UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JASON W. HEPBURN
United States Air Force

ACM S32073

28 October 2013

Sentence adjudged 20 June 2012 by SPCM convened at Spangdahlem Air Base, Germany. Military Judge: Dawn Eflein (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $980.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen; 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:

A special court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of distribution of marijuana; introduction of mushrooms containing psilocybin onto a military installation with the intent to distribute; introduction of mushrooms containing psilocybin onto a military installation; and possession of mushrooms containing psilocybin with the intent to distribute, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 6 months, forfeiture of $980.00 pay per months for 6 months, and reduction to E-1.

On appeal, the appellant asserts: (1) The Government violated his "military due process rights" by engaging in entrapment during an undercover drug distribution operation; (2) The military judge abused her discretion when she advised the appellant that she may consider whether circumstantial evidence of threats posted on Facebook pointed to consciousness of guilt; and (3) The evidence was legally and factually insufficient to support his convictions.[1] Finding no error that materially prejudices the substantial rights of the appellant, we affirm.

Background

The appellant and A1C SD both arrived at their first duty station, Spangdahlem Air Base (AB), Germany, in the summer of 2011. They were assigned to the same squadron and would see each other around the dormitories.

Not long after arriving in Germany, A1C SD developed an interest in cross-training into the Air Force Office of Special Investigations (AFOSI) career field. He met with representatives of AFOSI Detachment 518, Spangdahlem AB, to discuss the possibility in November 2011. The AFOSI representatives advised A1C SD he could improve his chances of cross-training by working as a confidential informant (CI) for AFOSI. A1C SD agreed and received training from AFOSI concerning CI activities.

When A1C SD had a conversation with the appellant wherein the appellant mentioned using Spice with some Army members, A1C SD reported it to AFOSI. Based on this information, AFOSI decided to investigate the appellant further. Soon after becoming a CI, A1C SD saw the appellant at the enlisted club. In the course of their conversation, A1C SD told the appellant he could not wait to go home on leave so he could get "high" again. The appellant responded "Oh, yeah, that would be great" and "You know, we could always go up to Amsterdam."

A1C SD reported this to AFOSI and they asked him to determine whether the appellant was going to Amsterdam and, if so, whether he intended to purchase drugs. A1C SD communicated with the appellant, mostly through Facebook messaging. A1C SD asked if he knew anyone who had marijuana to which the appellant responded, "No." A1C SD then asked if he was planning to go to Amsterdam and the appellant responded he might be going soon. A1C SD asked if he knew where they could get some marijuana in Amsterdam and the appellant responded, "No, but it's Amsterdam."

On 18 February 2012, the appellant informed A1C SD he was going to Amsterdam the next weekend and asked A1C SD if he wanted to go. A1C SD said he would go if he did not have to work. A1C SD eventually informed the appellant he could not go on the trip, but he met with the appellant, provided him with 20 Euros and asked

[1] All three issues were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

him to get as much marijuana as he could with the money while he was in Amsterdam. The 20 Euros had been provided to A1C SD by AFOSI as part of the investigation.

The appellant went to Amsterdam on 25 February 2012. A1C SD messaged the appellant via Facebook the next day and asked if he was back. The appellant responded, telling A1C SD to come by his room when he had the chance. A1C SD informed AFOSI. Under AFOSI observation, A1C SD went to the appellant's room. While there the appellant provided A1C SD with a plastic bag containing a substance A1C SD believed to be marijuana based on its appearance and smell. Prior to entering active duty, A1C SD had used marijuana approximately six times so he was familiar with the substance.

After leaving the appellant's room, A1C SD met with AFOSI where he provided them with the plastic bag he had received. Special Agent (SA) AM, who retrieved the bag from A1C SD, described the substance in the bag as a "green leafy substance." Based on his training and experience as an AFOSI agent, SA AM believed the substance looked and smelled like marijuana. As an agent, SA AM had seen marijuana "20, 30 plus times." The substance in question was not subjected to laboratory analysis.

During the first week of March 2012, the appellant told A1C SD he still had some of the marijuana left. A few days later, A1C SD went to the appellant's room again. While there he smelled marijuana and the appellant told him he had just smoked the rest of the marijuana.

At the same time they were using A1C SD as a CI to investigate the appellant, AFOSI was also utilizing another CI against the appellant. KW, a civilian employee at Spangdahlem AB, received CI training similar to that received by A1C SD. KW met the appellant at the enlisted club and they drank together. KW discussed his prior drug use to see if the appellant was involved with drugs. The appellant told KW he had recently gone to Amsterdam, got some marijuana, and smoked it.

KW reported this conversation to AFOSI. AFOSI asked KW to continue talking with the appellant and ask if he could go on any trips to Amsterdam with the appellant. In early March 2012, the appellant and KW made plans to go to Amsterdam in the near future. The appellant messaged A1C SD on Facebook, informing him he was going to Amsterdam to get some "shrooms," and told A1C SD he could get a box for him. When the appellant indicated he did not know how much a box would cost, A1C SD asked him to get what he could for about 20 Euros. The final plans for the trip to Amsterdam were made on 16 March 2012, with the appellant agreeing to drive.

The appellant, KW, and another airman drove to Maastricht, Netherlands on 17 March 2012. Upon arriving, the trio eventually found a store that sold mushrooms. They looked around the store and talked with the owner about the different kinds of

mushrooms. The appellant purchased 3-5 boxes of mushrooms, indicating to KW that he was picking some up for someone else and maybe his girlfriend.

Before departing for Spangdahlem AB, the appellant hid the mushrooms in the trunk of his car underneath the spare tire. As they drove back to base, KW texted AFOSI to let them know they were on their way back. The appellant's vehicle was detained as he attempted to enter base. A subsequent search of the vehicle disclosed three paper bags, each containing between 15-20 grams of mushrooms. Upon questioning by AFOSI, the appellant denied ever using drugs, but admitted to going to a "head shop," purchasing four packages of mushrooms for 60 Euros, and transporting them onto base.

In May 2012, Investigator JM, who was assigned to the Spangdahlem Joint Drug Enforcement Team, was on Facebook when he noticed the appellant's name on his Facebook page because they had mutual friends. Investigator JM decided to look at the appellant's Facebook page. Investigator JM determined it was the appellant's Facebook page because it was under the name "Jason Hepburn," indicated he currently lived at Spangdahlem AB, and had pictures Investigator JM recognized as the appellant. While reviewing the appellant's Facebook page, Investigator JM noted two comments posted by the appellant: "someone is about to get burnt" and "snitches get stitches and they sleep in ditches." These comments indicated they were posted on 11 May 2012.

Entrapment

At trial the defense did not raise a motion to dismiss for entrapment based on a violation of the appellant's due process rights. The defense did, however, argue the defense of entrapment. On appeal, the appellant contends the Government violated his "military due process" by: (1) Creating, rather than infiltrating, a criminal enterprise; (2) Irresponsibly choosing to use A1C SD as a CI; and (3) Using coercive methods.

As a preliminary matter, despite the appellant's contention to the contrary, there is no concept of "military due process" providing rights beyond those afforded him under constitutional due process. *See United States v. Berkhimer*, 72 M.J. 676 (A.F. Ct. Crim. App. 2013), and *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013) (holding that service members do not "enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the [*Manual for Courts–Martial*]."). Thus, we evaluate the appellant's claims here under established constitutional due process standards.

If one is not predisposed to engage in an activity, but they are nonetheless induced to do so by law enforcement officials and/or those working with them, "entrapment" is an affirmative and complete defense to criminal liability. Rule for Courts-Martial 916(g); *Jacobson v. United States*, 503 U.S. 540, 548 (1992). The purpose of the entrapment defense is to prevent government officials from overreaching and "implant[ing] in an

innocent person's mind the disposition to commit a criminal act, and then induc[ing the] commission of the crime so that the Government may prosecute." *Jacobson*, 503 U.S. at 548. Over time, two different approaches, the subjective and the objective tests, have evolved for determining whether entrapment has occurred. *United States v. Clark*, 28 M.J. 401, 407 (C.M.A. 1989).

The "subjective test" focuses on the accused's state of mind. To prevail under this test, an appellant must demonstrate that he would not have committed a crime, but for the police conduct. *United States v. Vanzandt*, 14 M.J. 332, 340 (C.M.A. 1982). This involves a balancing of the appellant's predisposition to commit the offense against the actions of the Government in encouraging the commission of the offense. *Id.* If an accused is "predisposed" to commit the crime regardless of the governmental involvement in his activities, he cannot be considered "entrapped." *Sherman v. United States*, 356 U.S. 369, 372 (1958); *Hampton v. United States*, 425 U.S. 484, 488 (1976); *United States v. Russell*, 411 U.S. 423, 426, 436 (1973) (clarifying that "[i]t is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play"). In evaluating an entrapment claim, a distinction must be made between a trap for "the unwary innocent" and a trap for "the unwary criminal." *Sherman*, 356 U.S. at 372-73; *United States v. Bell*, 38 M.J. 358, 360 (C.M.A. 1993).

While a series of Supreme Court cases resulted in the "subjective test" becoming the majority view, the Court has still recognized a situation where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, . . . violating [ ] fundamental fairness, shocking [ ] the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment." *Russell*, 411 U.S. at 431-32 (internal quotation marks and citations omitted); *Hampton*, 425 U.S. at 492 (Powell, J., concurring) (stating the due process guarantee may prevent the conviction of a predisposed defendant in light of outrageous police behavior in some circumstances). It is this "objective test" that serves as the basis for the appellant's claim on appeal.

Even though the Supreme Court has found the subjective test to be "paramount," our superior court has recognized that the objective test can be applicable in a "unique, peculiar situation where the conduct of the Government agents reaches the point of shocking the judicial conscience." *Vanzandt*, 14 M.J. at 342, 343 n.11; *see also United States v. Lemaster*, 40 M.J. 178, 181 (C.M.A. 1994) (declining to decide whether law enforcement activity was "outrageous" in the Constitutional sense but finding "[a]t a minimum, it violates the fundamental norms of 'military due process' and is the functional equivalent of entrapment" (citation omitted)); *United States v. Cooper*, 33 M.J. 356, 358 (C.M.A. 1991); *Bell*, 38 M.J. at 364 n.6; *United States v. Harms*, 14 M.J. 677, 678 (A.F.C.M.R. 1982).

On appeal, the appellant argues that the Government's conduct was sufficiently outrageous and shocking to justify dismissal of all the charges in his case. The due process defense is a question of law, whereas the issue of entrapment defense otherwise must be resolved by factfinder. *Vanzandt*, 14 M.J. at 344-45. Whether an accused's due process rights were violated is a question of law that this Court reviews de novo. *United States v. Lewis*, 69 M.J. 379, 383 (C.A.A.F. 2011).

To prevail on a due process argument, the appellant must show "either: (1) excessive government involvement in the creation of the crime, or (2) significant governmental coercion to induce the crime." *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994) (citation omitted). Any one factor is not dispositive and the inquiry is grounded on the totality of the circumstances. *Owen v. Wainwright*, 806 F.2d 1519, 1521 (11th Cir. 1986); *United States v. Perrine*, 518 F.3d 1196, 1207 (10th Cir. 2008). Entrapment based on a due process violation is an "extraordinary defense" that only applies in the "most egregious circumstances" and it is not to be applied simply because the Government acts in a deceptive manner or participates in a crime it is investigating. *United States v. Mosley*, 965 F.2d 906, 909-10 (10th Cir. 1992). The appellant must show the Government acted with coercion, violence, or brutality to the person in order to satisfy the requirement that the conduct was fundamentally unfair or shocking. *United States v. Patterson*, 25 M.J. 650, 651 (A.F.C.M.R. 1987).

The appellant's claim of outrageous Government conduct stems from his belief that the Government: (1) Created, rather than infiltrated, a criminal enterprise; (2) Was irresponsible in choosing to use A1C SD as a CI; and (3) Employed coercive methods. After evaluating the evidence, we cannot say that this conduct was so "shocking to the universal sense of justice" as to warrant dismissal of these specifications.

The Government did not create the criminal enterprise in this case. Before the Government was even aware of the appellant, he made a statement to A1C SD indicating his involvement in drug use. When this statement was reported to AFOSI, they decided to utilize A1C SD as a CI to determine the level, if any, of the appellant's involvement with drug use. Once aware of possible drug use, the "infiltration of criminal operations by undercover agents is an accepted and necessary practice." *United States v. Harms*, 14 M.J. 677, 679 (A.F.C.M.R. 1982); *United States v. Twiggs*, 588 F.2d 373 (3rd Cir. 1978). Government agents do not even need a reasonable suspicion of a target's criminal activity before an undercover operation can be initiated. *Id.*

A1C SD may have asked the appellant about purchasing marijuana, but the appellant voluntarily and willingly participated in the procurement and distribution of the marijuana. He was never threatened, coerced, or pressured by A1C SD, and he could have elected not to participate if he so desired. Neither A1C SD nor AFOSI employed any coercive methods, let alone ones that were fundamentally unfair or shocking.

It is undeniable A1C SD desired to be an AFOSI agent and he believed working as a CI would increase his chances of being accepted into the career field. This alone, however, does not make him an irresponsible choice to serve as an AFOSI CI. The record is devoid of any rational reason why AFOSI should have avoided using A1C SD as a CI. There were no issues with his credibility and nothing in his behavior would have given AFOSI any reason to question using him as a CI. In fact, A1C SD, unlike many AFOSI CIs, was not himself under investigation. If anything, he was a more responsible choice to use as a CI than someone who was working for AFOSI in an attempt to limit the punishment they may receive for their own crimes.

Accordingly, we find the appellant's due process argument to be without merit.

Admission of "Consciousness of Guilt" Evidence

We review a military judge's evidentiary rulings for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). Evidence of uncharged misconduct is impermissible for the purpose of showing a predisposition toward crime or criminal character, but it can be admitted for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Mil. R. Evid. 404(b). "Consciousness of guilt" is one of the "other purposes" for which uncharged misconduct may be admissible. *United States v. Cook*, 48 M.J. 64, 66 (C.A.A.F. 1998).

We review the admissibility of uncharged misconduct under Mil. R. Evid. 404(b) using the three-part test articulated in *United States v. Reynolds*:

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
>
> 2. What "fact ... of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value ... substantially outweighed by the danger of unfair prejudice"?

29 M.J. 105, 109 (C.M.A. 1989).

The appellant's challenge to the military judge's decision to admit evidence of postings on a Facebook page that allegedly belonged to the appellant focuses primarily on the first prong of the *Reynolds* test. The appellant challenges the strength of the evidence tying him to the Facebook page in question and the comments posted thereon. To satisfy the first prong of the Reynolds test, the Government is not required to prove beyond a reasonable doubt that the Facebook page belonged to the appellant and that he

wrote the comments. Rather, the evidence must be such that it reasonably supports a finding by the military judge, as the factfinder, that the Facebook page belonged to the appellant and he authored the comments. The Facebook page was under the name "Jason Hepburn," it indicated the owner/author of the page currently lived at Spangdahlem AB, and it contained pictures Investigator Miller recognized as the appellant. Comments written on a Facebook page and attributed to the "owner" can reasonably be believed, absent evidence to the contrary, to have been authored by the "owner" of the page. Taking all these indicators together, it was reasonable for the military judge to determine the evidence supported a finding the page belonged to the appellant and that he posted the comments in question. The first prong was clearly met by the evidence.

The second prong of the test asks whether the evidence makes a "fact [that is] of consequence" in the case "more probable or less probable." This is a question of logical relevance. *See* Mil. R. Evid. 401. It is well established that witness intimidation is relevant evidence to demonstrate consciousness of guilt. *Cook*, 48 M.J. at 66; *see also United States v. Gatto*, 995 F.2d 449, 454 (3d Cir. 1993) (jurors may note threats or intimidation of witnesses); *United States v. Mickens*, 926 F.2d 1323, 1328-29 (2d Cir. 1991) (defendant's hand gesture in the shape of a gun may be considered by jury); *United States v. Maddox*, 944 F.2d 1223, 1230 (6th Cir. 1991) (jurors may consider defendant's alleged mouthing of the words "you're dead").

The appellant argues there was no evidence that he was aware of the existence of a CI in his case when the comments were posted. Nonetheless, because he had been apprehended and questioned by AFOSI almost two months before the comments were posted, he was aware that information about his drug involvement had come to AFOSI's attention. It requires no stretch to believe he would have thought someone made statements to AFOSI about his actions. The "someone" who was "about to get burnt" and "snitches" did not have to necessarily be CIs; they could have been any person who talked with AFOSI about his criminal conduct. Thus, the fact that the appellant may not have known until after the messages were posted that a CI was involved in his case, does not make the evidence any less relevant on the issue of his consciousness of guilt.

The third prong of the *Reynolds* test requires a weighing of probative value and the danger of unfair prejudice. If the probative value is "substantially outweighed" by the danger of unfair prejudice, then the evidence should be excluded. The general risk is that the factfinder will treat evidence of uncharged acts as character evidence and use it to infer that an accused has acted in character, and thus convict.

Evidence that the appellant was upset that someone may have revealed his involvement with drugs to the AFOSI is very probative on the issue of his consciousness of guilt. In the range of witness intimidation behaviors, posting angry comments on a Facebook page is in the lower range. The danger that the appellant would be unfairly prejudiced is low and the probative value of the evidence is not "substantially

outweighed" by the danger of such unfair prejudice. Furthermore, this was a military judge alone case and we trust the military judge to consider the evidence only for its proper purpose. *See United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011); *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (A military judge is presumed to know the law and apply it correctly, absent evidence to the contrary).

In short, the military judge did not abuse her discretion in admitting evidence of the appellant's uncharged misconduct.

Legal and Factual Sufficiency

The appellant argues the evidence was legally and factually insufficient to support his convictions because a failure on the part of the Government to conduct scientific tests on the substances precludes a finding beyond a reasonable doubt that the substances were in fact controlled substances.[2] We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we] find correct in law and fact and determine [ ], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "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 *United States v. Turner*, 25 M .J. 324 (C.M.A. 1987)). "[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 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. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *Turner*, 25 M.J. at 325) (internal quotation marks omitted). 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.

[2] Although the appellant's third "issue presented" refers to the legal and factual sufficiency of the evidence on a non-existent "specification 2 of Charge II," the legal analysis and argument addresses all of the specifications in this case. Accordingly, we interpret the appellant's appeal to be an attack on the legal and factual sufficiency of the evidence for all offenses of which he was convicted.

There is no dispute that the substances which served as the basis for the charges in this case were not subjected to laboratory analysis. Such testing would have eliminated the issue the appellant complains of on appeal. Nonetheless, the issue raised by the appellant is whether there is a *per se* requirement to conduct scientific testing on a substance to determine whether it is, in fact, a controlled substance. Consistent with prior federal and military cases, we hold there is no *per se* requirement for such testing and that each case must be reviewed based on a totality of the circumstances present in the case. *See United States v. Day*, 20 M.J. 213 (C.M.A. 1985); *United States v. Tyler*, 17 M.J. 381, 387 (C.M.A. 1984); *United States v. White*, 9 M.J. 168 (C.M.A. 1980); *United States v. Nicholson*, 49 M.J. 478 (C.A.A.F. 1998) (relying on *United States v. Wright*, 16 F.3d 1429 (6th Cir. 1994), in observing that circumstantial evidence which could support identification beyond a reasonable doubt included "'the physical appearance of the substance'; evidence that the substance had the expected drug effect; 'evidence that the substance was used in the same manner as the illicit drug' in question; evidence that transactions involving the substance were for high prices, paid in cash, and covert; 'and evidence that the substance was called by the name of the illegal narcotic' by those in its presence"); *United States v. Griggs*, 61 M.J. 402 (C.A.A.F. 2005). Not all of the factors identified by our superior court in *Nicholson* need be present in a particular case and the list is not an exhaustive one. *Griggs*, 61 M.J. at 406 n.4.

Absent evidence clearly establishing that a substance was a proscribed drug, an accused may not be convicted of possessing, introducing or distributing a controlled substance. *See United States v. Guevara*, 26 M.J. 779 (A.F.C.M.R. 1988). However, circumstantial evidence can establish the identity of the controlled substance. *United States v. White*, 9 M.J. 168 (C.M.A. 1980). If a lay witness is familiar with a drug and its properties, they may testify that a substance is a particular drug. *See United States v. Landes*, 17 M.J. 1092 (A.F.C.M.R. 1984); *United States v. Hickman*, 15 M.J. 674 (A.F.C.M.R. 1983). Familiarity with a drug can be established with evidence of knowledge as to the odor and appearance of the substance. *United States v. Tucker*, 20 M.J. 863 (A.F.C.M.R. 1985); *United States v. Cooper*, 14 M.J. 758 (A.C.M.R. 1982). Statements made by an accused can also establish the substance was a particular drug. *See United States v. Day*, 20 M.J. 213 (C.M.A. 1985); *United States v. Hickman*, 15 M.J. 674 (A.F.C.M.R. 1983).

With respect to the marijuana charge, the evidence established that A1C SD was familiar with the smell and appearance of marijuana based on his pre-service use of the drug on approximately six occasions. A1C SD paid the appellant 20 Euros to obtain marijuana while he was in the Netherlands. In the opinion of A1C SD, the substance the appellant provided him looked and smelled like marijuana. The appellant himself identified the substance as marijuana when he told A1C SD that he had some left and, later, that he had just smoked the rest of the marijuana. When the appellant made the comment about having just smoked the rest of the marijuana, A1C SD smelled an odor he recognized to be that of marijuana. Based on his training and experience as an AFOSI

agent, SA AM was also familiar with the smell and appearance of marijuana. The substance A1C SD gave to SA AM right after he obtained it from the appellant was, in the opinion of SA AM, marijuana. SA AM based this conclusion on the smell of the substance and its green leafy appearance.

Likewise, there is overwhelming circumstantial evidence that the substance the appellant transported back from Maastricht, Netherlands on 17 March 2012 was mushrooms containing psilocybin. The appellant did not purchase them at the local commissary or even in the local vicinity of Spangdahlem AB. Rather he drove to a "head shop" in the Netherlands. He discussed which mushrooms were the best with the salesman at the head shop and paid 60 Euros for four packages. Upon his return trip to Spangdahlem AB, the appellant concealed the mushrooms under the spare tire in his trunk. Although he claimed he was joking when he made the comment, the appellant told to a female friend in advance of the trip that he was going to the Netherlands to purchase mushrooms and that they would "trip out" when he returned.

The evidence, with every inference from it being drawn in the prosecution's favor, was legally and factually sufficient to show the appellant distributed marijuana, introduced mushrooms containing psilocybin onto a military installation with the intent to distribute, introduced mushrooms containing psilocybin onto a military installation, and possessed mushrooms containing psilocybin with the intent to distribute. Based on the evidence presented, we are satisfied that the military judge could have reasonably found beyond a reasonable doubt that the substances the appellant distributed, possessed and introduced were what they were alleged to be, namely marijuana and mushrooms containing psilocybin. Similarly, having made allowances for not having personally observed the witnesses, we are likewise convinced beyond a reasonable doubt that the substance the appellant distributed, possessed, and introduced were, in fact, what they were alleged to be.

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, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court