UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CAMERON J. CROSSER
United States Air Force

ACM 35590

23 December 2005

Sentence adjudged 15 March 2003 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Kevin P. Koehler.

Approved sentence: Bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

At a general court-martial convened at Robins Air Force Base (AFB), Georgia, in which the appellant entered mixed pleas, a panel of officer and enlisted members convicted the appellant of three specifications of wrongfully using methamphetamine and one specification of obstructing justice, violations of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The court members sentenced him to a bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The appellant avers that the Circuit Trial Counsel (CTC) engaged in improper trial tactics that materially prejudiced his substantial rights. He also challenges the legal and factual sufficiency of his conviction for obstruction of justice. We hold that the CTC's tactics clearly constitute prosecutorial misconduct, were not cured through appropriate instructions, and conclude they were unfairly prejudicial. Article 59(a), UCMJ, 10 U.S.C. § 859(a). We also hold that the conviction for obstruction of justice is legally insufficient, in part. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Background

On 10 July 2002, base officials notified the appellant that he had been randomly selected to provide a urine specimen for drug testing. In late July, after tests revealed the appellant's urine was positive for the presence of methamphetamine, Special Agent Walb from the Air Force Office of Special Investigations (AFOSI) questioned him about the results. During this interview, the appellant provided Agent Walb with a story intended to explain how he might have unknowingly ingested methamphetamine. Based upon this story, the government charged him with impeding an investigation by providing "false information and a false alibi."

He told Agent Walb that he and a friend had gone to a bar in Atlanta the night before he was selected to provide a urine specimen. While there, he met a girl. He said that when he mentioned to her that he was tired and had to drive from Atlanta back to Robins AFB because he had to work that morning, she took some pills out of her pocket and gave them to him. He told Agent Walb that, at the time, he believed the pills were weight lifting supplements and/or caffeine pills. He said he took the pills from her without any concern or belief that they might be illegal drugs. The appellant also told Agent Walb that the bar where he met the girl was called Club Backstreet and that the friend he had been visiting in Atlanta was named KL. He advised Agent Walb that he drove to Atlanta with KL that night and that KL worked at an Outback Steakhouse near Moody AFB. He told Agent Walb he could not provide a home address for KL because his friend was moving.

During this initial interview with AFOSI, the appellant consented to another urinalysis, which tested positive for methamphetamine. A few weeks later, the appellant was again selected for a random urinalysis, which also tested positive for methamphetamine. The appellant pled guilty to knowingly using methamphetamine on these last two occasions, but pled not guilty to the methamphetamine use occurring on 10 July 2002 which purportedly was the result of ingesting pills from the unknown female at Club Backstreet.

Proceeding on the theory that all or some of the story the appellant told Agent Walb was a fabrication, the government also charged the appellant with obstruction of justice, to which the appellant pled not guilty. He testified at trial that the story he told

Agent Walb was true—that he unwittingly used methamphetamine after an unknown girl at Club Backstreet gave him some pills he mistook for weight lifting supplements.

Introduction

The appellant argues that the CTC engaged in numerous improprieties that either individually or cumulatively denied him a fair trial. *See United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992). Broadly speaking, he claims that the CTC solicited improper testimony and then incorporated this improper evidence in a sensationalized and inflammatory manner during her argument on findings. He frames this issue as follows:

> WHETHER APPELLANT'S CONVICTION AND SENTENCE SHOULD BE SET ASIDE WHERE [CIRCUIT] TRIAL COUNSEL'S IMPROPER COURTROOM TACTICS INCLUDED ATTACKING APPELLANT'S DECISION TO PLEAD NOT GUILTY, SUGGESTING THAT APPELLANT HAD AN OBLIGATION TO PRODUCE EVIDENCE TO "CLEAR HIMSELF," USING AN INVESTIGATOR TO PORTRAY APPELLANT AS A "GOOD LIAR," AND GIVING PERSONAL OPINIONS ABOUT WHETHER APPELLANT WAS TELLING THE TRUTH.

Incorporated within his brief, he further argues that the CTC improperly: (1) asked the appellant whether the government witnesses were lying; (2) personalized the prosecution; and (3) asked the court members to remember any occasions in the past when they personally had been lied to. We address most, but not all, of these issues below.

In determining whether a prosecutor has overstepped the "bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense," we turn to the oft-quoted statement from *Berger v. United States*, 295 U.S. 78, 84 (1935), where Justice Sutherland wrote that while a prosecutor may strike "hard blows, he [or she] is not at liberty to strike foul ones." We further note that the trial defense counsel made limited objections to the CTC's tactics. Thus, for the most part, we will review the record for plain error. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right. *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). *See also United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004).

Attack on Appellant's Decision to Enter Mixed Pleas

At trial, the appellant asked that the members be informed of his guilty pleas. He also discussed his pleas on direct examination, explaining he was willing to plead guilty

only to those offenses he was truly guilty of. He testified in findings that his first use, at Club Backstreet, was unknowing. On cross-examination, the CTC asked the appellant about the ramifications and penalties of his pleas, thereby suggesting his pleas were motivated by a desire to limit the maximum punishment he would face. During her argument on findings, the CTC argued:

> The defense tries to stand up here and talk to you about well, he pled guilty, and he's just an honest broker and the accused pled guilty to those last two [methamphetamine] uses because he really was guilty, but by golly he's not guilty of the first one [at the club in Atlanta] or lying to the cops about it.
>
> Let's look at that for what it really is. The scientific test is inescapable. He can't make any of the three urinalyses go away. They are super-duper hot, even the lowest one. *So he can't do anything else other than plead—boom—pop.* He's read his rights time and time again . . . . *So, why would he plead of course, to the ones that he's just absolutely dead in the water can't move from and try floating these lies and escape the 10 July urinalysis and lying to the cop?*
>
> The philosophy of trying to cut your losses comes into play. He is exposed to twice the penalty for lying to the cops for another methamphetamine use. So, here's another question. *Why would he use what we in the legal world call a "strategic plea"? Why would he use that?* . . . . Do you care how many times he used when you know it was all summer long? Do you care if it was 50 or 48, 46, or 45 [uses]? *I think* it's cheaper by the dozen in the defense approach. Okay, so I used meth. How much more sentence am I going to [sic] how much more I used? It was a summer event. But you work that when you're lying to the federal agents and your [sic] obstructing justice and that carries very severe penalties on its own, all by itself, and *there is no integrity for him and it adds a whole new can of whoop-ass.* He's working his way to try to avoid it and it doesn't make any sense.

(Emphasis added).

An accused has a "fundamental right" under the Fifth and Sixth Amendments to plead not guilty. *United States v. Johnson*, 1 M.J. 213, 215 (C.M.A. 1975). The appellant argues that these comments amount to constitutional error by undermining his right to plead not guilty and put the government to the test of proving his guilt beyond a reasonable doubt. On the other hand, the government argues that the CTC's comments about the appellant's mixed pleas were fair because the defense counsel opened the door when he asked the appellant about his pleas of guilty to the other two specifications of methamphetamine use, and especially when he elicited testimony about his client's motivation for pleading guilty to some but not all of the offenses.

A trial counsel is indeed permitted to make a "fair response" to claims made by the defense, even where a constitutional right is at stake. *United States v. Robinson*, 485 U.S. 25, 32 (1988); *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). In determining what is a "fair response" in findings arguments to matters raised by the defense, we are guided by the Discussion to Rule for Courts-Martial (R.C.M.) 919, which provides a lengthy list of "do's and don'ts" for argument by counsel on findings:

> Argument may include comment about the testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence. Counsel should not express a personnel [sic] belief or opinion as to the truth or falsity of any testimony or evidence or the guilt or innocence of the accused, nor should counsel make arguments calculated to inflame passions or prejudices. . . . Trial counsel may not comment on the accused's exercise of the right against self-incrimination or the right to counsel. See Mil. R. Evid. 512. . . . When the accused testifies on the merits regarding an offense charged, trial counsel may comment on the accused's failure in that testimony to deny or explain specific incriminating facts that the evidence for the prosecution tends to establish regarding that offense. Trial counsel may not comment on the failure of the defense to call witnesses.

In applying this guidance, we must review the CTC's argument "within the context of the entire court-martial" and the "focus of our inquiry should not be on words in isolation." *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (citing *United States v. Young*, 470 U.S. 1, 16, (1985)). "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." *Dunlop v. United States*, 165 U.S. 486, 498 (1897).

Even if the appellant first raised the issue of his pleas as a way of suggesting to the members he could only accept responsibility for those crimes he actually committed, it was improper, for the CTC to use language, to include vulgar terminology, that was "more of a personal attack on the defendant" than a fair response to the appellant's testimony. *See United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005). It was especially egregious for the CTC to suggest that the appellant was motivated to plead not guilty because he was a chronic methamphetamine user, an inference that was not supported by the evidence adduced at trial. We conclude it was clearly improper for the CTC to comment on the appellant's right to plead not guilty in this manner.

Attempts to Shift the Burden of Proof

We turn next to the issue of whether the CTC attempted to shift the burden of proof to the appellant. In her cross-examination of the appellant, the CTC asked him

several times whether he tried to go back to Club Backstreet and find the girl who gave him the pills. She also asked him why he had neither tried to find his friend KL nor given the AFOSI the address of his friend KL. The defense objected only to the form of one of these questions and the military judge overruled the objection. In her findings argument, the CTC commented on the appellant's failure to provide AFOSI more information by arguing, "We have no information about the mystery girl. He doesn't give it." She then went on to state, "His alibi is in the [KL] family and alibi in 'clubby girl,' neither of which he would find or produce or give any information and he can specifically withhold information about these people from the OSI." She later commented, "He didn't look for [KL] or the girl at the club."

The military judge did not interrupt the CTC or give a curative instruction following any of these comments. The judge gave only the standard instruction on the presumption of innocence and that the burden of proof beyond a reasonable doubt is with the government.

Citing *United States v. Vandyke*, 56 M.J. 812, 816-17 (N.M. Ct. Crim. App. 2002), the government argues that the CTC's cross-examination and argument were aimed at attacking the defense theory of the case, not at shifting the burden of proof. The government contends the CTC's questions and argument were legitimate responses to the appellant's attempt to characterize himself as fully cooperating with AFOSI agents. The government further argues that the appellant has not carried his burden of establishing plain error.

The government always has the burden of proof to produce evidence on every element and to persuade the members of guilt beyond a reasonable doubt. *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995). The burden of proof never shifts to the defense. A trial counsel's suggestion that an accused may have an obligation to produce evidence of his or her own innocence is "error of constitutional dimension." *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004).

Trial counsel must strike a delicate balance when an accused takes the stand on his or her own behalf. The government "may comment on the accused's failure to *deny or explain* incriminating facts" but may not "comment on the failure of the defense to call witnesses." R.C.M. 919(b), Discussion (emphasis added). The CTC approached this difficult task with what can only be charitably characterized as a lack of finesse, and the military judge failed to intervene immediately with instructions to the court members. It is not fair comment to assert or suggest that the defense somehow has a responsibility to call witnesses or put on evidence to prove his or her innocence. We conclude it was clear error for the CTC to make comments suggesting the appellant had a duty to offer evidence to prove his innocence. Further, we conclude it was clear error when the military judge failed to sua sponte instruct the court members that the appellant had no duty to call witnesses or put on evidence.

Use of "Human Lie Detector" Evidence

The appellant also argues it was error for the CTC to solicit testimony from Agent Walb to establish that the appellant was a "good liar." This testimony had some relevance to the obstruction of justice charge, which alleged that the appellant gave "false information and a false alibi" to the AFOSI. Agent Walb told the court members that, following his first interview with the appellant, he initially believed the appellant was telling the truth about unwittingly taking methamphetamine from a girl he did not know.

However, the CTC then proceeded to ask Agent Walb several leading and argumentative questions indicating that Agent Walb believed the appellant was lying after the results of the second urinalysis came back. For example, at one point Agent Walb testified that suspects in unrelated cases had raised the possibility that their positive urinalysis tests could have been the result of using weightlifting supplements. The CTC then asked, "Just because there are people that tell these stories doesn't mean that they are telling the truth, right?" Agent Kalb responded by saying, "Usually the first hour or so, they lie. They don't tell me the truth."

The defense objected to only one potential lie detector question. The military judge sustained the objection, but not before the CTC asked and answered her own question by saying, "Believable? No."

In closing argument, the CTC picked up on the theme that AFOSI agents were "taught to take a look at people lying." She argued, "I will submit to you that [the accused] is an emphatic and practiced liar. He's the man who can look you in the eye and tell you a big fat whopping lie. We would like to believe what people tell us, we rely on integrity." The military judge did not give an immediate instruction to disregard any of the questions or comments, only giving the standard instruction that counsel's arguments are not evidence.

Mil. R. Evid 608 allows opinion testimony about a person's general character for truthfulness. However, parties may not introduce "human lie detector" testimony or opinion testimony that a witness's specific statement is untrue. *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003). Our superior court has evinced a very low tolerance for human lie detector evidence. In *Kasper*, the court held that a military judge must issue "prompt cautionary instructions," even absent a defense objection, to ensure that the testimony is not used improperly by court members. *Id.* at 315. We conclude the failure to do so in this case was an obvious error.

Other Misconduct

In addition to the problems previously discussed, we find the following portions of the CTC's findings argument to be improper:

a. *Personalizing the prosecution.* It was improper for the CTC to argue that the appellant was a "[l]iar, liar, liar right to you. Right to the OSI and right to me" and to engage in the excessive use of personal pronouns. *See United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980).

b. *Asking the court members to imagine themselves as victims of a lie*. The CTC engaged in clearly inflammatory comment when she challenged the court members "to think about that certain someone, that first serious heart breaker that lied to you. They told you such a good one that you fell for it. You might have gotten a divorce or dumped the boyfriend or girlfriend because they lied." *See Baer*, 53 M.J. at 238.

c. *Comments on the Defense Counsel's Representation.* The CTC made numerous comments that suggested that the appellant's mixed pleas were nothing more than a fabrication created by the defense counsel. For example, she cross-examined the appellant at one point by asking, "Now, you talked with your defense counsel here about how you pled guilty to the two uses [of drugs]." *See generally* Mil. R. Evid. 512. She bootstrapped this testimony into her argument before the court members to suggest that the appellant's mixed pleas were simply tricky lawyer tactics.

Prejudice

To summarize, we find error that is "plain and obvious" in the CTC's arguments that commented on the appellant's not guilty pleas, shifted the burden of proof to the defense, personalized the prosecution, inflamed the passions of the court members by asking them to remember when they had been lied to, and suggested that the defense was a fabrication of the trial defense counsel. We also find obvious error in eliciting human lie detector testimony from Agent Kalb and then using it in argument. We will apply a constitutional harmless error analysis to the CTC's improper comments relating to the appellant's not guilty pleas and shifting of the burden of proof to the defense. *See Chapman v. California*, 386 U.S. 18, 23-4 (1967). The government must show beyond a reasonable doubt that these errors did not contribute to the verdict. *Id.* at 24. For the remaining errors, we must conclude the error resulted in material prejudice to the appellant's substantial rights. *Powell*, 49 M.J. at 463-64.

We determine the impact of prosecutorial misconduct by balancing three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." This requires "reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184.

The defense counsel made a number of comments in his argument on findings that suggest he was not asleep at the wheel during the CTC's argument. He commented on a number of the CTC's obvious misstatements, leading this Court to conclude he made a deliberate choice not to object to the CTC's hyperbole because he perceived it to be ineffective. To the extent the trial defense counsel was in the best position to judge the prejudicial impact of the CTC's argument, we will factor that into our analysis.

But let there be no doubt, we find the CTC's conduct was quite seriously misguided and of significant gravity. *See also TJAG Standards Policy Memorandum-3* (TJS-3), *Air Force Standards for Criminal Justice*, Attachment 1, Standards 3-5.8(a), (b) and (c), (15 May 2005). The case at bar does not involve a mere slip of the tongue, inartful advocacy, or a few brief moments of getting "carried away by the moment." Rather, the record is replete with numerous improper and unprofessional comments, questions, and arguments. Thus, we have little difficulty in concluding that the CTC's improper conduct was substantial and severe, especially given their cumulative impact. *See Banks*, 36 M.J. at 170-71. *See also United States v. Walters*, 16 C.M.R. 191, 209 (C.M.A. 1954) ("a number of errors, no one perhaps sufficient to merit reversal, [may] in combination necessitate the disapproval of a finding").

Moreover, the military judge failed to undertake any significant efforts to reign in the CTC. He had a sua sponte duty to instruct the court members on how to handle the trial counsel's comments on the mixed pleas, her efforts to shift the burden of proof, and the improper admission of human lie detector testimony. *See also* TJS-3, Attachment 1, Standard 3-5.8(e). His use of the standard instructions on burden of proof and argument of counsel were wholly insufficient to overcome the CTC's pervasive misconduct. We further note that although the government's evidence against the appellant may have been strong, it was not overwhelming (no eyewitnesses who saw the appellant ingest methamphetamine, no admissions or statements against interest) and the appellant testified directly that he had not used methamphetamine. He also presented some evidence of his character for truthfulness.

In applying the *Fletcher* factors, we find the balance firmly in the appellant's favor. We cannot be confident that the members convicted the appellant solely on the basis of the evidence.

Legal and Factual Sufficiency of Charge II

We next address the appellant's complaint that Charge II and its Specification are legally and factually insufficient. The government repeatedly referred to the appellant's story that he unknowingly ingested methamphetamine at the Backstreet Club as a "false alibi." In our view, the appellant was attempting to create an "innocent ingestion" defense, not an "alibi." These are separate and distinct defenses. R.C.M. 701(b)(2), which requires notice of certain defenses, makes a distinction between alibi and innocent

ingestion. Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 5-13 (15 Sep 2002), describes the alibi defense as follows: "'Alibi' means that the accused could not have committed the offense(s) charged (or any lesser included offense) because the accused was at another place when the offense(s) occurred."

Even if the appellant had not been at the Backstreet Club on the night prior to his urinalysis test, he still could have committed the offense at some other location. In this regard, we find nothing in the record to support a finding that the appellant provided an alibi—false or otherwise—and conclude the Specification is legally and factually insufficient in that regard.

Conclusion

Accordingly, we modify the Specification of Charge II by excepting out the words "and a false alibi." Further, we set aside the findings as to Specification 2 of Charge I and Charge II and its Specification, as modified. The sentence is also set aside, and the record of trial is returned to The Judge Advocate General of the Air Force for further disposition. A rehearing is authorized.

OFFICIAL

LAQUITTA J. SMITH
Documents Examiner