UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic KASAANDRA C. DAVIS
United States Air Force

ACM S31902

13 February 2013

Sentence adjudged 16 December 2010 by SPCM convened at Eielson Air Force Base, Alaska. Military Judge: W. Shane Cohen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 35 days, a fine of $400.00 with 30 days of contingent confinement if the fine is not paid, and a reprimand.

Appellate Counsel for the Appellant: Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

A special court-martial composed of a military judge convicted the appellant, contrary to her pleas, of dereliction of duty, operation of a motor vehicle while intoxicated, larceny, and forgery, in violation of Articles 92, 111, 121, and 123, UCMJ, 10 U.S.C. §§ 892, 911, 921, 923. The adjudged sentence consisted of a bad-conduct discharge, confinement for 35 days, a fine of $400 with 30 days of contingent confinement if not paid, and a reprimand. The convening authority approved the sentence as adjudged. On appeal, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant asserts the evidence is factually and legally insufficient to support her convictions for operation of a motor vehicle while intoxicated and forgery,

and the trial counsel's improper comments about her unsworn statement materially prejudiced her substantial rights. Finding no error that materially prejudices the appellant, we affirm.

Background

In August 2010, the appellant was experiencing financial difficulties, including being overdrawn on her bank account and being three months behind in her car payments. She asked an Army acquaintance, Private (PVT) CW, for a small loan but he refused. Approximately a week later, she and a friend went to PVT CW's dormitory to play cards and listen to music. While there, the appellant asked PVT CW if she could go into his bedroom to change the music. He agreed and she went into the bedroom alone for what PVT CW estimated was 5-7 minutes. PVT CW kept his checkbook in the top dresser drawer in his bedroom.

About a week later, PVT CW learned his bank account was overdrawn. At his request, his bank sent him copies of his last seven withdrawals. Within those materials were three checks that he had not written, which contained what purported to be his signature, and another that contained someone else's signature. The checks also contained the name "Christina Davis" or "Kassandra Davis." Three of the checks had been cashed at the Base Exchange on Eielson Air Force Base, and one had been cashed at a local credit union. The total amount of all four checks was $557.86.

Testimony from a Base Exchange employee and security video-recordings established that the appellant was the individual who cashed the three checks on 10 and 11 August. Two of those checks contained what appeared to be the signature of PVT CW and one contained the appellant's signature. The employee saw the appellant fill out most of the information on that latter check but did not see her write anything on the other two.

An employee from the on-base credit union testified that the appellant approached her on 11 August to ask if the credit union could cash a check for her. After being told she needed an account at the bank before being able to cash a check, the appellant opened an account. She then attempted to deposit a $200 check made out to "Fresh Cutts" and signed with the name of PVT CW. The appellant told the employee that "Fresh Cutts" was the name of her haircutting business she did in the dormitories. Because she had not opened a business account, the appellant could not deposit that check into her new account, so the employee recommended she ask the maker of the check to add her name in the payee line and initial the change.

The appellant attempted to cash the "Fresh Cutts" check at a local credit union. By now, that check had the appellant's name added to the payee line. When questioned by the credit union teller about the multiple payees on the check, the appellant told her

the payer had been unsure who to make the check out to. The appellant endorsed and cashed the check.

A forensic document examiner from the United States Army Criminal Investigation Laboratory opined she could not be identified or eliminated as the individual who wrote the maker signature on the checks. He also opined that PVT CW probably did not write those maker signatures, but his finding was limited due to an insufficient number of known writing samples.

Early one morning, an enforcement officer observed a passenger vehicle parked on the side of a local highway, its headlights and emergency flashers activated. As he approached the vehicle to determine if its occupant needed assistance, the officer observed the appellant in the driver's seat but leaning over the center console. She initially did not respond to his verbal inquiries or knocking on the window. When he opened her car door, he smelled alcohol. Her key was in the ignition and the car was running. The appellant eventually got out of the car but appeared impaired and unstable on her feet. She smelled of alcohol. Her eyes were bloodshot, her speech was thick and slurred, and she was unable to answer basic questions about why she was parked on the side of the highway. She did say that she was taking an unspecified medication.[1]

After she failed several field sobriety tests administered by a state trooper and refused to take others, the appellant was arrested and taken to the police station. While there, she agreed to provide a sample for a breathalyzer test but, after two attempts, she did not blow enough air into the machine for it to test.

When the appellant did not show up for work on the morning of 20 August, the appellant's supervisor went to her dormitory room to look for her. Her room was empty but he saw alcohol bottles inside. The appellant's first sergeant then learned she was incarcerated at the local civilian detention facility for driving while intoxicated and underage drinking. At this time, the appellant was 20 years old. After procuring a search authorization, Security Forces re-entered her dormitory room and collected the bottles as evidence.

Factual and Legal Sufficiency

The appellant argues the evidence is factually and legally insufficient to sustain her conviction for driving while intoxicated, because the prosecution did not present any

[1] The appellant's medical records indicated she had been prescribed a muscle relaxant which could affect the patient's motor skills. She was also prescribed an anti-nausea medication, which causes intense drowsiness and may cause dizziness, confusion, and dilated pupils. According to a pharmacist who testified at trial, the use of alcohol with these medications can intensify the drug's side effects. No evidence was presented about whether the appellant had taken either drug on the night she was found by the side of the highway.

scientific evidence to prove she was under the influence of alcohol and because her prescribed medication could have produced the same effects. She also challenges her conviction for forging the signature of PVT CW with the intent to defraud him because the Government's own expert could not determine if she was the author of those signatures. We disagree.

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2003). The test for factual sufficiency is "whether, after weighing the evidence . . . and making allowances for not having personally observed the witnesses, [we ourselves are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *as quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). 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.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F 2002) (quoting *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) (citations omitted). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The offense of operating a motor vehicle while intoxicated required the Government to prove beyond a reasonable doubt that (1) the appellant was in physical control of a vehicle, and (2) while in the physical control of that vehicle, she was drunk (meaning she had consumed alcohol sufficient to impair the rational and full exercise of her mental or physical faculties). *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 35.b(1)-(2), (6) (2008 ed.). The appellant was clearly in physical control of her car when she was found by the side of the highway, as she had the present capability and power to direct the vehicle since the keys were in the ignition and the motor was running. The evidence shows the appellant had consumed alcohol and that her mental and physical faculties were impaired as a result. Under the circumstances, it was not necessary that the prosecution prove her precise blood-alcohol concentration level. We are satisfied that the evidence is legally and factually sufficient to prove this offense.

To convict the appellant of forgery, the Government was required to prove beyond a reasonable doubt that (1) the appellant falsely made the signature of PVT CW to three checks; (2) this writing was of a nature which would, if genuine, apparently operate to the

legal harm of another; and (3) the false making was with the intent to defraud. *MCM*, Part IV, ¶ 48.b(1). The appellant had access to PVT CW's checkbook when she was in his bedroom. PVT CW did not make any checks payable to her yet several days later, she cashed three of his checks. Considering all the evidence presented in this case, a handwriting expert was not necessary. We are satisfied that the evidence is legally and factually sufficient to prove this offense.

Sentencing Argument

Failure to object to improper argument before the start of sentencing instructions waives the objection. Rule for Courts-Martial 1001(g). Absent objection, argument is reviewed for plain error. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (citation omitted). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). Error is not "'plain and obvious'" if, in the context of the entire trial, the appellant fails to show that the military judge should have intervened sua sponte. *Burton*, 67 M.J. at 153 (citing *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008)).

In her unsworn statement, the appellant stated she had "apologized many times since arriving on Eielson AFB from the first sheet of paperwork that I received, and each apology has been sincere, but they've lost meaning and significance over time." She did not expressly reference PVT CW or the Base Exchange and credit union employees during her unsworn statement. Without an objection from the defense, in his sentencing argument, the trial counsel stated:

> [T]he unsworn statement was long and it was devoid of really any mention of [PVT CW] or even one line of, I'm sorry I did this to you, or I took your money, or I'm sorry for anything, which I think is something that would have been appropriate; that would have been some remorse. Recognizing that the defense doesn't have the burden, I just point out that there was a lack of any apology because she did apologize to some people, but none of the victims in this case, none of the people who had to come here, none of the people who she duped at the bank . . . or [PVT CW].

The appellant contends error occurred when the trial counsel mentioned her supposed lack of remorse, as she did make generalized apologies even if she did not mention individuals by name. She also contends it was error for the Government to argue she should apologize for a crime she had pled not guilty to. We disagree.

Counsel should limit their arguments to "the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). "[T]rial counsel is at liberty to strike hard, but not foul,

blows." *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (citation and quotation marks omitted). Whether or not the comments are fair must be resolved when viewed within the context of the entire court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F 2001).

A trial counsel's sentencing argument which comments upon an accused's exercise of her constitutionally protected rights is "beyond the bounds of fair comment." *United States v. Johnson*, 1 M.J. 213, 215 (C.M.A. 1975) (emphasis and citation omitted). However, an accused's refusal to admit guilt after being found guilty may be an appropriate factor for the sentencing authority's consideration of her rehabilitation potential, but only if a proper foundation has been laid. *United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007) (citation omitted). The predicate foundation can be met if the accused has made an unsworn statement and "has either expressed no remorse or [her] expression of remorse can be arguably construed as being shallow, artificial, or contrived." *Id.* (quotation marks and citation omitted). The accused's decision to plead not guilty cannot result in any inference that she is not remorseful. *Id.*

Military judges are presumed to know the law and to follow it, absent clear evidence to the contrary. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (citations omitted). We presume the military judge was able to distinguish between proper and improper sentencing arguments. The appellant fails to provide any evidence to rebut that presumption.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. [2] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[2] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).