UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant ANTHONY G. PAGE
United States Air Force

ACM 35342

22 December 2004

Sentence adjudged 1 August 2002 by GCM convened at Randolph Air Force Base, Texas. Military Judge: Patrick M. Rosenow.

Approved sentence: Dismissal, confinement for 6 months, forfeiture of all pay and allowances, and a reprimand.

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, Major John D. Douglas, and Captain C. Taylor Smith.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto. Considering the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found all essential elements of the one contested indecent exposure specification of which the appellant was convicted beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). 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 of this specification beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *Walters*, 58 M.J. at 395.

We also find that the trial counsel's argument that the appellant was lying during his testimony on findings did not result in prejudicial error. First, we are not at all persuaded that the argument was improper in the context of the entire case. It was not the type of argument that sought to unduly or improperly inflame the passions or prejudices of the court members. *United States v. Clifton*, 15 M.J. 28 (C.M.A. 1983). Rather, it tracked with the military judge's instruction that it was up to the members to determine whether discrepancies in the witness's testimony resulted from innocent mistakes or deliberate lies. Second, we note that defense counsel failed to object to the argument and we are convinced that the argument was not plain error in light of their lack of objection. *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). Finally, even assuming plain error, we conclude that the argument did not materially prejudice a substantial right of the appellant. *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000); Article 59(a), UCMJ, 10 U.S.C. § 859(a). Notwithstanding trial counsel's assertions that the appellant was untruthful, the members chose to acquit him of one of two contested specifications at which the argument was aimed. It is hard to discern material prejudice of a substantial right when it is patent from the results of trial that the argument had minimal impact on the members. And we do not.

After the trial, the convening authority waived mandatory forfeitures for a period of six months and directed that the money be paid to the appellant's wife and son. The convening authority did not, however, first modify, disapprove, or suspend the adjudged forfeitures, as required by *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). In light of our superior court's holding in *United States v. Lajaunie*, 60 M.J. 280 (C.A.A.F. 2004), we conclude that it is necessary to return this case for a new action that expressly complies with *Emminizer*.

The record of trial is returned to The Judge Advocate General for remand to the convening authority for a new action consistent with this opinion. Thereafter, Article 66(c), UCMJ, 10 USC § 866(c), shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court