**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant BRADLEY K. RHODES**
**United States Air Force**

**ACM 34697**

**24 February 2004**

Sentence adjudged 4 April 2001 by GCM convened at Yokota Air Base, Japan. Military Judge: David F. Brash.

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Antony B. Kolenc (argued), Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Jefferson B. Brown.

Appellate Counsel for the United States: Major Steven R. Kaufman (argued), Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant pled guilty to larceny and disorderly conduct, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. § 921, 934, and a military judge accepted his pleas. A general court-martial comprised of officers and enlisted members found the appellant guilty, contrary to his pleas, of the use and possession of psilocyn, a Schedule I controlled substance, and the distribution of 3, 4-methylenedioxymethamphetamine (also known as "ecstasy"), a Schedule I controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court-martial acquitted the appellant of using ecstasy and

introducing psilocyn onto a military installation. The sentence adjudged and approved was a bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

The appellant asserts numerous allegations of error. He contends: 1) The military judge erred in admitting a document as a statement against penal interest under Mil. R. Evid. 804(b)(3); 2) The military judge erred in admitting evidence of uncharged misconduct; 3) The appellant could not lawfully be convicted of both possession and use of psilocyn because the possession was a lesser included offense in this case; 4) The evidence is legally insufficient to support the convictions for the drug offenses; and 5) The appellant's sentence was inappropriately severe. We find no error and affirm.

*Statement Against Penal Interest*

This case arose from an investigation of drug abuse at Yokota Air Base, Japan, involving several military members. Government investigators called in Senior Airman (SrA) John Daugherty for questioning on 21 July 2000. SrA Daugherty confessed to using illegal drugs, including psilocyn, a hallucinogenic contained in a particular kind of dried mushroom that is a Schedule I controlled substance. SrA Daugherty wrote a five-page confession, including details about the kind and quantities of drugs used, the dates of purchase, and the cost. In the confession, SrA Daugherty identified the appellant as one of the individuals with whom he purchased, distributed, and used psilocyn mushrooms.

On about 6 December 2000, the appellant approached SrA Daugherty in his dormitory room and asked SrA Daugherty to contact the appellant's defense lawyer. After speaking with the defense counsel, SrA Daugherty signed an affidavit claiming that he no longer remembered the details of the incident in question.

The government charged the appellant, inter alia, with the use, possession, and introduction of psilocyn mushrooms onto a military installation. As indicated above, the appellant pled not guilty to these charges.

At trial, SrA Daugherty continued to claim a lack of memory of the details of the incident, although he expressed his belief that his statement to investigators was truthful. By pretrial motion, the prosecution sought a ruling on the admissibility of SrA Daugherty's five-page confession. The government argued the confession was admissible under Mil. R. Evid. 804(b)(3) as a statement against penal interest, because SrA Daugherty was unavailable due to his professed lack of memory and the confession made him subject to criminal liability. Trial defense counsel opposed admission of the confession on the grounds that it violated the appellant's right to confront a witness against him. Relying upon the decision in *Lilly v. Virginia*, 527 U.S. 116 (1999), trial

defense counsel argued that the statement of an accomplice is presumptively unreliable and inadmissible absent a showing of particularized guarantees of trustworthiness.

The military judge took testimony from SrA Daugherty concerning his confession and the events leading up to his professed memory loss. Additionally, the military judge heard from the investigator who took SrA Daugherty's confession. The military judge entered extensive findings of fact and conclusions of law. He found that SrA Daugherty's statement was self-inculpatory. He also found sufficient indicia of reliability in SrA Daugherty's confession, including: the declarant's perception that the statement was against his penal interests, the length and detail of the statement, the government's involvement in the making of the statement was only as a facilitator, the open-ended nature of the investigator's questions, the evidence showing there was no coercion, the absence of any indication the declarant attempted to shift the blame to others, the indication that the statement was not made in an attempt to garner favor, and the lack of evidence of animosity between the declarant and the accused. The military judge found that the statement so far tended to subject SrA Daugherty to criminal liability that a reasonable person would not have made the statement unless he believed it to be true, and therefore ruled it was admissible as a statement against penal interest under Mil. R. Evid. 804(b)(3). The military judge also ruled that, if the prosecution introduced SrA Daugherty's confession, it must introduce his affidavit declaring his lack of memory so the court members could assess his credibility.

The prosecution called SrA Daugherty as a witness at trial. He identified his hand-written confession and testified that he gave the statement under oath. He indicated that he could no longer remember the incidents in question. Significantly, however, he testified that he was sure the contents of his confession were true at the time he made them. The trial counsel inquired about the language in the confession implicating the appellant in the purchase, introduction, distribution, and use of psilocyn mushrooms. SrA Daugherty testified that his memory was vague, but that it would have been better when he made the statement to investigators. He also admitted that he went out socially with the appellant on Christmas Eve, a few weeks after making the affidavit declaring his lack of recall. The prosecution introduced into evidence SrA Daugherty's written confession and his affidavit professing a lack of memory.

Trial defense counsel cross-examined SrA Daugherty at length. The cross-examination attacked SrA Daugherty's ability to perceive and recall, his prior drug use, his bias, and his motivation for making the statement. SrA Daugherty continued to assert that he could not remember the details of the events, but that he did not lie in his statement to investigators.

The court-martial found the appellant guilty of the wrongful possession and use of psilocyn on divers occasions. The court-martial acquitted him of introducing psilocyn onto a military installation.

Before this Court, the appellant renews the objection raised at trial to the admission of SrA Daugherty's confession. We review a military judge's decision to admit hearsay evidence for an abuse of discretion. *United States v. Haner*, 49 M.J. 72, 78 (C.A.A.F. 1998); *United States v. Hyder*, 47 M.J. 46, 48 (C.A.A.F. 1997); *United States v. Pollard*, 38 M.J. 41, 49 (C.M.A. 1993).

At the outset, it is important to note that this issue does not involve the Confrontation Clause of the Sixth Amendment of the Constitution. SrA Daugherty was called as a witness, testified under oath, and was subjected to unrestricted cross-examination. Thus, the appellant was not denied his opportunity to confront this witness. *United States v. Owens*, 484 U.S. 554 (1988); *California v. Green*, 399 U.S. 149, 162 (1970); *United States v. McGrath*, 39 M.J. 158, 163 (C.M.A. 1994). The appellant seems to base his argument upon the special standards that arise when considering whether an accused was denied a Constitutional right. *See Lilly*, 527 U.S. at 124-25; *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). However, the question before this Court is an evidentiary issue, not a Constitutional one. Specifically, we must determine whether the military judge properly admitted SrA Daugherty's confession as an exception to the rule against hearsay under Mil. R. Evid. 804(b)(3). "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now." *Dutton v. Evans*, 400 U.S. 74, 86 (1970). *See also McGrath*, 39 M.J. at 165. Our superior court has "consistently recognized a difference in the analysis between the reliability determination required when there are confrontation concerns and when the declarant actually testifies in the trial of the case." *Hyder*, 47 M.J. at 48. *See also United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003); *United States v. Bridges*, 55 M.J. 60, 62-3 (C.A.A.F. 2001); *United States v. Morgan*, 40 M.J. 405, 410 (C.M.A. 1994); *Haner*, 49 M.J. at 78.

We must determine whether SrA Daugherty's confession was properly admissible as an exception to the rule against hearsay, specifically a statement against penal interest under Mil. R. Evid. 804(b)(3). "Hearsay" is an extra-judicial statement offered into evidence to prove the truth of the matter asserted. Mil. R. Evid. 801(c). Hearsay is not admissible at trial, except as otherwise provided by the rules of evidence. Mil. R. Evid. 802. One of the exceptions to the hearsay rule is for statements against penal interest when the declarant is unavailable. Mil. R. Evid. 804(b)(3) describes a statement against penal interest as:

> A statement which . . . at the time of its making . . . so far tended to subject the declarant to . . . criminal liability, . . . that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true.

The rule "is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson v. United States*, 512 U.S. 594, 599 (1994). Only those statements that are truly self-inculpatory are admissible under this rule. Statements that are not self-inculpatory are not admissible, even if they are included "within a broader narrative that is generally self-inculpatory." *Id.* at 600-01.

In order to determine whether a statement is truly self-inculpatory, we must view it in context. *Id.* at 603. "Even statements that are on their face neutral may actually be against the declarant's interest." *Id.* Statements that are not explicit confessions to a crime but which would lead investigators to evidence of a crime may be self-inculpatory. *Id.* Likewise, "statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest." *Id.* A statement that is neutral as to the declarant but incriminating to another may not be sufficiently self-inculpatory to be admissible under this exception; indeed a declarant's statement about what a co-actor said or did may be "less credible than ordinary hearsay evidence." *Lee v. Illinois*, 476 U.S. 530, 541 (1986). However, a statement mentioning the conduct of others may be self-inculpatory under the circumstances. "[A] declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible codefendant." *Williamson*, 512 U.S. at 606 (Scalia, J., concurring). As the Supreme Court observed, the statement, "'Sam and I went to Joe's house' might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy." *Id.* at 603.

We turn now to SrA Daugherty's statement. The relevant portions of the document (as they appeared) were:

> In early to mid March I purchased Mushrooms for the first time from a place called Ero. A guy named Brad was with me. There were about 10 bags purchased for about 4500 a bag. The bags were brought back and divided up between Val, Stacy, Chris, and myself. Brad also with his current girlfriend did too. We ate them with Doritos and listened to music and talked the rest of the night. . . . The effects that mushrooms have had on me has been. I have thrown up. I have gotten scared I have seen ceilings cave in on me. I have seen pretty light shows in my head. I have felt heavily intoxicated. I have heard strange noises. They look like blue and green shriveled up dried mushrooms and taste terrible. . . . To clarify the mushroom thing once again. There were 10 bags purchase Brad and his current Brazilian civilian, girlfriend at the time, took three. They ate about a half of a bag between them and held onto the rest. This was on the first night I did mushrooms by the way. I had ½ a bag Val ½, Stacy ½,

> Chris ½. That is five so far. . . . We all chipped in on the before mentioned shrooms. As for how much per person I cannot remember.

(Prosecution Exhibit 5).

Those statements relating that the declarant purchased psilocyn mushrooms, brought them on base, used the drugs, and provided them to others were clearly self-inculpatory, because they constituted confessions to the possession, introduction, use, and distribution of a controlled dangerous substance. The details of the offenses, including the cost, description, taste, and effects of the psilocyn mushrooms were similarly self-inculpatory for they added details helping to establish elements of the crimes. *Williamson*, 512 U.S. at 603.

The references to "Brad" (the appellant) and his girlfriend were also self-inculpatory. First, they would lead investigators to other witnesses to the crimes, necessary for corroboration of the confession. *Id.* Secondly, the appellant knew that his friends were under investigation before making the statement, thus he would know that statements admitting his connection with them would link him to their crimes. *Id.* Third, each distribution was potentially a separate offense, so that including "Brad" as a recipient of the psilocyn mushrooms was directly incriminating to the declarant. Fourth, each statement demonstrates that the declarant was guilty as a principal of the use and possession offenses of the others named in the confession. Finally, the circumstances do not indicate that the statements were actually self-serving. The tenor of the statements does not suggest that they were made in an attempt to minimize the declarant's culpability, or to shift blame to the appellant or others. We find that the statements were not made in a effort to curry favor with authorities, but rather out of resignation and remorse. Considering all the circumstances, we agree with the military judge's conclusion that the statements were sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." Mil. R. Evid. 804(b)(3).

Although not raised as an issue at trial or before this Court, we note that SrA Daugherty's confession contained portions unrelated to the charges in this case. Ordinarily such statements would not be admissible. We note that the prosecution did not rely on the unrelated portions, but trial defense counsel referred to them in an effort to attack SrA Daugherty's credibility. Under the circumstances, we find no material prejudice to the appellant's substantial rights, and thus no plain error in admitting these unrelated portions within SrA Daugherty's confession.

*Uncharged Misconduct*

In a preliminary session, trial defense counsel moved to prohibit the prosecution from presenting uncharged misconduct to the court-martial, specifically evidence

indicating the appellant may have influenced SrA Daugherty to claim a loss of memory of the events. After hearing evidence and argument, and entering detailed findings of fact and conclusions of law, the military judge denied the motion.

As discussed above, SrA Daugherty testified at trial that he could not remember details of the events in question. The government introduced his hand-written confession along with his affidavit declaring his loss of memory. The prosecution also elicited evidence that the appellant contacted SrA Daugherty in his dormitory room, and that SrA Daugherty declared his loss of memory shortly thereafter. SrA Daugherty testified that the appellant did not discuss the substance of the case or otherwise affect his abilty to recall the events. The government argued that the timing of the claimed memory loss, its patent unbelievability, and the self-serving nature of the claim all showed that the appellant contributed to the professed memory loss, which in turn demonstrated the appellant's consciousness of guilt. The military judge instructed the members that if they believed the appellant influenced SrA Daugherty to change his testimony, they could consider that as evidence of the appellant's consciousness of guilt.

The appellant now agues that the military judge abused his discretion in admitting evidence of uncharged misconduct. Specifically, he maintains that the evidence did not reasonably support a finding that the appellant was culpably involved in SrA Daugherty's loss of memory, and that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Mil. R. Evid. 404(a) provides that "Evidence of a person's character . . . is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion." Courts have interpreted this to mean that evidence of uncharged misconduct may not be admitted solely to demonstrate that the accused is a bad person, or has the propensity to commit crimes. *United States v. Diaz*, 59 M.J. 79, 93-94 (C.A.A.F. 2003); *United States v. Humpherys*, 57 M.J. 83, 90-01 (C.A.A.F. 2002); *United States v. Morrison*, 52 M.J. 117, 121 (C.A.A.F. 1999) (and cases cited therein). There are exceptions to this general rule, however. Mil. R. Evid. 404(b) provides that evidence of other crimes, wrongs, or acts may be admissible if offered for a proper purpose, such as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), the (then) Court of Military Appeals set out a three-part test to analyze the admissibility of uncharged misconduct.

> 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"? . . .

The evidence must meet all three tests to be admissible. *Id.* We review a military judge's ruling on the admissibility of evidence under Mil. R. Evid. 404(b) and 403 for an abuse of discretion. *Morrison*, 52 M.J. at 122; *United States v. Mirandes-Gonzalez*, 26 M.J. 411, 414 (C.M.A. 1988).

The appellant argues that the evidence was inadmissible because it did not satisfy the first prong of the *Reynolds* test. He argues that the only evidence of uncharged misconduct was the testimony of SrA Daugherty, who steadfastly denied the appellant attempted to influence his testimony in any way. The appellant acknowledges that the members could have refused to believe SrA Daugherty, but argues there was no other evidence of wrongdoing to support the conclusion that the appellant committed the act.

We find this argument unpersuasive. The court was not required to accept or reject SrA Daugherty's testimony in toto. The members could have believed that the appellant came to SrA Daugherty's room and spoke to him about contacting his defense counsel, and not believed his testimony that there was no further discussion of the substance of the case.

> In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.

*Huddleston v. United States*, 485 U.S. 681, 690 (1988). Our superior court observed that the standard for meeting this first factor is quite low. *United States v. Dorsey*, 38 M.J. 244, 246 (C.M.A. 1993).

In *Huddleston*, the Supreme Court considered a case where the prosecution introduced "similar act" evidence under Federal Rule of Evidence 404(b) to show that the appellant knew certain video cassette tapes were stolen. The uncharged misconduct was that on a different occasion the defendant offered to sell several thousand stolen 12" black and white televisions for $28.00 apiece. The only evidence supporting the assertion that the televisions were stolen was that the defendant failed to produce a bill of sale at trial, and that the televisions were sold at a low price. The Supreme Court found no error in admitting this evidence.

In *Mirandes-Gonzalez*, 26 M.J. at 411, the prosecution offered evidence of uncharged misconduct to dispel the appellant's claim that he injured a child accidentally. The evidence of uncharged misconduct was the testimony of a neighbor that she heard a sound like a thump against the bathtub next door, the appellant shouting at the child, and the child screaming as if in pain, she saw a bruise on the child's forehead the next day, and that the appellant claimed the injury was accidental. Our superior court found that the evidence was sufficient for a reasonable court member to have found, by a preponderance of the evidence, that the appellant committed the act. *Id.* at 414.

In this case, there was evidence that SrA Daugherty engaged in the purchase, distribution, and use of psilocyn mushrooms on several occasions between December 1999 and March 2000. During the time leading up to his interview by authorities, SrA Daugherty was aware that others were being investigated and prosecuted for drug offenses, and he was anxious about it. SrA Daugherty was finally interviewed by authorities on 21 July 2000, between five and seven months after the incidents in question. On that date, he was able to recall and relate the incidents in considerable detail, including the kinds of drugs involved, the approximate dates, places of purchase, the cost, and the identities of others involved. SrA Daugherty had not been in trouble before, and was frightened at the prospect of going to jail for his involvement in illegal drugs. The appellant returned to the United States in anticipation of separating from the Air Force, but was recalled to Yokota Air Base in November 2000 to face court-martial action. On about 6 December 2000, the appellant contacted SrA Daugherty in his dormitory room, and asked SrA Daugherty to contact his defense attorney. Shortly thereafter, SrA Daugherty executed an affidavit claiming a loss of memory of the incidents in question. A few weeks later, SrA Daugherty and the appellant celebrated the holiday together as friends.

Court members are expected to evaluate testimony in light of their common sense and knowledge of people and the ways of the world. Here, SrA Daugherty clearly recalled details of the offenses when interviewed by authorities five to seven months after the events. It is simply unbelievable that, after making his detailed confession, while his friends were being prosecuted, and while he was himself facing court-martial, the details of the incidents in question would just slip from his mind. That SrA Daugherty's memory loss should come to light at the very moment that the appellant contacted him about speaking to his defense counsel would be an unlikely coincidence to any reasonable observer.

The appellant argues that there could be other explanations for this chain of events that do not involve misconduct by the appellant. That may be so, but the test is not whether the evidence admits of only one conclusion, but rather whether reasonable court members could find by a preponderance of the evidence that the act occurred. Under all the circumstances, we find the military judge did not abuse his discretion in allowing admission of the evidence.

The appellant also argues that the evidence of uncharged misconduct was inadmissible under the third prong of the test, because its prejudicial effect outweighed its probative value. He maintains that obstruction of justice is a far more serious offense than those charged in this case, and that evidence that the appellant did so was unfairly prejudicial.

Our superior court has repeatedly stated that a military judge enjoys "wide discretion" when applying the balancing test under Mil. R. Evid. 403. *United States v. Tanksley*, 54 M.J. 169, 176 (C.A.A.F. 2000); *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Where a military judge conducts a proper balancing test on the record, the ruling will not be overturned unless there is a "clear abuse of discretion." *Manns*, 54 M.J. at 166 (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)).

We find the military judge did not abuse his wide discretion here. Evidence that the appellant may have influenced SrA Daugherty to lose his memory about the incidents in question showed the appellant's consciousness of guilt. Where, as here, proof of several allegations depended upon sorting out the conflicts between SrA Daugherty's confession and his later affidavit, evidence indicating the affidavit was contrived or untruthful was highly probative. We also note that evidence of the confession and the later affidavit would have been admissible in any event, given the military judge's ruling admitting the confession as a statement against penal interest, as discussed above. Thus, any additional possible prejudice from allowing the parties to argue the significance of the evidence was de minimis. Finally, the military judge carefully instructed the members about the limited way in which they could consider the evidence, further reducing the possibility of unfair prejudice. We conclude the military judge did not abuse his discretion in holding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

*Multiplicity*

The appellant was charged, inter alia, with wrongfully using psilocyn mushrooms on divers occasions between 1 February and 31 May 2000, and wrongfully possessing psilocyn mushrooms on divers occasions between 1 December 1999 and 31 May 2000. The appellant did not make a motion to dismiss on double jeopardy or multiplicity grounds at any time during the trial. The court-martial found the appellant guilty of these offenses. Before beginning the sentencing proceedings, the military judge announced that he would, sua sponte, "merge" the above specifications "under an equitable merger theory or under a straight multiplicity analysis." When asked if he wanted to be heard, trial defense counsel replied, "No, Your Honor." The military judge announced that he would "instruct them . . . that they should consider both of these offenses as one for sentencing purposes," and reduced the maximum possible confinement for the two specifications combined from 10 to 5 years.

The appellant now maintains that the specifications in question were multiplicious for both findings and sentencing purposes. Recognizing that trial defense counsel failed to raise the issue at trial, the appellant asserts that this was "plain error" that this Court should notice and correct.

Multiplicity is a concept derived from the Double Jeopardy Clause of the Constitution, prohibiting individuals from being twice punished for a single offense. *Albernaz v. United States*, 450 U.S. 333, 344 (1981); *United States v. Erby*, 46 M.J. 649 (A.F. Ct. Crim. App. 1997), *aff'd in part and modified in part*, 49 M.J. 134 (C.A.A.F. 1998). Of course, the legislature is free to define crimes so that a single act may constitute several offenses. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The question for the court in such cases is whether Congress intended the offenses to be separate for punishment purposes. *See United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). "[B]ut once the legislature has acted courts may not impose more than one punishment for the same offense." *Brown*, 432 U.S. at 165.

It is well established that a conviction for both a greater offense and a lesser included offense violates the Double Jeopardy Clause. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794 (1989). Our superior court has determined that the use and possession of a drug is multiplicious where the amount used was precisely the amount possessed, at the same place and on the same date. *United States v. Bullington*, 18 M.J. 164 (C.M.A. 1984). Possession of a drug that is not incident to its use may be separately punishable. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000).

R.C.M. 907(b)(3) provides, in part, "A specification may be dismissed upon timely motion by the accused if: . . . (B) The specification is multiplicious with another specification . . . ." The non-binding Discussion to the Rule explains, "A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other."

Failure to make a timely motion to dismiss waives double jeopardy claims, including claims founded on multiplicity, unless they rise to the level of "plain error." *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997). To demonstrate "plain error," the appellant must show there is error, the error is clear or obvious, and the error materially prejudiced a substantial right. *United States v. Powell*, 49 M.J. 460, 463-64 (C.A.A.F. 1998). For multiplicity issues, an appellant may demonstrate "plain error" by showing that the specifications are "facially duplicative." *Heryford*, 52 M.J. at 266 (quoting *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997)). In order to determine whether specifications are facially duplicative, we must review the language of the specifications and the "facts apparent on the face of the record." *Heryford*, 52 M.J. at 266 (quoting *Lloyd*, 46 M.J. at 24).

Here, the appellant did not raise an issue of multiplicity at trial, and thus waived consideration of the matter, absent plain error. Examining the specifications in question, we find that each specification related to psilocyn, and alleged that the offense occurred at or near Yokota Air Base, Japan. One specification alleged the appellant used psilocyn on divers occasions between about 1 February 2000 and 31 May 2000; the other specification alleged the appellant possessed psilocyn on divers occasions between about 1 December 1999 and 31 May 2000. While there is some possible overlap, it is not obvious from a review of the specifications that each refers to precisely the same amount used and possessed, at the same place and on the same date. *Bullington*, 18 M.J. at 164.

We turn to the evidence in the record of trial. We note that the government proceeded on two theories: that the appellant actually committed the charged offenses, and that he was guilty as a principal under Article 77, UCMJ, 10 U.S.C. § 877. SrA Christina Pugh testified that she attended a New Year's Eve party with the appellant. At his suggestion, she went with him to a Japanese store named Ero where he purchased two bags of psilocyn mushrooms for each of them. She consumed one bag that night, but saved one bag for later. She retained the mushrooms until about February 2000, when she and the appellant retrieved and consumed them.

As discussed above, SrA Daugherty's confession was admitted into evidence. In it, SrA Daugherty related that the appellant and his "civilian" girlfriend took three bags of mushrooms, "ate about a half of a bag between them and held onto the rest."

The evidence apparent from the face of the record is sufficient to find that the appellant possessed psilocyn, as a principal, on divers occasions that were independent of the use of the drug. *Heryford*, 52 M.J. at 267. We find that the specifications in question were not facially duplicative, and thus there was no plain error. Therefore, the appellant waived the multiplicity issue by failing to raise it at trial. *Id.*

*Legal and Factual Sufficiency of the Evidence*

The appellant contends the evidence is not legally or factually sufficient to support his convictions for the drug offenses. He argues that the only evidence supporting these convictions came from untrustworthy accomplices, whose testimony was inconsistent and unreliable.

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that this Court approve only those findings of guilt that we determine to be correct in both law and fact. The test for legal sufficiency 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Every reasonable inference from the evidence must be drawn in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131 (C.M.A. 1993). Circumstantial evidence may suffice. *United*

*States v. Blocker*, 32 M.J. 281, 285 (C.M.A. 1991). Our superior court holds that the test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of this Court are themselves convinced of the accused's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

We considered carefully the evidence presented at trial, through both direct and cross-examination. We find the evidence legally and factually sufficient to support the findings of guilt.

*Sentence Appropriateness*

The court-martial sentenced the appellant to a bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1. The appellant contends the sentence was inappropriately severe in light of his record of exemplary service.

We considered the appellant's commendable record of duty performance, both before and after the pendency of these charges. We also considered his special position of responsibility as a noncommissioned officer, the repeated nature of the misconduct, and the fact that he involved other, junior airmen in the crimes. We find the sentence appropriate to the offenses and the offender.

*Conclusion*

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

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court