UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MARK GIBSON
United States Air Force

ACM 35150

17 August 2004

Sentence adjudged 23 January 2002 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Sharon A. Shaffer (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Martin J. Hindel.

Before

STONE, GENT, and MOODY
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

A general court-martial composed of a military judge sitting alone found the appellant guilty, in accordance with his pleas, of using cocaine and fraudulent enlistment (two specifications), in violation of Articles 112a and 83, UCMJ, 10 U.S.C. §§ 912a, 883. He was also convicted, contrary to his pleas, of divers uses of cocaine, in violation of Article 112a, UCMJ. His adjudged and approved sentence was a bad-conduct discharge, confinement for 1 year, and reduction to the grade of E-1.

The appellant assigns four errors for our consideration: (1) The military judge improperly considered profile evidence; (2) There was insufficient evidence of divers uses of cocaine; (3) The manner of removing the appellant's hair for a drug test was pretrial punishment, or in the alternative, the trial defense counsel was ineffective; and (4) The military judge improperly considered privileged spousal communication. Issues 2, 3, and 4 are submitted pursuant to *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982). We affirm.

Background

The appellant was charged with using cocaine on divers occasions between 1 September 2000 and 13 April 2001. He pled guilty to this charge, except the word "divers." The military judge accepted his plea to using cocaine on 12 April 2001.

The government elected to go forward with proof that the appellant used cocaine on divers occasions. Trial counsel first offered the testimony of the appellant's spouse, Gina M. Gibson. The Gibson family resided at Shaw Air Force Base, South Carolina. Ms. Gibson testified that on a Friday night, 1 September 2000, preceding the three-day Labor Day weekend, the appellant was supposed to attend a minor league baseball game in Charlotte, North Carolina. She later learned there was no minor league baseball game in Charlotte that weekend. Her husband got a hotel room there and made a series of bank withdrawals, totaling over $800. Nearly $500 was withdrawn in $100 increments between 0500 and 0540 Saturday morning. The appellant called his wife, and in the presence of another man, said that he thought his bankcard had been stolen, but Ms. Gibson found that he still had it after he returned home.

When Ms. Gibson saw the appellant Saturday afternoon, he was nervous and defensive when she asked about his conduct. He also had dark bluish-purple circles under his eyes and two flat, grayish-yellow burn marks on his lips. One mark was on the top lip and one was on the bottom lip. The burns were on the inside edge of his lips, at a place where one would hold a cigarette. After the appellant returned to his home he went to sleep for about five hours. His sleep was not disturbed by children playing in the house. Ms. Gibson said that although the appellant occasionally napped on prior weekends, his sleep on that weekend was different.

Ms. Gibson next testified that her husband had been addicted to crack cocaine before they began to date. Before their marriage in 1999, the appellant told her that while he was living in New Mexico, he became addicted to crack cocaine. He ended up homeless because he sold all of his possessions to buy crack. His family sent him money to return to New Jersey on several occasions, but he spent it on crack rather than returning home. Ms. Gibson learned that the appellant resumed using cocaine while they were dating during February, March, and April 1998. The appellant took money from her and fell in arrears on child support payments. She saw him after he had used cocaine

on about six occasions. He had dark circles under his eyes and exhibited unusual and defensive behavior. He also slept very soundly and for an abnormal length of time during the day. The appellant told her that burn marks on the lips were a sign of crack use. He had burn marks on his lips then, and he said using crack caused them.

Ms. Gibson also testified that the burn marks she saw in September 2000 were just like those she saw on the appellant's lips when they were dating. The dark circles under his eyes and his unusual sleep pattern were also like those she observed when the appellant used cocaine while they were dating.

Ms. Gibson further testified about her observations of the appellant on two other occasions during the charged time period. During the three-day weekend beginning on 17 February 2001, the appellant was supposed to go to Atlanta. He went instead to Augusta. He removed $160 from their bank account with no explanation. When he returned home the following day, he had dark circles under his eyes. He was pale and edgy. His behavior was erratic for a couple of days. Both his appearance and behavior were consistent with what she observed when he used cocaine before their marriage.

About a month later, during the long weekend beginning on Friday, 30 March 2001, the appellant went to Columbia with a group of friends. He was supposed to go to a café. The appellant called Ms. Gibson at about 0530 on Saturday morning. His tone was urgent and demanding. He was threatening and angry. When she picked him up from a hotel later that morning, he was very hostile. He was pale and had circles under his eyes. He appeared as he had in the past when he used cocaine. At about noon, he went to bed and slept until after dinnertime. His sleep pattern was consistent with what she observed when he used cocaine before their marriage. Ms. Gibson also learned that the appellant had removed $130 from their savings account.

The government next offered the testimony of Senior Detective Rodger S. Rabon. He worked in the Organized Crime and Vice Control Unit (Drug Unit) of the Sumter City Police Department. Detective Rabon had been a police officer since 1994 and had specialized training in, among other things, the manufacture of drugs, how they are hidden, "common usage," and "the signs to look for of usage." He also had specialized training in detecting crack users by their body language and appearance. Since his role in the Drug Unit was to detect drug users and to prosecute those who use and sell drugs, he engaged in undercover operations and worked with informants. As a result, he had nearly daily contact with crack users. He developed a list of common characteristics of crack users based upon his training, experience, and the views of other detectives and drug counselors. He acknowledged that not all crack users display all the characteristics on his list. He also said that he couldn't detect all crack users simply by their appearance.

The government offered Detective Rabon as an expert in the characteristics of crack users. The defense objected to his testimony on the grounds that Detective Rabon

was not an expert, his "list" of characteristics was not reliable, the characteristics were not relevant, consideration of the characteristics would be unfairly prejudicial, and the list was impermissible profile evidence.

The military judge found Detective Rabon qualified to offer expert testimony concerning the characteristics of cocaine users. The military judge said that Detective Rabon's testimony was relevant, and coupled with Ms. Gibson's testimony, it was helpful in deciding whether the appellant used cocaine on more than one occasion. The military judge also concluded that Detective Rabon's testimony was reliable since other detectives used the same list of characteristics to determine whether one might be under the influence of cocaine. Finally, the military judge concluded that Detective Rabon's testimony was not unfairly prejudicial.

But the military judge limited Detective Rabon's testimony. She ruled that Detective Rabon could not discuss the social effects of crack cocaine. She also indicated that she would not allow Detective Rabon to give an opinion about whether the appellant was a crack addict based upon whether he displayed the profile of those who use cocaine.

The military judge allowed Detective Rabon to testify about the general physical characteristics of cocaine users. He discussed the following characteristics: weight loss; nervousness, including twitching, scratching, an inability to sit still and talkativeness; burns on the mouth; a haggard look, including dark circles around the eyes or bloodshot eyes; and unusual sleep patterns.

Analysis

In *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992), our superior court established a four-part test for the admissibility of expert testimony:

> Mil. R. Evid. 702-705 and 403 operate to establish a simple four-part test for admissibility of expert testimony: (1) Was the witness "qualified to testify as an expert"? (2) Was the testimony "within the limits of [the expert's] expertise"? (3) Was the "expert opinion based on a sufficient factual basis to make it relevant"?, and (4) "Does the danger of unfair prejudice created by the testimony outweigh its probative value?"

(Citations omitted.)

In *United States v. Diaz*, 59 M.J. 79, 89 (C.A.A.F. 2003), our superior court said that "[t]hese rules reflect the intuitive idea that experts are neither omnipotent nor omniscient."

We conclude that the military judge properly considered Detective Rabon's testimony as that of an expert witness in the behavior and characteristics of cocaine users. His testimony was within his expertise and his testimony was relevant. The danger of any unfair prejudice caused by Detective Rabon's testimony was substantially outweighed by its probative value. Mil. R. Evid. 403.

In *United States v. Banks*, 36 M.J. at 162, our superior court joined others[1] in denouncing the use of profile evidence. *Banks* defined profile evidence as "*any information or data* so as to place [an] appellant in an alleged 'group' of persons who have committed offenses in the past." *Id.* at 163. The Court reasoned that "[t]he argument usually follows that a defendant who shares common characteristics of the group is likely to have acted the same with respect to the crime charged." *Id.* Our superior court concluded that this is impermissible because "[o]ur system of justice is a trial on the facts, not a litmus-paper test for conformity with any set of characteristics, factors, or circumstances." *Id.* at 161. Our superior court also observed that the use of profile evidence violates Mil. R. Evid. 404(a)(1) which "precludes the prosecution from introducing character evidence of an accused who has not put his character at issue." *Id.*

There are exceptions to this rule. Military courts may permit the use of profile evidence in "narrow and limited circumstances," i.e., when it is used as background information to explain sanity issues or as an investigative tool to establish reasonable suspicion. *Id.* at 162. Profile evidence may also be admitted in rebuttal when a party "opens the door" by introducing potentially misleading testimony. *Id.* None of these circumstances are present in the case before us.

While "[c]ourts have condemned the use of profiles as substantive evidence of guilt," they have also acknowledged that "there is a fine line between potentially improper profile evidence and acceptable specialized testimony." *United States v. Long*, 328 F.3d 655, 666 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 921 (2003) (citations omitted). Experts may testify regarding the modus operandi of a certain category of criminals where those criminals' behavior is not ordinarily familiar to the average layperson. *Long*, 328 F.3d at 666.

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004); *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000). "We will not overturn a military judge's evidentiary decision unless that decision was 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *McDonald*, 59 M.J. at 430 (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)). A military judge abuses their discretion if their findings of fact are clearly erroneous or their conclusions

[1] *United States v. Beltran-Rios*, 878 F.2d 1208 (9th Cir. 1989); *United States v. Gillespie*, 852 F.2d 475 (9th Cir. 1988); *United States v. Khan*, 787 F.2d 28 (2d Cir. 1986); *United States v. Hernandez-Cuartas*, 717 F.2d 552 (llth Cir. 1983); *United States v. Taylor*, 716 F.2d 701 (9th Cir. 1983).

of law are incorrect. *McDonald*, 59 M.J. at 430 (citing *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)).

We conclude the military judge did not abuse her discretion. But even if we assumed that at least some portion of Detective Rabon's testimony constituted improper profile evidence, we find no prejudice. First, this was a bench trial. The military judge made it clear she would not consider profile evidence. Next, Ms. Gibson's testimony described in great detail the appellant's behavior and appearance when he used cocaine prior to their marriage. She recognized the same behavior and appearance on more than one occasion during the charged time period. Trial defense counsel's efforts to undermine Ms. Gibson's testimony were not persuasive. Finally, an analysis of the appellant's hair indicated that he was a chronic cocaine user during a portion of the charged time period. Given the overwhelming evidence of divers uses, we conclude any error was harmless. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

We carefully reviewed the record of trial, the briefs of appellate counsel, declarations from the appellant and his trial defense counsel, as well as photographs provided by the appellant. We conclude that the remaining assignments of error are without merit. *Grostefon*, 12 M.J. at 436.

The 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); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court