**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant JAMES R. FAILE**
**United States Air Force**

**ACM S32098**

**07 November 2013**

Sentence adjudged 27 July 2012 by SPCM convened at Joint Base Charleston, South Carolina. Military Judge: Michael A. Lewis.

Approved Sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WIEDIE, Judge:

The appellant was tried by a general court-martial composed of officer members. Contrary to his pleas, the appellant was found guilty of wrongful use of cocaine and amphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The members sentenced the appellant to a bad-conduct discharge and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal the appellant raises six issues for our consideration. The appellant argues: (1) This court should reject the "permissive inference" because it is unfounded; (2) The evidence to support his convictions for wrongful use of cocaine and amphetamine

is factually insufficient; (3) The military judge abused his discretion by providing the members with a prior inconsistent statement instruction; (4) The military judge erred by failing to sua sponte interrupt trial counsel's argument when trial counsel argued facts not in evidence; (5) The military judge abused his discretion by denying a defense motion for mistrial after trial counsel stated during sentencing argument that the members could rely on possible mitigating action by the convening authority; and (6) The military judge abused his discretion by denying a defense motion for mistrial after trial counsel purported to speak for the convening authority during sentencing argument.

Finding no error materially prejudicial to the substantial rights of the appellant, we affirm.

*Background*

The appellant was selected for a random urinalysis inspection and provided a urine sample for testing on 13 March 2012. The sample was subsequently tested at the Air Force Drug Testing Laboratory (AFDTL) and tested positive for cocaine. When the positive test result was reported back to the appellant's command, he was required to provide another urine sample for testing pursuant to a base policy based on *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990). The second urine sample provided by the appellant was collected on 6 April 2012 and also tested positive, this time for hydrocodone[1] and amphetamine.

At trial the Government presented expert witness testimony from Dr. DT of the AFDTL. Based on his review of the testing, Dr. DT testified to his conclusion that the 13 March 2012 sample contained the metabolite for cocaine and the 6 April 2012 sample contained d-amphetamine. On cross-examination, Dr. DT conceded that the testing could not determine whether the uses were knowing.

Trial defense counsel called Mr. John Bergin, a neighbor of the appellant's for three years, to testify. Mr. Bergin testified that in January 2012 he had a conversation with the appellant's wife, Mrs. Kristen Faile, wherein she mentioned she wanted to obtain some drugs. About a month later, Mr. Bergin purchased cocaine in the bathroom of a local bar. As part of this drug transaction, the seller of the drugs also provided Mr. Bergin with orange pills. At the time, Mr. Bergin did not know what the pills were.

Mr. Bergin further testified that he took the drugs with him when he attended a party at the appellant's house. During the course of the party, Mr. Bergin went into the appellant's bathroom and snorted two lines of cocaine. He then left the remaining cocaine, as well as the pills, on the top of the back of the toilet. Upon leaving the bathroom, he told Mrs. Faile that the drugs were in the bathroom.

[1] The appellant was also charged with wrongful use of hydrocodone but found not guilty of this specification.

The defense then called Mrs. Faile to the stand. Mrs. Faile confirmed that she had been provided drugs by Mr. Bergin. In her testimony on direct examination, Mrs. Faile said the party where she received the drugs was on a Friday in "late February, early March."

Mrs. Faile claimed to have snorted one line of cocaine on that Friday and then saved the rest of the cocaine and pills. She testified that, at a cookout on the following Sunday, she put the rest of the cocaine into a water bottle. Mrs. Faile indicated that she put the bottle down during the course of the party and that her husband drank from it while grilling, unaware it contained cocaine. She testified that, at the time, she did not tell the appellate he had just drank water laced with cocaine.

Mrs. Faile further testified that on a subsequent Sunday she was watching television with her husband in the garage when she put down her beverage. Earlier, she had crushed up the pills provided to her by Mr. Bergin and put them in her drink. When Mrs. Faile returned from a trip to the restroom, she avers she saw the appellant take a drink from her drink, again unaware that it contained drugs. Once again, she claims she did not tell the appellant that he had just consumed a drink laced with drugs.

On cross-examination, trial counsel attempted to pin Mrs. Faile down on the date of the party when Mr. Bergin provided her with the drugs. On that subject, the following exchange took place:

> Q**:** Do you recall saying that [the party] was – initially, you thought it was the 29th of February? Do you recall saying that?
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> A**:** The end of February, yeah, like the 29th and beginning of March.
>
> Q**:** Do you remember me telling you that the 29th of February was a Wednesday?
>
> A**:** Yes, ma'am.
>
> Q**:** And then do you remember you telling me that, no, it must have been the 26th of February and not the 29th?
>
> A**:** I did not say that.

The appellant testified in his own defense. He denied that he ever knowingly used cocaine or amphetamine. He further corroborated his wife's version of events and denied having felt any effects after drinking from her drinks.

In an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session to discuss findings instructions, the military judge advised the parties he was going to provide the members with the permissive inference instruction. The defense counsel objected to the instruction but the military judge determined it was appropriate to give the instruction. During that same Article 39(a), UCMJ, session, the military judge asked the parties if they believed there had been a prior inconsistent statement. There was disagreement between the parties whether an inconsistent statement had, in fact, been made by Mrs. Faile concerning the date of the party where Mr. Bergin provided her with the drugs. The defense objected, arguing there had been no inconsistent statement. The military judge indicated the issue was unclear based on the testimony of the witness in which the date of the party in question appeared to be "a moving target." The judge concluded there was enough to raise the issue and provide an instruction but that the parties could address in argument whether an inconsistent statement had actually been made.

With respect to the permissive inference, the military judge provided the members with the standard permissive inference instruction provided in the Military Judge's Benchbook. On the subject of prior inconsistent statements, the military judge instructed the members:

> You have heard evidence that before this trial [Mrs. Faile] made a statement over the telephone to the trial counsel **that may be inconsistent** with her testimony here in court. **If you believe** that an inconsistent statement was made, you may consider the inconsistency in deciding whether to believe that witness's in-court testimony.
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> (Emphasis added).

In her closing argument, trial counsel argued to the members that they heard that Mrs. Faile told her in a telephone conversation that she placed the cocaine in a water bottle "on the 26th of February." Trial counsel's findings argument contained five sentences on the issue of the alleged prior inconsistent statement. The fifth of those sentences was: "So you're able to take all three of those and you're able to decide whether or not that's an inconsistent statement and you're able to use that to determine whether or not you think [Mrs. Faile] is credible." Defense counsel did not object to this portion of trial counsel's argument. Although not in direct response to this issue, the military judge's instructions did correctly address the arguments of counsel concerning the facts of the case.[2]

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[2] Prior to argument, the military judge instructed members:

> You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you.

During sentencing argument, assistant trial counsel attempted to counter statements the appellant made in his unsworn statement about the financial difficulties his family was experiencing and the impact a loss of pay would have on them. Assistant trial counsel said, "[t]he convening authority also has the ability to take his pay and award it ---". The military judge, sua sponte, stepped in and stopped assistant trial counsel's argument just as defense counsel started to voice an objection. The military judge then addressed the members, stating:

> I've given the members the instruction on that matter and then at the end I told them that they're not to rely on that in any way, shape or form. Members, do you remember that instruction that I read you before?[3] That's an affirmative response from all members. Are all of you going to be able to follow that? That's an affirmative response from all members.

Following this exchange, the members were temporarily excused and an Article 39(a), UCMJ, session was held. Defense counsel expressed his belief that there were grounds for a mistrial and voiced concern with not only the statement about mitigating action by the convening authority with respect to a forfeiture of pay but also the assistant trial counsel's use of the word "we" at various points during the sentencing argument. Although not expressly stated by defense counsel, the implication was that the use of the word was an inappropriate assertion that assistant trial counsel was speaking for the convening authority. The military judge observed that the word "we" was commonly used in argument and that any issue was adequately addressed by his instruction[4] to the members concerning the recommendations of counsel. The military

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[3] The military judge, in the sentencing instructions provided before argument, stated:

> The counsel may make reference to the availability or lack thereof of monetary support for the accused's family members. Again, by operation of law, if you adjudge confinement for more than 6 months, or any confinement and a bad-conduct discharge, then the accused will forfeit two-thirds of all pay due him during any period of confinement.
>
> However, when the accused has dependents, the convening authority may direct that any or all of the forfeiture of pay which the accused otherwise by law would be required to forfeit be paid to the accused's dependents for a period not to exceed 6 months. This action by the convening authority is purely discretionary. You should not rely upon the convening authority taking this action when considering an appropriate sentence in this case.

[4] The military judge had previously instructed the members:

> During argument, trial counsel or defense counsel may recommend that you consider a specific sentence in this case. You are advised that the arguments of counsel and their recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

judge further stated that he believed his curative instruction adequately addressed the issue concerning mitigating action by the convening authority.

Nevertheless, when the members returned to court, the military judge addressed the issues raised by defense counsel. The military judge specifically advised the members that although trial counsel used the term "we" during argument, her sentence recommendation should be treated as her own personal recommendation as to sentence. The military judge then reread his instruction to the members about the recommendations of counsel. The military judge also directed the members back to his instruction concerning the fact that they should not rely upon the convening authority taking action on forfeitures when determining an appropriate sentence and advised them to disregard trial counsel's comments on this topic.

*Permissive Inference Instruction*

In his first assignment of error, the appellant concedes that current case law allows the prosecution, in urinalysis cases, to rely on a permissive inference "'which has long been recognized by military law as flowing from proof of the predicate fact of use of' the drug." *United States v. Ford*, 23 M.J. 331, 333 (C.M.A. 1987) (quoting *United States v. Harper*, 22 M.J. 157, 162 (C.M.A. 1986)). Nonetheless, the appellant invites us to "revisit" the permissive inference of knowing use. We may not ignore precedent of our superior court (*see United States v. Jones*, 23 M.J. 301, 302 (C.M.A. 1987)), and that is exactly what we would have to do in order to reach the result for which the appellant argues. We decline to accept this invitation and find this assignment of error to be without merit.

*Factual Sufficiency of the Evidence*

The appellant claims his convictions for wrongful use of cocaine and amphetamine are factually insufficient. We review issues of factual 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 ourselves are] 'convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The appellant argues, to the extent the permissive inference was appropriate, no reasonable finder of fact could have concluded he was guilty of the offenses given his testimony that he did not knowingly use the drugs and his wife's testimony that he innocently drank from her drug-laced drinks. In essence, the appellant's argument is that the Government failed to adequately rebut evidence of his defense.

In *Harper*, our superior court held that evidence of urinalysis tests, their results, and expert testimony explaining them is sufficient to permit a factfinder to find beyond a reasonable doubt that an accused wrongfully used a controlled substance. 22 M.J. at 163. Furthermore, in *Ford*, our superior court noted that the evidence is sufficient to support a conviction as long as the appellant's innocent ingestion evidence could reasonably be disbelieved by the factfinder. 23 M.J. at 334-35. The simple fact that the defense has raised an innocent or unknowing ingestion defense does not require the Government to rebut such a defense in order for members to find the appellant guilty. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *United States v. Bond*, 46 M.J. 86, 90 (C.A.A.F. 1997).

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. At trial, the appellant stipulated to the proper collection and testing of both urine samples and to the fact that his urine contained the metabolite for cocaine on the first urinalysis and d-amphetamine on the second urinalysis test. The sole question, therefore, was whether the use of the drugs in question was knowing. We find that it is appropriate to rely on the permissive inference in this case and that, in applying such an inference, the evidence establishes the appellant's guilt beyond a reasonable doubt.

We have no doubt the members disbelieved the unlikely chain of events the appellant attempted to show at trial and we likewise disbelieve it. The defense forwarded by the appellant ran counter to logic and common sense. The appellant contends his wife, at a cookout attended by their neighbors, laced her own water bottle with cocaine and then, with total disregard for the fact someone else might mistake it for their own, set it down in the open. This sequence of events is even less believable given the wife's testimony that she was fully aware that her husband, a military member subject to drug testing, often drank from her drinks. The appellant further claims that in addition to unknowingly consuming his wife's drug-laced drink, he consumed enough of the drug to test positive the next day but not enough that he felt the effects of the drug. On top of all of this, the appellant wants this Court to believe he had the misfortune of being selected for a random urinalysis test the very day after his unknowing and innocent ingestion of cocaine. The appellant then contends this sequence of events essentially repeated itself less than a month later causing him to test positive for amphetamine. Given the improbability of the evidence on its face, we find there was no need for the Government to rebut it in order for the permissive inference to be sufficient to find knowing use.

Accordingly, considering the evidence in the light most favorable to the prosecution, we find the evidence factually sufficient to prove the appellant's guilt beyond a reasonable doubt.

*Instruction Concerning Prior Inconsistent Statement*

The appellant complains that the military judge erred by instructing the members that his wife made statements prior to trial that were inconsistent with her testimony. We review a military judge's decision to provide instructions to the members for an abuse of discretion. *United States v. Smith*, 34 M.J. 200, 203 (C.M.A. 1992).

A close reading of Mrs. Faile's testimony reveals she did not make statements in court that were inconsistent with some of her prior declarations. The issue in dispute was whether the party was held the weekend before or after 29 February 2012. Trial counsel's questioning of Mrs. Faile clearly indicated trial counsel's belief that she previously indicated the party was held on 26 February 2012. However, Mrs. Faile denied this and no witnesses testified that she made a prior statement indicating the party was held on 26 February 2012. The unadopted question by trial counsel is not evidence. *See United States v. Barbeau*, 9 M.J. 569 (A.F.C.M.R. 1980); *United States v. Watson*, 14 M.J. 593 (A.F.C.M.R. 1982).

Although the instruction was erroneous, we find it did not prejudice the substantive rights of appellant. First, the instruction was evidentiary in nature, "which went solely to credibility as opposed to an instruction on the elements." *United States v. Gillespie*, 47 M.J. 750, 757 (A.F. Ct. Crim. App. 1997). Second, the wording was not such that it advised the members that an inconsistent statement had been made. To the contrary, the members were instructed that a prior inconsistent statement may have been made but that it was their responsibility to determine if one had actually been made. The members were further advised that they could only consider the statement to assess Mrs. Faile's credibility if they determined it to be inconsistent with a prior statement.

Court members are presumed to follow the military judge's instructions absent evidence to the contrary. *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). We see no reason to find otherwise in this case. They were advised only to consider the prior statement if they determined it was inconsistent with her testimony.

We find no prejudice to the appellant because Mrs. Faile's story that her husband not once, but twice, unknowingly drank her drug-laced beverage on the eve of a urinalysis test was so improbable it significantly damaged her credibility. Even if members relied on the instruction and concluded she made a prior inconsistent statement, it would have done no more damage to her credibility than her actual testimony at trial had already done.

*Improper Argument - Facts not in Evidence*

We review a military judge's ruling on an objection to argument for an abuse of discretion. *United States v. Briggs*, 69 M.J. 648, 650 (A.F.C.C.A. 2010) (citing *United*

*States v. Macklin*, 104 F.3d 1046, 1049 (8th Cir. 1997)). A court-martial verdict must be based solely on the evidence admitted at trial. *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983) (citing *United States v. Bouie*, 26 C.M.R. 8 (C.M.A. 1958)). Furthermore, the arguments of counsel are not evidence. *Id.* "When counsel argues facts not in evidence, or when he discusses the facts of other cases, he violates both of these principles." *Id.* at 29-30.

"When no objection is made during the trial, a counsel's arguments are reviewed for plain error." *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (citing *United States v. Schroder*, 65 M.J. 49, 57–58 (C.A.A.F. 2007)). "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 of the accused." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

During her closing argument, trial counsel argued to the members that they heard that Mrs. Faile previously said that the party where she placed the cocaine in the water bottle occurred "on the 26th of February." As noted in our discussion above, Mrs. Faile was extensively cross-examined on this issue but never conceded that she made the statement and no other witness testified that she made the statement. The only suggestion this statement was made was trial counsel's question which, if not adopted by the witness, is not evidence. Thus, when trial counsel argued that Mrs. Faile admitted she previously said the party was on 26 February 2012, she was arguing facts not in evidence. Trial defense counsel did not object to the statement.

Trial counsel's treatment of this issue consisted of only five sentences in her entire findings argument and contained – at least in certain points – qualifying language. For example, while trial counsel initially argued there had been a prior inconsistent statement, she softened this stance in the last sentence of her closing argument, stating, "you're able to decide whether or not that's an inconsistent statement." This hardly constitutes an overwhelming indictment on the credibility of Mrs. Faile. Furthermore, the members were provided two separate instructions that had a bearing on this issue. The members were advised by the military judge that the arguments of counsel were not evidence and that they were to base the determination of the issues in the case on the evidence as they remembered it. Additionally, the members were instructed that it was their responsibility to determine whether a prior inconsistent statement had been made.

The appellant asserts on appeal that this issue was crucial because Mrs. Faile was the defense's most important witness and the case turned on her credibility. We do not dispute that assessment; however, trial counsel's brief reference to an alleged prior inconsistent statement had a negligible impact on her credibility. The real damage to her credibility was done by her own testimony. Mrs. Faile's story detailing how the appellant innocently ingested illegal drugs not once, but twice, so strained her credibility that any additional damage to it was superfluous.

As the statement of trial counsel consisted of a fact which was not in evidence, it was an error for the military judge not to interrupt trial counsel's argument sua sponte. Despite the error, we conclude that based on the facts of this case the appellant was not materially prejudiced by the argument of trial counsel.

*Motion for Mistrial*

Because the appellant's last two assignments of error are closely related, both factually and in the law, we address them concurrently. The appellant asserts the military judge abused his discretion in not granting a mistrial based on trial counsel's statements during sentencing argument that (1) the members could rely on the convening authority's mitigating action, and (2) suggested she spoke for the convening authority.[5]

The law is well settled that "declaration of a mistrial is a drastic remedy," and should be used only to avoid "manifest injustice." *Rushatz*, 31 M.J. at 456; *See United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993). A military judge's denial of a motion for a mistrial is reviewed for a clear abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003) (citing *Dancy*, 38 M.J. at 6).

Improper argument is generally cured by a cautionary instruction to the members and not declaration of a mistrial. A curative instruction is the favored remedy for curing error caused by members hearing inadmissible evidence or improper argument, provided any possible prejudice to the appellant is negated by the curative instruction. *United States v. Mansfield*, 33 M.J. 972, 986 (A.F.C.M.R. 1991) (citing *United States v. Evans*, 27 M.J. 34 (C.M.A. 1988), *cert. denied*, 488 U.S. 1011 (1989)).

Assistant trial counsel's statement during sentencing argument concerning the convening authority's ability to provide financial relief to the appellant's family was clearly an improper argument. The military judge responded promptly to this improper argument and stopped assistant trial counsel before she was even able to finish the sentence. The military judge then immediately reminded the members of his instruction that while the convening authority could direct any forfeiture of pay be paid to the accused's dependents that they were not to consider this in "any way, shape or form." The members acknowledged they had been given the instruction and could follow it.

In the Article 39(a), UCMJ, session held immediately after the statement was made, defense counsel asked for a mistrial. In addition to voicing concern with the statement about mitigating action by the convening authority, defense counsel also objected to assistant trial counsel's use of the word "we" throughout her sentencing

[5] Both of these issues were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

argument. As noted above, following the Article 39(a), UCMJ, session, the military judge addressed the issues raised by defense counsel in detail with the members.

This was not a case that required the drastic remedy of a mistrial and thus, the military judge did not abuse his discretion by denying the defense motion. The military judge responded immediately to the matters raised and issued proper curative instructions which negated any possible prejudice to the appellant.

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court