UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MATHEW P. SCHEURER
United States Air Force

ACM 34866

25 August 2003

Sentence adjudged 3 August 2001 by GCM convened at Yokota Air Base, Japan. Military Judge: David F. Brash (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo and Major Jennifer R. Rider.

Before

BRESLIN, STONE, and BILLETT
Appellate Military Judges

OPINION OF THE COURT

BILLETT, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of two specifications of wrongful use of methylenedioxymethamphetamine (commonly known as "ecstasy"), one specification of wrongful use of lysergic acid diethylamide (LSD), one specification of wrongful distribution of ecstasy on divers occasions, and one specification of wrongful introduction of methamphetamine (commonly known as "crystal meth"), in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge also convicted the appellant, contrary of to his pleas, of physically controlling a vehicle while impaired by methamphetamine and LSD, in violation of Article 111, UCMJ, 10 U.S.C. § 911, and one specification of soliciting a minor to wrongfully use methamphetamine, in violation of

Article 134, UCMJ, 10 U.S.C. § 934. He was also found guilty, in accordance with his pleas, of two specifications of wrongful use of methamphetamine, in violation of Article 112a, UCMJ. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. On appeal, we are asked to determine whether the military judge properly admitted and considered hearsay statements made against the appellant and offered pursuant to Military Rule of Evidence (Mil. R. Evid.) 804(b)(3).

Facts

While stationed at an overseas installation, the appellant used drugs both on and off base and occasionally drove his vehicle after using drugs. His wife, also an Air Force member, participated in drug use as well. The appellant and his wife used a variety of drugs on almost a daily basis, both together and separately. Sometimes they used drugs alone as a couple. Other times they used drugs in the company of others. They were also involved in the purchase of drugs, and they supplied drugs to others, although they did this more as social facilitators than as dealers. A seventeen-year-old military dependent sometimes used drugs with the appellant and his wife. The appellant and his wife occasionally received money from the minor and then supplied him with drugs, acting as "middlemen" between the minor and their dealer.

Over a period of about eight months beginning in January 2000, while working at her duty station, the appellant's wife told a co-worker about the drug use, including the participation of the minor. The co-worker was a military member who, although she had an amiable on-the-job relationship with the appellant's wife, was not a close friend of the wife. Typically, the wife initiated the conversations about drug activity. On most occasions, she would describe joint drug use with the appellant. In a few instances, she would describe incidents where either she or her husband acted alone while using drugs. The wife described how she and her husband would use body cleansing soaps and shampoos to purge their systems of drugs. The wife described her belief that the Air Force Office of Special Investigations (AFOSI) was "watching them" and looking to "get" both of them for distributing drugs to a minor. At first, the co-worker did not take the appellant's wife's representations seriously because the wife often described the activities in a joking manner. After June 2000, however, the co-worker began to view the revelations in a more serious light. She eventually contacted the AFOSI and agreed to wear a "wire" to facilitate recording of the wife's statements. Two of the conversations between the appellant's wife and the co-worker in August 2000 were preserved in this manner. The conversations ceased shortly thereafter.

Before trial, the appellant made a motion in limine to exclude the wife's statements to the co-worker. The government proffered the evidence as statements against interest, an exception to the hearsay rule in Mil. R. Evid. 804(b)(3). During pre-trial motions, the government called the appellant's wife to the stand, at which time she invoked her

marital privilege and refused to testify against her spouse. The government then called the co-worker to testify on the motion and she related the interaction between herself and the appellant's wife, essentially as described above. When ruling on the motion, the military judge made detailed findings of fact regarding the testimony of the co-worker. He also made extensive conclusions of law, the most salient of which are: (1) The appellant's wife, as the declarant, was unavailable as a witness; (2) Admissibility under Mil. R. Evid. 804(b)(3) requires that the statement tends to subject the declarant to criminal liability to the extent that a reasonable person in the position of the declarant would not have made the statement unless she believed it to be true; (3) The statements were against her interest in that the wife was well aware of her criminal liability when making the statements; (4) Under a line-by-line analysis, each implication of the appellant by the wife carried with it an attendant description of her own involvement and there was no attempt to shift blame away from the declarant toward the appellant–thus the statements were truly self-inculpatory; (5) There was no animosity toward the appellant on the part of the wife; and (6) The presumption of unreliability that attaches to statements like the wife's was overcome by the particular facts of the case. The judge also analyzed the statements under Mil. R. Evid. 401 and Mil. R. Evid. 403 and concluded that the statements were relevant and that their probative value was not substantially outweighed by the danger of unfair prejudice. The judge ruled that the testimony of the co-worker, consisting of about 20 individual statements concerning what the appellant's wife told her about the appellant, was admissible.

Law

This Court reviews de novo whether the individual hearsay statements violate the Confrontation Clause of the United States Constitution. *Lilly v. Virginia*, 527 U.S. 116, 136 (1999)(plurality opinion). If a statement is admitted in violation of the Constitution, we must determine whether the error was harmless beyond a reasonable doubt, that is, whether the evidence may reasonably have had an effect on the decision. *United States v. George*, 52 M.J. 259, 261 (2000).

In all criminal prosecutions, the accused has a right, guaranteed by the Sixth Amendment to the Constitution, to be confronted with the witnesses against him. This confrontation right forces all witnesses to submit to cross-examination, "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970). In certain instances, however, hearsay statements may be admissible in criminal trials notwithstanding the confrontation right. A statement against penal interest is one exception to the hearsay rule which was established on the belief that someone usually does not make a statement that may result in confinement or monetary loss unless he or she believes it to be true.

In determining whether statements are made against the declarant's penal interest, our superior court has held that decisive factor is not whether a declarant's statement

might be admissible to convict him if at some later time he were brought to trial, but instead, whether the declarant himself would have perceived at the time he made his statement that it was against his penal interest. *United States v. Greer*, 33 M.J. 426, 430 (C.M.A. 1991).

In addressing statements against penal interest, Mil. R. Evid. 804(b)(3) provides, in pertinent part:

> (b) [T]he following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> . . . .
>
> (3) *Statement against interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Ohio v. Roberts, 448 U.S. 56, 66 (1980), established a two-pronged test for admissibility of hearsay statements when, as in this case, the witness is unavailable: (1) Whether the evidence falls within a firmly rooted hearsay exception, or (2) Whether it contains such "particularized guarantees of trustworthiness" that adversarial testing would be expected to add little to the statement's reliability. If statements against interest constitute a "firmly-rooted" hearsay exception, they may be admitted without further corroboration or independent evidence as to their reliability. *Id.* In *Lilly*, 527 U.S. at 127, the United States Supreme Court indicated that whether a statement against penal interest is a "firmly rooted" hearsay exception depends upon the type of statement against interest involved. The *Lilly* Court identified three categories of such statements: (1) Those statements made as voluntary admissions against the declarant; (2) Those statements made as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) Those statements offered by the prosecution to establish the guilt of an alleged accomplice of the declarant. *Id*. The out-of-court statements of the appellant's wife in this case clearly fall into the third category.

Regarding the third category of statements against interest, the *Lilly* Court reasoned that such statements are "inherently unreliable." *Id*. at 131. This is because of the accomplice's "strong motivation to implicate the [appellant] and to exonerate himself." *Lee v. Illinois*, 476 U.S. 530, 541 (1986) (quoting *Bruton v. United States*, 391

U.S. 123, 141 (1968)). The *Lilly* Court went on to say that the third category is "not unambiguously adverse to the penal interest of the declarant" and the statements do not fall within a firmly-rooted exception to the hearsay rule. *Lilly*, 527 U.S. at 134.

Statements offered to establish the guilt of a declarant's accomplice may still be admissible, however, because the presumption of unreliability that attaches to codefendant's confessions may be rebutted. "Particularized guarantees of trustworthiness" as defined in *Ohio v. Roberts* must be established by relevant circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 819 (2000). A key inquiry in making this determination is whether or not adversarial testing would add to the statement's reliability. Another key inquiry is whether and to what extent the government was involved in the production of the statements. *Lilly*, 527 U.S. at 137.

Even assuming a statement against penal interest is admissible under either of the *Ohio v. Roberts* prongs, a court must make further inquiry. The Supreme Court held that Federal Rule of Evidence 804(b)(3), which is nearly identical to Mil. R. Evid. 804(b)(3), "does not allow admission of non self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Williamson v. United States*, 512 U.S. 594, 600-01 (1994). As a result, the trial judge is required to make "a fact-intensive inquiry" to determine "whether each of the statements in [a] confession [is] truly self-inculpatory." *Id*. at 604.

Discussion

At the time she was called to testify, the appellant's wife claimed her marital testimonial privilege. In making his ruling on the motion, the military judge ruled preliminarily that the wife was unavailable within the meaning of Mil. R. Evid. 804(b)(3). The judge also ruled that the wife's statements were self-inculpatory and tended to subject her to criminal liability. He determined she was aware of her criminal liability at the time the statements were made, which is amply supported by the fact that the wife was aware that the AFOSI was investigating her during the period in which the statements were made.

The military judge concluded that there were sufficient indicia of reliability to allow the introduction of the totality of the statements of the appellant's wife. He carefully laid out his findings of fact and his legal analysis. His conclusion that the "presumption of unreliability" had been overcome is strongly supported by the fact that there was no significant government involvement in obtaining the evidence. The co-worker eventually contacted the AFOSI in August 2000 and was eventually wired, but this occurred after most of the inculpatory statements were made and did not involve direct questioning, direction, or suggestion on the part of the government. The judge correctly concluded that the appellant's wife freely divulged the damaging information to

a person she trusted while at the same time recognizing that there was risk in doing so (her statement indicating her belief that the AFOSI was watching). The judge also correctly concluded that the appellant's wife implicated herself in misdeeds to an extent that nearly matched the illegal activity of her husband. Thus, there was no apparent attempt by the wife to shift blame by either minimizing her own involvement or emphasizing the involvement of the appellant. Recognizing these factors, we find that, regarding the statements made to the co-worker by appellant's wife, there were particularized guarantees of trustworthiness as contemplated by *Ohio v. Roberts*.

While the military judge's overall analysis of the admissibility of the various statements against interest was correct, his method of dealing with each individual statement contained in the co-worker's testimony is problematic. The problem arises from his conclusion that each of the wife's statements implicating her husband carried with it an attendant self-inculpatory admission. Our review of the testimony of the co-worker indicates that it included approximately 20 statements specifically discussing the appellant's drug-related activities. Of those 20 statements, the vast majority referenced joint illegal drug activity. As such, they were not self-inculpatory as to the wife,[*] the unavailable declarant.

The co-worker testified as to the wife's description of two instances of the appellant's drug use (LSD) at a party at Mt. Fuji. Although the wife was obviously present, her two statements did not convey information as to her own drug involvement or any other specific illegal activity on her part. The co-worker also testified about a third statement which was the wife's description of drugs that appellant traded (exchanging a "hit" of acid for two pills) at this same party. Again, there was no description by the wife of any simultaneous illegal drug activity on her part. Lastly, the co-worker testified as to the wife's description of the appellant talking to an acquaintance, a minor, and admonishing him not to tell anyone about "what was going on" (i.e., drug activity). The co-worker's testimony at this point does not indicate any admission on the part of the wife that she was involved in the conversation with the minor. These four individual statements by the wife were not against her penal interest and were therefore inadmissible.

We must now assess whether the military judge's consideration of the improperly admitted statements was harmless beyond a reasonable doubt. Regarding the two statements describing appellant's LSD use at the Mt. Fuji party, through exceptions and substitutions, the military judge made findings of not guilty concerning appellant's LSD use at Mt. Fuji. Thus, any potential harmful effect presented by consideration of the statements was eliminated. Regarding the statement describing appellant's wrongful

[*] Inasmuch as the reliability of the wife's admissions is largely dependent on a determination of whether she tried to minimize her own involvement at the expense of her husband, it should be pointed out that contained within the approximately 20 statements at hand are three statements where the wife admitted her illegal drug involvement without directly implicating appellant.

distribution of a "hit" of LSD while at Mt. Fuji, the military judge made a finding of not guilty as to Specification 1 of the second additional charge (violation of Article 112a, UCMJ). This was the only specification alleging LSD distribution on the part of appellant. Thus, any potential harmful effect presented by consideration of the third statement was likewise eliminated. The fourth statement does not directly relate to the proof of any specification. Its relevance appears to be that it describes an incident of contact between appellant and a minor that goes toward establishing proof that the minor was involved in drugs with the appellant. Our review of the record indicates that all specifications alleging drug involvement where the appellant and the minor interacted are clearly established by other evidence. The military judge, as fact finder, had an adequate basis to enter findings of guilty for the specification in question independent of any consideration of the improperly admitted statement.

After a review of the whole record developed at trial, we find that the military judge's error in considering the four statements described in the preceding paragraphs was harmless beyond a reasonable doubt. *Rose v. Clark*, 478 U.S. 570 (1986). The approved findings of guilty and the 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; *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court