UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class AUDREY M. POPE
United States Air Force

ACM S31578

08 March 2010

Sentence adjudged 03 October 2008 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: William Burd.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $450.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, Major Michael A. Burnat, Major Tiffany M. Wagner, Captain Andrew J. Unsicker, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Nicole P. Wishart, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Senior Judge:

Contrary to the appellant's pleas, a panel of officers sitting as a special court-martial convicted her of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, three months of confinement, forfeiture of $450 of pay per month for three months, and reduction to the grade of E-1. On appeal, the appellant asks this Court to set aside the findings and the sentence.

As the basis for her request, she asserts that the military judge: (1) abused his discretion by admitting a green detoxification drink, Prosecution Exhibit 16, under the doctrine of similar physical evidence; (2) committed plain error by failing to give a limiting instruction that the green detoxification drink was being entered into evidence for illustrative purposes only; (3) committed plain error by instructing the members that they may consider whether circumstantial evidence that drinking large amounts of water and a detoxification drink before providing a urine sample for drug testing points to consciousness of guilt when there was no evidence that any of these acts occurred; (4) committed plain error by allowing the trial counsel to elicit, through testimony during the sentencing portion of trial, uncharged misconduct which was not directly related to the charged offense and was not proper testimony of the appellant's rehabilitative potential; (5) committed plain error by allowing the trial counsel to elicit testimony on the appellant's right to remain silent and to comment on this right during the findings argument; (6) committed plain error by allowing the trial counsel to question a government witness during the sentencing portion of trial about the appellant's brother having a history of selling narcotics;[1] and (7) committed the aforementioned errors, which cumulatively warrants relief. Finding no prejudicial error, we affirm.

Background

On 24 March 2008, the appellant was randomly selected to provide a urine sample. On that same day, the appellant reported to the drug testing center but was unable to provide a urine sample within the prescribed time period. The next day she returned and provided a urine sample. That sample was shipped to the Air Force Drug Testing Laboratory and the sample subsequently tested positive for benzoylecgonine, the cocaine metabolite.

At trial, the government's evidence consisted of, inter alia, the positive urinalysis test result; a representative example of a green detoxification drink the appellant allegedly possessed (Prosecution Exhibit 16); and findings testimony from Airman First Class (A1C) KS, the appellant's roommate, that: (1) in the past, she saw the appellant possess a green detoxification drink that the appellant asserted her brother provided to "clean out [her] system;" (2) the green detoxification drink admitted as Prosecution Exhibit 16 was a representative example of the drink the appellant had possessed; (3) the appellant admitted that she had gone drinking with her brother and that she had "messed up;" and (4) the appellant's brother had been a drug dealer.

[1] We note that the appellant, in this assignment of error, erroneously asserts that the complained of testimony occurred during the sentencing portion of trial wherein an examination of the record reveals the complained of testimony occurred during the findings portion of trial.

Discussion

Admission of a Detoxification Drink

We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Under an abuse of discretion review, we examine a military judge's findings of fact using a clearly erroneous standard and conclusions of law de novo. *United States v. Larson*, 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *Ayala*, 43 M.J. at 298). Further, if the military judge performs a Mil. R. Evid. 403 balancing test, a test affording him wide discretion, we will not overturn his decision unless the decision is a "clear abuse of discretion." *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)); *see also United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). We consider the evidence in the light most favorable to the prevailing party. *Rodriguez*, 60 M.J. at 246-47.

In the case at hand, the military judge did not make findings of fact or conclusions of law. Nor did he conduct a Mil. R. Evid. 403 balancing test. Thus, we will examine the record ourselves to determine whether the military judge abused his discretion in admitting the detoxification drink. *Manns*, 54 M.J. at 166. Here, the detoxification drink was illustrative evidence[2] offered, admitted, and used to assist A1C KS during her testimony as she described seeing the appellant possess a green detoxification drink that the appellant asserted her brother had provided to "clean out [her] system." A1C KS's testimony was relevant on the knowing use element of the specification and arguably highlighted consciousness of guilt on the part of the appellant. Under such circumstances, the military judge did not abuse his discretion in admitting the detoxification drink.

Military Judge's Failure to Give an Illustrative Evidence Instruction

"Military judges have 'substantial discretionary power in deciding on the instructions to give.'" *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (quoting *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)). "We review the military judge's decision to give or not give a specific instruction, as well as the substance of any instructions given, 'to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence. The question of whether a

[2] "Illustrative evidence is [evidence] admitted solely to help the witness explain his or her testimony. [It] has no probative force beyond that which is lent to it by the credibility of the witness whose testimony it is used to explain." *Carson v. Polley*, 689 F.2d 562, 579 (5th Cir. 1982).

jury was properly instructed [is] a question of law, and thus, review is *de novo*.'" *Id*. (alteration in original) (quoting *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)).

The failure to object to the omission of an instruction before members deliberate constitutes waiver of the objection in the absence of plain error. Rule for Courts-Martial (R.C.M.) 920(f); *United States v. Simpson*, 58 M.J. 368, 378 (C.A.A.F. 2003) (citing *United States v. Glover*, 50 M.J. 476, 478 (C.A.A.F. 1999)). Here, as the trial defense counsel failed to object to the omission of an illustrative evidence instruction, any error was waived absent plain error. "To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). Moreover, while the threshold for establishing prejudice is low, the appellant must nevertheless make "some colorable showing of possible prejudice." *Id*. at 436-37 (quoting *Kho*, 54 M.J. at 65).

Under the plain error analysis, we need not decide whether the military judge erred by not providing an illustrative evidence instruction and whether such an error was plain or obvious because any error did not materially prejudice a substantial right of the appellant. On this point, we note that the record made it abundantly clear that Prosecution Exhibit 16 was not the detoxification drink the appellant allegedly had possessed. Investigator CW testified that she purchased Prosecution Exhibit 16 and A1C KS testified that Prosecution Exhibit 16 was a "representative example" of the green detoxification drink the appellant had possessed.

Moreover, there is no evidence in the record that would have led the members to believe that Prosecution Exhibit 16 was the actual bottle of detoxification drink the appellant allegedly had possessed. Finally, the trial counsel did not argue that Prosecution Exhibit 16 was the actual bottle of detoxification drink the appellant had possessed but rather argued that Prosecution Exhibit 16 resembled the green detoxification drink that A1C KS testified the appellant had possessed. Put simply, the appellant has failed to make some colorable showing of possible prejudice. The military judge's failure to give an illustrative evidence instruction did not materially prejudice a substantial right of the appellant and, there being no plain error, any objection to such a failure was waived.

Military Judge's Consciousness of Guilt Instruction

As noted above, the question of whether a jury was properly instructed is a question of law we review de novo. *McDonald*, 57 M.J. at 20. The failure to object to an instruction before members deliberate constitutes waiver of the objection in the absence of plain error. R.C.M. 920(f); *Simpson*, 58 M.J. at 378. Here, the trial defense counsel

failed to object to the consciousness of guilt instruction, thus, any error is waived absent plain error.

Contrary to the appellant's assertions, there was sufficient evidence in the record for the military judge to provide a consciousness of guilt instruction to the members. During his testimony, Dr. MH, the government's expert forensic toxicologist, explained that individuals may consume large amounts of water and detoxification products to avoid drug detection. Additionally, A1C KS testified that the appellant, on several occasions, possessed a green detoxification drink intended to "clean out [her] system." These all warrant reference in the instruction the military judge provided.

Moreover, the military judge did not instruct the members that the appellant ingested large amounts of water and a detoxification drink prior to providing a urine sample. Instead, he instructed the members that should they find that the appellant ingested large amounts of water and a detoxification drink before providing her urine sample, it may be considered as circumstantial evidence of consciousness of guilt. In short, the military judge did not err. However, assuming, arguendo, error, any error was not plain or obvious and the appellant has failed to make some colorable showing of possible prejudice. There being no plain error, the appellant's objection to the military judge's consciousness of guilt instruction was waived.

Admission of Uncharged Misconduct

On cross-examination during the sentencing portion of trial, the appellant's mother testified that the appellant had been arrested for cocaine possession.[3] We review a military judge's decision to admit or exclude evidence, including sentencing evidence, for an abuse of discretion. *Manns*, 54 M.J. at 166 (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Swenson*, 51 M.J. 522, 524 (A.F. Ct. Crim. App. 1999) (alteration in original) (quoting *Ayala*, 43 M.J. at 298).

Like all evidence, sentencing evidence is subject to the Mil. R. Evid. 403 balancing test. *Manns*, 54 M.J. at 166. "When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *Id*. (quoting *Ruppel*, 49 M.J. at 250). However, when a military judge fails to conduct a proper Mil. R. Evid. 403 balancing test, we give his ruling no deference and decide the issue ourselves. *Id*.

[3] During redirect, the appellant's mother testified that the cocaine possession charge against the appellant had been dismissed.

"Mil. R. Evid. 404(b), like its federal rule counterpart, is one of inclusion. . . . The nub of the matter is whether the evidence is offered for a purpose other than to show an accused's predisposition to commit an offense." *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000) (internal citations omitted), *overruled in part by United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003). In the absence of a defense objection to uncharged misconduct, we review a claim of erroneous admission of evidence for plain error. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). "Plain error is established when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *Id*. (citing *Powell*, 49 M.J. at 463-65). The appellant must persuade this Court that all prongs of the plain error test are satisfied. *Id*. (citing *Scalo*, 60 M.J. at 436).

On this issue, the military judge did not make findings of fact or conclusions of law, nor did he conduct a Mil. R. Evid. 403 balancing test. Moreover, the appellant did not object to the admission of this uncharged misconduct. We thus decide the admissibility of this uncharged misconduct under a plain error analysis. Here, the uncharged misconduct was offered to test or question the appellant's mother's factual basis for opining that the appellant learns from her mistakes and punishment. Such use of the uncharged misconduct was proper. R.C.M. 1001(b)(5)(E) ("On cross-examination, inquiry is permitted into relevant and specific instances of conduct."); *see also United States v. Pruitt*, 46 M.J. 148, 151 (C.A.A.F. 1997) (holding that "[c]ross-examination concerning prior arrests or prior misconduct, if there is a good-faith belief for the question, is the means of testing a witness' testimony concerning an accused's character [by] . . . rais[ing] questions as to whether the witness has a sufficient basis to know an accused's reputation in the community or to raise questions about the witness' standard of evaluating good character"); *United States v. Donnelly*, 13 M.J. 79, 81 (C.M.A. 1982) (holding that it was proper to cross-examine a character witness about uncharged misconduct, even though it was the same as the offense charged, as it was relevant to rehabilitative potential and to the determination of an appropriate sentence).

Moreover, assuming, arguendo, that it was error for the military judge to admit evidence of the appellant's prior arrest for cocaine possession, such an error was not plain or obvious and the appellant has fallen short of establishing the requisite prejudice. On this latter point, the witness was rehabilitated when she testified on redirect that the appellant's charge for cocaine possession was subsequently dismissed. We find no plain error and, there being no plain error, the appellant's objection to the admission of her prior arrest was waived.

Comment on the Appellant's Right to Remain Silent

Without defense objection, Investigator CW testified that when she informed the appellant of the positive urinalysis test result the appellant's reaction was "[v]ery

lackadaisical, no response whatsoever, just sat there as if she didn't care." During the findings argument, again without defense objection, the trial counsel argued

> You heard Investigator [CW] say . . . a grad student escorted the accused to Security Forces. . . . You heard Investigator [CW] say that she actually appeared lackadaisical. It didn't faze her when she was notified that she tested positive for cocaine because she had used cocaine. She wasn't surprised that she had tested positive for cocaine.

The appellant for the first time on appeal asserts that the trial counsel improperly elicited testimony on and commented on the appellant's right to remain silent.

Absent plain error, failure to object to improper findings argument before the military judge instructs the members waives the objection. R.C.M. 919(c). Additionally, failure to object to the admissibility of evidence waives the objection absent plain error. *United States v. Gilley*, 56 M.J. 113, 122 (C.A.A.F. 2001). To find plain error, we must be convinced: (1) that there was error; (2) that it was plain or obvious; and (3) that it materially prejudiced a substantial right of the appellant. *See United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000); *Powell*, 49 M.J. at 463-65.

We must consider comments within the context of the entire court-martial when determining whether or not the comments were fair. *Gilley*, 56 M.J. at 121. It is appropriate for counsel to argue the evidence, as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975). However, the trial counsel may not comment on the appellant's exercise of her constitutional rights. *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992); *United States v. Carr*, 25 M.J. 637, 639 (A.C.M.R. 1987). More specifically, the trial counsel may not comment on the appellant's right to remain silent. *United States v. Toro*, 37 M.J. 313, 318 (C.M.A. 1993) (citing *Griffin v. California*, 380 U.S. 609 (1965)).

Here, the comments of Investigator CW during examination and the trial counsel during the findings argument were not references to the appellant's right to remain silent. Rather, they were comments on the appellant's reaction to being informed of her positive urinalysis test results and, as such, are proper comments on the evidence. The military judge did not err in admitting Investigator CW's testimony and in allowing the trial counsel to make the aforementioned comments in her argument.

Moreover, assuming, arguendo, that there was error and the errors were plain or obvious, the errors were harmless. Before this Court can hold a federal constitutional error harmless, we must find the error harmless beyond a reasonable doubt. *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Whether an error is harmless beyond a reasonable doubt will depend on "whether there is a reasonable possibility that the evidence [or error] complained of

might have contributed to the conviction." *Id.* (alteration in original) (quoting *Chapman*, 386 U.S. at 24). "To [find] that an error did not 'contribute' to the ensuing verdict is not . . . to say that the jury was totally unaware of [the error] . . . . It is, rather, 'to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" *Id*. (internal citations omitted).

We find that if there was any error with admitting Investigator CW's comments and allowing the trial counsel's argument, it was harmless beyond a reasonable doubt. The lack of a defense objection to Investigator CW's comments and to the trial counsel's argument is "some measure of the minimal impact" of the comments and argument. *Gilley*, 56 M.J. at 123 (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)). Also, any prejudicial impact from the errors was dampened by the minor part they played in Investigator CW's seventeen-page testimony and the trial counsel's fifteen-page argument.

Lastly, other evidence supporting the appellant's conviction properly admitted and argued—namely, the appellant's positive urinalysis test results, her alleged possession of the detoxification drink, and the circumstances surrounding the receipt of her urine sample—belies any notion that the complaint of errors tipped the balance against the appellant. We find no error and, even assuming error, find that the appellant has failed to make some colorable showing of possible prejudice. Accordingly, there being no plain error, the appellant's objections to the admission of Investigator CW's comments and the trial counsel's findings argument were waived.

A1C KS's Testimony that the Appellant's Brother was a Drug Dealer

During the findings portion of trial, A1C KS testified, without defense objection, that the appellant confided that her brother had been a drug dealer. As we have previously noted, absent plain error, failure to object to the admissibility of evidence waives the objection. *Gilley*, 56 M.J. at 122. Here, we find no error because the testimony was properly admitted to suggest that the brother was a possible source of the cocaine the appellant was charged with using. Moreover, assuming, arguendo, obvious error, we find that the appellant has failed to make the requisite showing of prejudice. Since we find no plain error, the appellant's objection to this testimony was waived.

Cumulative Error

We can order a rehearing based on an accumulation of errors that do not individually warrant a reversal. *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993)). "[W]hen assessing the record under the cumulative-error doctrine, [we] 'must review all errors preserved for appeal and all plain errors.'" *Id*. (quoting *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993)). We consider each error within the context of the entire

case, with particular attention paid to "the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [military judge] dealt with the errors as they arose . . . ; and the strength of the government's case." *Id.* (quoting *Sepulveda*, 15 F.3d at 1196).

Additionally, "[c]ourts are far less likely to find cumulative error '[w]here evidentiary errors are followed by curative instructions' or when a record contains overwhelming evidence of a defendant's guilt." *Id.* (second alteration in original) (quoting *United States v. Thornton*, 1 F.3d 149, 157 (3d Cir. 1993)). In the case at hand, we found no errors. As such, the cumulative error doctrine is not applicable to this case. Moreover, assuming, arguendo, that additional errors exist, the cumulative error doctrine would be inapplicable because evidence of the appellant's guilt, as previously discussed, is overwhelming.

Conclusion

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

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court