UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant TERRY A. FLETCHER
United States Air Force

ACM 34945

27 February 2004

Sentence adjudged 28 September 2001 by GCM convened at Patrick Air Force Base, Florida. Military Judge: Harvey A. Kornstein.

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

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel David N. Cooper.

Before

STONE, MOODY, AND JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, contrary to his pleas, of one specification of use of cocaine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The general court-martial, consisting of officer and enlisted members, sentenced him to a bad-conduct discharge, confinement for 1 month, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant avers that: (1) The prosecutor made improper comments in her findings argument that materially prejudiced the substantial rights of the appellant; and (2) The evidence is neither legally nor factually sufficient. Finding no material error affecting a substantial right, we affirm.

The appellant was assigned to Cape Canaveral Air Force Station in Florida. On 9 April 2001, he submitted a urine sample pursuant to a random inspection of his organization. The urine sample tested positive for cocaine. On 24 April 2001, the appellant consented to another urinalysis, this one also testing positive for cocaine. These two urinalyses formed the basis of the charge and specification.

After the presentation of evidence on findings, the circuit trial counsel (CTC) argued for the government. In her argument, she made numerous statements which the appellant argues were improper and operated to his material prejudice. For example, the appellant alleges that the prosecutor improperly argued facts not in evidence, interjected her own personal beliefs into the case, and improperly disparaged both the appellant and his trial defense counsel. These statements, which will be described in more detail below, form the basis of the first assignment of error. At trial, the defense counsel objected to some, but not all, of the prosecutor's allegedly improper statements.

I. Improper Findings Argument

The standard of review 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). *See also United States v. Diamond*, ACM 33605 (A.F. Ct. Crim. App. 12 Aug 1999) (unpub. op.); *United States v. McNeal*, ACM S29528 (A.F. Ct. Crim. App. 12 Feb 1999) (unpub. op.). Failure to object to improper argument waives the objection absent plain error. Rule for Courts-Martial (R.C.M.) 919(c); *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998).

A. Statements to which trial defense counsel objected

By way of background, it should be noted that during the defense counsel's cross-examination of a government witness, Mr. V, the witness slumped in his chair and was taken to the hospital. Mr. V did not return to the trial. The appellant agreed on the record to forgo further cross-examination. During the rebuttal portion of her findings argument, the CTC stated:

> [T]he defense attorney. . . is the one with the overpowering and yelling and cutting people off in cross examinations and the wild argument he just gave you . . . He's the one that could have scared a witness and freaked them out. Me, I won't cut them off. I'll apologize if I do.

The circuit defense counsel (CDC) then objected:

> CDC: Objection, Your Honor, improper argument.
>
> MJ: Sustained. Don't comment on the character of the defense attorney.

. . . .

CTC: Well, ask yourselves, do I scare you? Am I going to . . .

CDC: Again, objection, Your Honor.

MJ: Overruled.

CTC: Will I cause you to lie?

MJ: Sustained.

CTC: Now---

MJ: Hold on a second. I'm sustaining the objection. We're not trying the character of counsel.

CTC: Yes, Your Honor.

The appellant contends that the trial counsel's comments improperly bolstered her credibility and denigrated the credibility of the CDC.

Clearly, it is improper for a lawyer to "degrade the intelligence, ethics, morals, integrity, or personal behavior of others, unless such matters are legitimately at issue in the proceeding." TJAG Policy Memorandum, TJAGD Standards (TJS) – 2, *Air Force Standards of Professional Conduct and Standards for Civility in Professional Conduct*, Attachment 2, ¶ 28 (20 December 2002). Furthermore, a prosecutor may not seek to induce the panel to trust in the government's evaluation of the facts rather than in its own. *See United States v. Ramirez-Velasquez*, 322 F.3d 868, 874 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 107 (2003); *United States v. Young*, 470 U.S. 1, 18-19 (1985). *See also United States v. Perez-Ruiz*, 353 F.3d 1, 13 (1st Cir. 2003) (A prosecutor may not imply "that the jury should credit the prosecution's evidence simply because the government can be trusted").

However, in the case sub judice, the prosecutor was, at least in part, responding to an attack by the trial defense counsel who, in his own findings argument, referred to the prosecution's dismissal of the possibility of unknowing contamination of the appellant's urine sample as "hypocritical." Such a reference attributes a moral failing to the prosecution and could be expected to invite a response. Although the response which the CTC provided was improper, we do not find that, taken in context, it materially prejudiced the substantial rights of the appellant. *Young*, 470 U.S. at 12. Therefore, we conclude that the remarks were harmless error.

B. Statements to which trial defense counsel did not object

As stated above, failure to object to improper argument constitutes waiver, absent plain error. The burden is on the appellant to establish three criteria: (1) There must be error; (2) The error must be plain or obvious; and (3) The error must materially prejudice the substantial rights of the appellant. *Powell*, 49 M.J. at 464.

1. Interjection of the prosecutor's personal beliefs

In commenting on a prior inconsistent statement by the appellant, the prosecutor made the following comment:

> Now, I went a long time cross examining him, gave him the opportunity to have integrity or to make another fiction for you, all the way through at the very end of my cross examination, I asked him about why? And his excuse showed that he had no integrity.

The appellant points out that throughout the prosecutor's findings argument, she repeatedly referred to herself through such phrases as "I would ask you," "I think," "I knew it," and the like.

A prosecutor may not interject his or her personal beliefs into a trial. To do so constitutes "a form of unsworn, unchecked testimony and tend[s] to . . . undermine the objective detachment that should separate a lawyer from the case being argued." *Young*, 470 U.S. at 8, n.5 (quoting American Bar Association (ABA) Standards for Criminal Justice, Standard 3-5.8(b), Commentary (2d ed. 1980)). *See also United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980).

In *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977), our superior court overturned an arson conviction due to improper argument by the prosecutor. Among other comments, the prosecutor stated during the findings argument:

> I think that having listened to all of the evidence in this case, there is very little doubt, *in fact in my mind there is no doubt whatsoever*, that the man sitting over there at the defendant's table, Mr. Terry Knickerbocker, was in fact the individual who was involved in this matter as a principal.

Knickerbocker, 2 M.J. at 129. (emphasis in original). In effect, the prosecutor had attempted to substitute his own judgment for that of the panel on the ultimate issue in the case.

In the case sub judice, we conclude that the prosecutor's remarks did not rise to this level. For the most part, she was simply commenting on the significant impeachment

of the appellant's own evidence concerning his reported excellent character for truthfulness. We find the prosecutor's other uses of the subjective pronoun to be artless; we are not able to find any error in these remarks to be obvious. Therefore, we find that they do not constitute plain error. As a consequence, we conclude that the objection has been waived.

2. Disparaging comments about the appellant's credibility

The appellant also complains that the prosecutor improperly disparaged the appellant's credibility as a witness through the remarks quoted above as well as others. For example, she argued that the appellant "has zero integrity and [his] telling us that he didn't knowingly use cocaine is utterly unbelievable."

These comments were proper and relevant when viewed in the context of the trial as a whole. *See United States v. Golston,* 53 M.J. 61 (C.A.A.F. 2000); *United States v. Grandy,* 11 M.J. 270 (C.M.A. 1981); *Young,* 470 U.S. at 11; *United States v. Fields*, 72 F.3d 1200 (5th Cir. 1996). The appellant presented considerable evidence in his case in chief of both his good military character as well as his excellent character for truthfulness. He testified in his own behalf, emphatically denying that he had ever used cocaine and stating that he had no idea how the two urinalyses came back positive. The most critical testimony came when his attorney asked him whether he had, "between on or about 1 April and 24 April 2001, knowingly [used] cocaine." The appellant replied, "No, sir, I've never used cocaine before in my life." Unfortunately for the appellant, the defense counsel returned to the question: "Again, did you on or about 1 April or 24 April 2001 knowingly use cocaine?" To this the appellant responded, "No, sir, I did not. I've never used drugs and I never will."

As a result of these questions, the trial counsel questioned him about his prior drug use. The appellant conceded that he had tried marijuana as a teenager and had so admitted on a form he filled out in order to obtain a security clearance. The prosecutor, as to be expected, made much of this during her findings argument. We find that her remarks were fair comment given the state of the evidence and do not constitute obvious error. Therefore, we conclude that they do not constitute plain error and, as a result, we conclude that failure of the trial defense counsel to object has waived the issue.

3. Arguing facts not in evidence

This aspect of the assignment of errors refers to the prosecutor's efforts to counter the effect of the appellant's character evidence. This evidence included testimony as to his active and sincere involvement in church activities as well as to his good duty performance and excellent character for truthfulness. In addressing the members, the prosecutor stated the following:

> Is a religion an indicator of law abidingness? Is it okay to play faith for a get out of jail free card--nah uh. Do people even with true faith make criminal mistakes . . . do they use drugs? Yeah. Do they commit adultery on their wives? Ask Jessie Jackson about his two year old daughter. Ask Jerry Falwell about the hooker that he got caught with having intercourse with in a car in Palm Springs. Jim Bakker cheating on his taxes. I challenge you in findings to come up with the rest. I made a huge list but I don't have time to go over them. Is the fact that he's done good work mean that he can't use cocaine, nah uh. Dennis Quaid, prolific actor, needed inpatient treatment. Friends, Matthew Perry, fabulous performer, shows up every week. Had to go to inpatient treatment for drugs. How about this one, Robert Downy, Jr., wins an Emmy for the performances that he had during the time with which he was actually being arrested, charged and showing up positive for having used cocaine.

Trial defense counsel did not object, nor did the military judge sua sponte offer any kind of curative instruction. Indeed, the only comment from the bench was the inclusion of the standard instruction that "the arguments of counsel are not evidence but they may assist you in forming your view of the evidence."

Of course, it is not necessarily error for a prosecutor to comment on "contemporary history" or other matters of common knowledge. *United States v. Barrazamartinez*, 58 M.J. 173, 175 (C.A.A.F. 2003). In that case the prosecutor made reference to the war on drugs in arguing for an appropriate sentence for an offender convicted of wrongfully importing marijuana.

We find that the case sub judice is distinguishable from *Barrazamartinez*. First of all, it entails a findings argument rather than sentencing. That is, it did not argue matters of common knowledge in order to place the offenses in a social and moral context relevant to fashioning an appropriate punishment. On the contrary, it invited comparison between the appellant's case and others which bore no similarity and some of which dealt with offenses other than drugs--prostitution, tax evasion, etc--in order to persuade the panel of the appellant's guilt. Clearly the prosecutor could not have introduced such matters into its case in chief, even in an attempt to rebut the appellant's character evidence, as these matters have no relevance to anything properly before the court.

The specificity and detail in the prosecutor's argument about prominent cultural figures and their crimes went beyond the more generalized comments found in *Barrazamartinez* and constituted matters not in evidence. The prosecutor is "never justified in arguing facts not of record." *United States v. Fearns*, 501 F.2d 486, 489 (7th Cir. 1974). *See also Ramirez-Velasquez,* 322 F.3d. at 874; *United States v. Nelson*, 1 M.J. 235, 239-40 (C.M.A. 1975); *United States v. Davis*, 47 C.M.R. 50, 53 (A.C.M.R. 1973). The prosecutor even went so far as to advise there were other cases that she had

thought of that she did not have time to mention and she encouraged the panel to make their own similar list while deliberating. This was a direct and explicit invitation to the panel to analogize the appellant's case with other ones that could not have any possible bearing on the proper determination of the appellant's guilt.[1] We find that this argument was error and that it was obvious, satisfying the first and second prongs of the *Powell* test.

The only remaining question is whether it materially prejudiced the substantial rights of the appellant. In making this determination we will consider the improper statements in light of the entire record, to include the strength of the case against the appellant. *See United States v. Diffoot*, 54 M.J. 149, 151 (C.A.A.F. 2000); *Horn*, 9 M.J. at 430*; United States v. Kiddo,* 16 M.J. 775, 776 (A.C.M.R. 1983); *United States v. Anderson*, 30 C.M.R. 223, 227 (C.M.A. 1961) ("Reversal of a conviction on the ground of improper argument by trial counsel is not justified if the evidence of guilt is clear and compelling."); *Ramirez-Velasquez*, 322 F.3d at 875; *United States v. Henry*, 2 F.3d 792, 794 (7th Cir. 1993). As the Supreme Court observed in *Young*, "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Young*, 470 U.S. at 11.

At the outset, we note no objective unfairness in the way the prosecution conducted its case up to the findings argument. The evidence consisted of two urinalysis reports interpreted by an expert, as well as other witnesses who established the requisite chain of custody. The prosecution's examination of the expert was thorough and competent; her cross-examination of the appellant was effective.

As to the strength of the case against the appellant, the uncontroverted testimony of the government expert established that the urine testing was done properly, that any mistakes attributable to the laboratory were minimal and did not impugn the reliability of the results, and that the two tests were sufficiently far apart so as to reflect two separate and distinct ingestions of cocaine. The appellant's own testimony provided no reason seriously to believe or even suspect that unknowing ingestion had occurred. His case relied instead on the possibility of laboratory error or some other type of unknowing contamination of the urine samples. The collection and testing were done at the same base and laboratory only a few weeks apart. The expert established the test results were the result of two separate, independent ingestions. In our view, these circumstances are highly relevant and substantially diminish the likelihood that there was any contamination, mixup, or laboratory error. The second positive urinalysis vitiates the

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[1] The appellant also alleged that the prosecutor's remarks that he did not know she was in possession of his security clearance questionnaire constituted facts not in evidence. However, the appellant concedes that the record substantiates that the appellant was unaware of this fact. We do not consider these remarks, therefore, to be an attempt to argue matters not of record.

credibility of this argument, especially when there was no serious discussion about innocent ingestion as the cause of the positive results.

Moroever, though the appellant testified emphatically that he had not used cocaine, his blanket denial of ever having used drugs at any time in his life permitted the prosecution to elicit the otherwise inadmissible fact of his prior marijuana use. His emphatic and clear denial of any prior drug use in light of his prior admission of marijuana use was a substantial windfall to the prosecution. This testimony greatly diminished the appellant's overall credibility and more specifically his good military character and character for truthfulness. On the whole, we find that the case against the appellant was "strong and conclusive" while the defense's theory was implausible. *See United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985). We find, therefore, "that the evidence of record weighs heavily in support of the conviction brought in by the court after their deliberations." *Horn*, 9 M.J. at 430.

Viewed in the context of the case as a whole, including the strength of the government's evidence, we conclude that the prosecution argument did not "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Young*, 470 U.S. at 16. *See also United States v. Dunston*, ACM 26243 (A.F.C.M.R. 23 November 1987) (unpub. op.); *United States v. Falcon*, 16 M.J. 528, 531 (A.C.M.R. 1983). As a consequence, we further conclude that the erroneous argument did not materially prejudice the substantial rights of the appellant and that the argument was not plain error within the meaning of *Powell*. *Powell*, 49 M.J. at 464. *See Henry*, 2 F.3d at 795 ("Strong evidence of guilt eliminates any lingering doubt that the prosecutor's remark unfairly prejudiced the jury's deliberation"); *Fields*, 72 F.3d at 1208 ("[E]ven if the prosecutor's argument was improper, it would not cast serious doubt upon the verdict. The evidence of the defendant's guilt was overwhelming, so any error would be harmless.") Therefore, because the prosecution's argument did not constitute plain error, we conclude that failure of the trial defense counsel to object waived the issue.

II. Legal and Factual Sufficiency of the Evidence

We resolve this issue adversely to the appellant. Considering the evidence in the light most favorable to the prosecution, we find that a rational factfinder could have found all essential elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The approved 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); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

JOHNSON WRIGHT, Judge (concurring in part and dissenting in part):

I concur with the majority's resolution that the evidence presented at trial was legally and factually sufficient to support the conviction. However, I do not agree that the prosecutor's improper and inflammatory remarks in closing did not materially prejudice the substantial rights of the appellant. I therefore dissent.

A lawyer is prohibited from expressing her personal belief or opinion in the truth or falsity of testimony or evidence during closing argument. *Knickerbocker*, 2 M.J. at 130, n.1 (quoting ABA Standards for Criminal Justice, Standard 5.8, *The Prosecution Function* (1971)). "Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." *Young*, 470 U.S. at 8, n.5 (quoting ABA Standards for Criminal Justice, Standard 3-5.8(b), Commentary). Furthermore, such prohibited expression is considered unprofessional conduct for the prosecutor. *United States v. Clifton*, 15 M.J. 26, 30, n.5 (C.M.A. 1983) (citing ABA Standards for Criminal Justice, Standard 5.8).

Under a plain error analysis, the error must be obvious and substantial and must have had an unfair prejudicial impact on the jury's deliberations. *Powell,* 49 M.J. at 465. Our superior court further addressed this issue:

> Although the Supreme Court was not addressing plain error in *Arizona v. Fulminante*. . .that decision provides a pertinent example of an error that "affects substantial rights" but, nevertheless, does not necessarily warrant reversal of a conviction. In *Fulminante*, the Supreme Court recognized that a confession is one of the most powerful types of evidence but, nevertheless, the Court held that the erroneous admission of an involuntary confession could be harmless beyond a reasonable doubt, because of other overwhelming evidence of guilt.

Id. at 464.

The prosecutor stepped deep into the quagmire of improper comment; ranging from personally attacking defense counsel's character, to using excessive pronouns ("we," "our," or "us") that figuratively placed her in the jury box throughout her findings

argument, to improperly commenting on high-profile, very irrelevant, and extremely prejudicial cases. During argument, she inappropriately focused on famous people and their alleged transgressions. She highlighted Jessie Jackson, Jerry Falwell, Jim Bakker, Dennis Quaid, Matthew Perry, and Robert Downey, Jr. She discussed adultery, tax fraud, improper sexual activity, and finished with a reference to Mr. Downey and his cocaine use. Then she invited the members to make their own lists. Such a blatant and obvious impropriety easily inflamed the passions or prejudices of the panel members. Comments by CTC, viewed together and taken in context of the entire record of trial, did materially prejudice the appellant's substantial rights. The appellant's testimony was very important in this case. It countered the government's evidence of *knowing* use. It is clear from the record that at least one panel member was interested in why the appellant took leave prior to the second urinalysis test. Another member wanted to know when the appellant was first notified of the urinalysis tests. Arguably, at this point in the trial, all of the members were not convinced beyond a reasonable doubt that the appellant's use was knowing. CTC's unfair comments and personal opinions invaded the territory reserved solely for the panel members and jeopardized the appellant's right to a fair trial.

While the government's evidence against the appellant may have been strong, it was not overwhelming (no eyewitnesses who saw the appellant ingest cocaine, no admissions or statements against interest, the appellant presented 19 ½ years of stellar military service, the appellant knowingly consented to the second urinalysis test, etc.) Accordingly, the findings and the sentence should be set aside.

OFFICIAL

HEATHER D. LABE
Clerk of Court