UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BRANDA E. FITZPATRICK
United States Air Force

ACM 35235

20 September 2004

Sentence adjudged 20 April 2002 by GCM convened at Andrews Air Force Base, Maryland. Military Judge: Ann D. Shane.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel William B. Smith.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto. In deciding this case, we have not considered the military judge's post-trial questioning of the court members. *See* Mil. R. Evid. 606(b); *United States v. Loving*, 41 M.J. 213, 234-39 (C.A.A.F. 1994).

The military judge's preliminary instruction to the members that "the accused is presumed at this point to be guilty" of the offense was clearly erroneous. However, the balance of the instructions concerning the presumption of innocence and the burden of proof, both preliminary and on findings, were correct. The statement in question was

obviously a mere slip of the tongue. "When read in context, the instructions as a whole emphasize the presumption of innocence and the burden on the Government to prove appellant's guilt beyond a reasonable doubt." *United States v. Czekala*, 42 M.J. 168, 171 (C.A.A.F. 1995).

The error in the case sub judice is similar to the one addressed in *United States v. Hanley*, 974 F.2d 14, 17 (4th Cir. 1992), in which the judge instructed the jury that if they entertained a reasonable doubt as to the guilt of the defendant, "then it will be your duty to find the defendant guilty." The Court, on appeal, observed, "We simply do not believe that a reasonable jury would have been misled by this isolated mistake, especially considering the idea ingrained in the psyche of all Americans that a defendant is presumed innocent unless found guilty beyond a reasonable doubt by a jury of his peers." *Id*. at 18.

We are satisfied beyond a reasonable doubt that the erroneous statement did not materially prejudice the substantial rights of the appellant and, therefore, was not plain error. *Czekala*, 42 M.J. at 170. *See also United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). Because this was not plain error, we hold that trial defense counsel's failure to object constitutes waiver. *See* Rule for Courts-Martial 920(f). Even if no waiver, in light of the discussion above, we are satisfied beyond a reasonable doubt that the error was harmless. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

The findings and the 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator