UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSEPH F. RICHARDSON
United States Air Force

ACM S31743

26 September 2011

Sentence adjudged 29 September 2009 by SPCM convened at Hurlburt Field, Florida. Military Judge: Terry A. O'Brien.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Phillip T. Korman; and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Deanna Daly; Major Naomi N. Porterfield; Captain Joseph J. Kubler; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

PER CURIAM:

Contrary to the appellant's pleas, a panel of officer members sitting as a special court-martial convicted him of one specification of wrongful distribution of marijuana and one specification of wrongful possession of less than 30 grams of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] The adjudged and approved

[1] The charged timeframe for the wrongful distribution of marijuana is on divers occasions between on or about 1 December 2008 on or about 29 March 2009. The charged timeframe for the wrongful possession of less than

sentence consists of a bad-conduct discharge, confinement for 30 days, and reduction to E-1. On appeal, the appellant asks the Court to set aside his conviction on both offenses. The bases for his request are as follows: (1) The evidence is legally and factually insufficient to support his conviction for wrongful possession of marijuana; (2) The military judge erred to the substantial prejudice of the appellant by unfairly limiting the scope of trial defense counsel's cross-examination of Ms. AI; and (3) The military judge abused her discretion when she excluded evidence that a government witness had received a letter of reprimand for failure to go and an Article 15, UCMJ, 10 U.S.C. § 815 for absence without leave (AWOL). We disagree and, finding no prejudicial error, we affirm the findings and the sentence.

Background

Airman First Class JH lived with the appellant for two and one-half months beginning in November 2008. During the first week of January 2009, A1C JH saw the appellant and civilian MR breaking down a bag of marijuana into smaller baggies with a scale at the apartment. A1C JH notified his supervisor of what he had seen and was subsequently escorted to the Air Force Office of Special Investigations (AFOSI) by his first sergeant. A1C JH agreed to serve as an AFOSI confidential informant and in this capacity, called the appellant and sent him text messages discussing his need to make some extra money.

Special Agent (SA) AW testified at trial that A1C JH was trained to serve as a confidential informant. As part of his agreement with AFOSI, A1C JH testified he sent text messages to the appellant stating, "I saw you with marijuana. Is there any way you could hook me up so I could make money on the side." Appellant responded he "wasn't into it" and referred A1C JH to Mr. MR. When A1C JH pressed the appellant for marijuana, the appellant stated he was no longer involved in such transactions, and he provided A1C JH with a list of contacts and suggested A1C JH go through Mr. MR to obtain bootleg DVDs to sell to others to make some money. According to A1C JH, on or about 4 March 2009, the appellant offered to buy A1C JH's television in exchange for $250 worth of marijuana and $200 in cash. The prosecution introduced photographs of text messages on A1C JH's cell phone from the appellant offering to sell A1C JH marijuana.

On 29 March 2009, the appellant met A1C JH in the parking lot of his apartment complex. A1C JH went inside the appellant's car, where the appellant showed him $200 in cash and a freezer bag containing marijuana valued at $250. The appellant and A1C JH then drove to A1C JH's apartment, at which time the appellant gave him the marijuana and cash. Once inside, A1C JH placed the marijuana and cash on the kitchen counter and then helped the appellant carry the television set out to the appellant's car.

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30 grams of marijuana is on or about 26 May 2009.

SA AW testified to seeing the appellant and A1C JH enter the apartment and leave three minutes later with a flat screen television. SA AW also testified that after the appellant and A1C JH left the residence, he entered and saw marijuana in plastic bags and $200 in cash lying on A1C JH's kitchen counter. SA AW seized the substance, which tested positive for marijuana by a a field identification test and the United States Army Criminal Investigation Laboratory (USACIL). On 26 May 2009, the AFOSI questioned the appellant and, after obtaining proper consent, searched his car. Investigators discovered leafy flakes under the driver's seat of the appellant's car, which a field identification test and USACIL also confirmed were marijuana. At trial, A1C KT, the appellant's roommate at the time of trial, testified he rode in and may have driven the appellant's car. A1C JH also testified he had driven the appellant's car in the past.

At trial, the prosecution called civilian AI as a witness, who testified under a grant of immunity from the State of Florida. Ms. AI testified the appellant sold her drugs approximately 36 times between December 2008 and 31 March 2009. She also testified to seeing the appellant with baggies of marijuana in his house that he would weigh with a scale. She additionally stated the appellant wore his "camouflage uniform" most of the time when she bought marijuana from him. The prosecution raised a motion in limine to limit the scope of Ms. AI's testimony to the charged timeframe. The defense sought to cross-examine Ms. AI on her drug use outside the charged timeframe. The defense argued this line of questioning was necessary to show the frequency of her marijuana use; it made no sense for her to switch from other drug dealers she knew to buying marijuana from the appellant, whom she hardly knew; her drug use affected her memory; and, she did not like the appellant. The military judge limited the cross-examination to the charged timeframe, ruling that evidence of Ms. AI buying drugs from other people outside the charged timeframe was neither relevant nor probative of truthfulness.

The prosecution also called A1C JH as a witness. During cross-examination A1C JH admitted to having received a letter of reprimand for failure to go and nonjudicial punishment under Article 15, UCMJ, for AWOL. When the defense questioned A1C JH about his reputation for being late and missing appointments, the prosecution objected. The defense argued the question went to A1C JH's credibility and trustworthiness, showing he had a motive to fabricate allegations about the appellant to save his own career. The military judge ruled the evidence of the failure to go and AWOL was irrelevant, holding the underlying conduct did not speak to A1C JH's veracity. The military judge did, however, allow the defense to cross-examine A1C JH about the fact that he had been in trouble before cooperating with the AFOSI and whether he, at some point, no longer wanted to cooperate with the AFOSI.

Legal and Factual Sufficiency of the Evidence

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 fact finder 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) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Moreover, "[i]n resolving legal-sufficiency questions, [we are] bound to draw every reasonable inference from the evidence in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)). *See also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). 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, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The appellant challenges the legal and factual sufficiency of the evidence to support his conviction of wrongful possession of less than 30 grams of marijuana. He specifically attacks the small amount of marijuana found in his car; he also asserts that other individuals drove his car at one time or another and could have been the source of the drug. The members found otherwise, and the evidence supports their finding. Marijuana was seized from under the driver's seat of the appellant's car; the car belonged to the appellant; and the appellant exercised control over his car, as corroborated by the testimony of A1C JH and defense witness A1C KT. We have considered the evidence produced at trial with particular attention to the matters raised by the appellant and are convinced beyond a reasonable doubt the appellant is guilty of the specification of which he was found guilty: wrongful possession of less than 30 grams of marijuana.

Scope of Cross-Examination

We review the military judge's rulings limiting cross-examination for abuse of discretion. *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006); *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005). This standard is strict, and requires "more than a mere difference of opinion." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010). The military judge's action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)). "Trial judges have broad discretion to impose reasonable limitations on cross-examination, 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *McElhaney*, 54 M.J. at 129 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). That discretion, however, is not unfettered. An accused's "right under the Sixth Amendment to cross-examine witnesses is violated if the military judge precludes a defendant from

exploring an entire relevant area of cross-examination." *Israel*, 60 M.J. at 486 (citing *United States v. Gray*, 40 M.J. 77, 81 (C.M.A. 1994)).

The appellant argues that cross-examination of Ms. AI about her drug use before and after the charged timeframe was necessary to show her inconsistency and lack of memory. At trial, defense counsel argued that Ms. AI's drug use outside the charged timeframe was relevant because it showed that she bought drugs from other persons before and after allegedly buying it from the appellant; thus, buying drugs from the appellant made no sense and showed that she was not telling the truth. Trial defense counsel asserted this was the "heart" of the defense theory, adding that "[i]f we can't attack her story that it doesn't make sense, then our defense is effectively neutered." Additionally, trial defense counsel argued Ms. AI was inconsistent when asked how many times the appellant sold her drugs, that she did not like the appellant, and that he would "gyp her" when she bought drugs from him. Trial defense counsel contended all of these matters go to Ms. AI's credibility.

The military judge ruled that evidence of Ms. AI's drug use outside the charged timeframe was not probative of truthfulness and thus not relevant. In limiting cross-examination to the charged timeframe, the military judge ruled the trial defense counsel could still question Ms. AI about whether the appellant liked her or tried to "gyp" her, and whether she bought drugs from other individuals. In fact, during cross-examination, trial defense counsel was also allowed to cross-examine Ms. AI about her recall and memory, to include how many times she said the appellant sold her marijuana and what she may have told defense counsel during their interview. Additionally, trial defense counsel was able to probe Ms. AI's credibility and elicit testimony that she had lied to AFOSI, had a sexual encounter with the appellant, that the appellant owed her money, and that she thought he was a "snake."

We have reviewed the evidence presented at trial paying particular attention to the matters raised by the appellant on this issue. We find the military judge did not abuse her discretion. The military judge recognized that allowing the defense to attack Ms. AI's credibility, inconsistent statements, and prejudices against the appellant were important to the appellant's defense. The military judge was well within her discretion to exclude irrelevant evidence about Ms. AI's pre-and post-charged timeframe drug purchases from others besides the appellant because that evidence did not go to her veracity or bias.

Admission of Evidence

We review a military judge's ruling to admit or exclude evidence for abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010); *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002); *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997); *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." *White*, 69 M.J. at 239 (citing *Ayala*, 43 M.J. at 298). *See also 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).

Here, the appellant argues that evidence of A1C JH's prior letter of reprimand for failure to go and punishment under Article 15, UCMJ, for AWOL, raised during his cross-examination by trial defense counsel, was necessary to show that A1C JH had a motive to fabricate allegations about the appellant's crimes. The military judge excluded the evidence as irrelevant, ruling that it did not go to A1C JH's veracity, and she instructed the members to disregard the specific instances of A1C JH's misconduct. We have reviewed the evidence presented at trial with particular attention to the matters raised by the appellant on this issue. The military judge properly exercised her discretion to exclude the evidence. In doing so, however, she allowed defense counsel to question A1C JH about several items: he had been in trouble before reporting the appellant's drug offenses to his supervisor and the AFOSI; he lied to the appellant; he was unsure if he would be testifying in a court-martial when he first approached AFOSI; he may have had a "change of heart" after initially cooperating with AFOSI; and he did not want to cooperate with trial defense counsel as well. Under this set of facts, we find the military judge did not abuse her discretion.

Post-Trial Processing Delay

In this case, the overall delay between the date this case was docketed with the Court and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See also United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The appellant's term of confinement ended prior to action. Additionally, the post-trial record shows no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review of his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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;

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
Clerk of the Court