny[1] in violation of Article 121, UCMJ, 10 U.S.C. § 921. The appellant was also convicted, contrary to his pleas, of conspiracy and burglary,[2] in violation of Articles 81 and 129, UCMJ, 10 U.S.C. §§ 881, 929. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 5 months, forfeiture of $849.00 pay per month for 5 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts the

[1] The appellant pled guilty by exceptions and substitutions to Charge II and its Specification, and the military judge found him guilty in accordance with his pleas.
[2] Although the appellant pled not guilty to both conspiracy and burglary, the military judge found him guilty of each by exceptions and substitutions.

military judge erred when he admitted the statement of a co-conspirator prior to finding a conspiracy existed, and that the trial counsel improperly argued the appellant's duty position as an aggravating factor in sentencing.

Background

On 11 April 2005, a number of airmen and a civilian were gathered in Airman (Amn) M's dormitory room. The appellant stated he knew where he could make a quick $150.00. Thereafter, Amn M informed the appellant that Amn M's suitemate, Airman First Class (A1C) B was deployed and had an X-box video game system in his room. After hearing this, the appellant left Amn M's room and returned via the bathroom connecting Amn M's and A1C B's rooms. Amn M, Senior Airman (SrA) F, and the appellant then went into A1C B's room. The appellant was seen leaving A1C B's room holding an X-box under his arm like a football. The appellant was eventually questioned and confessed to entering A1C B's room through a window and to stealing the X-box and four video games.

Discussion

Before this Court, the appellant avers the military judge erred when he admitted, over the trial defense counsel's objection, the testimony of Amn R. Amn R testified he overheard a conversation between the appellant, SrA F, and Amn M regarding the X-box; specifically that Amn M knew where an X-box was and that he could get money for it. The basis of the objection by the defense was that the government had not established the existence of a conspiracy prior to the military judge admitting the statement under Mil. R. Evid. 802(d)(2)(e). Initially, the military judge sustained the objection. When questioned by the military judge, the trial counsel responded the statement was being offered as part of what established the conspiracy. Further evidence presented in the government's case-in-chief included eye-witness accounts and the appellant's confession.

This Court reviews a military judge's decision to admit evidence for abuse of discretion. *United States v Dorsey,* 38 M.J. 244, 246 (C.M.A. 1993). To admit a statement from a co-conspirator in accordance with Mil. R. Evid. 802(d)(2)(e), the court must conclude that there was a conspiracy, the declarant and the appellant were part of the conspiracy, and the statement was made in furtherance of the conspiracy. *Bourjaily v. United States,* 483 U.S. 171, 175 (1987). We presume the military judge knew the law, acted according to it, and applied it correctly. *United States v Prevatte,* 40 M.J. 396, 398 (C.M.A. 1994) (citing *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990)). The military judge clearly found the statement admissible under Mil. R. Evid. 802 (d)(2)(e). This conclusion is supported by the evidence in the proceeding.

Next, the appellant avers the trial counsel improperly argued the appellant's duty status as an aggravating factor. The trial defense counsel objected when the trial counsel

referenced testimony from the victim, A1C B, where he said "I've trusted all these people around me because they're Delta Flight, they're Security Forces." The objection was overruled. In her argument, the trial defense counsel addressed the issue of not considering duty performance as an aggravating factor.

An appellant's duty position, without more, cannot be considered as a matter in aggravation. *United States v. Rhodes,* 64 M.J. 630 (A.F. Ct. Crim. App. 2007); *United States v Bobby,* 61 M.J. 750, 755-56 (A.F. Ct. Crim. App. 2005) (citing *United States v Collins,* 3 M.J. 518 (A.F.C.M.R. 1977)). The legal test for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citing *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976)). We presume the military judge knew the law, acted according to it, and applied it correctly. *Prevatte,* 40 M.J. at 398.

Throughout the trial, it was quite clear the persons involved in the case were all members of Security Forces, they all deployed at various times, and that they were a close-knit group. Even the appellant, during his oral unsworn statement, which was conducted in a question/answer format, went so far as to say "A Security Forces member that upholds the law on base and he does a crime--how are you supposed to respect a cop that won't even respect the law?" Therefore, we find that the trial counsel's argument was not erroneous and did not result in any prejudice to the appellant.

Conclusion

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator